

No 1. intromission had by him ought first to be ascribed to the comprising, and for payment of the sums for which the lands were comprised, before he could claim payment of the annualrent, albeit the same preceded both the comprising; seeing the right of the property comprised was the most sovereign right, and therefore the intromission ought to be ascribed to that cause, and not to the right of the annualrent, by the which right he could never, as annualrenter, have attained to the possession of the land; for the first comprising, being become extinct by intromission with more than satisfied the same, it was found that the intromission could not be ascribed to the annualrent, albeit prior, as said is, but to the comprising of the property, albeit the whole intromission (the same being counted betwixt the parties), did not complete the annualrent of the terms owing to him; and albeit by the same the said comprising was satisfied, whereby the right of the property, which thereby was in his person, ceased, and by which the argument of confusion and consolidation of the property with the annualrent now ceased, the said comprising of the property being unexpired, and subject to the legal reversion, and found now in effect redeemed and extinct, wherethrough he alleged he ought to have the preference, and might have recourse to his right of annualrent; whereas the consolidation might only have place, if he might bruik the land as proprietor, which now he could not; notwithstanding whereof, the LORDS preferred the second compriser to the right of the land and the duties thereof, against the tenants, as said is; seeing they found, that the annualrenter might poid for the annualrent, or comprise the property therefor, after which comprising he would be preferred in the right to the land; but as an annualrenter he could not retain possession of the land before he had comprised; and so the second compriser might seek the tenants, or remove them from the lands, as she pleased; neither was it respected, where the annualrenter alleged, that if she removed the tenants, the lands might become waste and uninhabited and ruinous, whereby he would be prejudged of his annualrent; which was repelled, seeing he might comprise the lands therefor, as for all terms whereof he should be unpaid.

Act. Cunninghame & Scot.

Alt. Stuart.

Clerk, Scot.

Fol. Dic. v. 1. p. 458. Durie, p. 496.

1669. *January 14.*

M'KENZIE against ROSS.

No 2. A CREDITOR having in his person two apprisings of the same subject, the one carrying only the reversion of the first, the question being, whether the whole mails and duties must be imputed to the first apprising, so as to extinguish it within the legal, or proportionally to both, whereby both would be kept up? It was *argued* for the appriser, That indefinite payment is first applicable to the annualrents, before it can be imputed to the stock. It was *pleaded* on the other

hand, That, *in dubio solutio est imputanda in duriores sortem*; and if imputation be made to both apprisings, the first apprising will not be satisfied, and the debtor's right will be taken away, which is most unfavourable. *2do*, The second apprising was no title for possession, carrying only the right of reversion of the first. The possession was found only to be attributed to the first apprising, and not to the second, until the first should be satisfied.

Fol. Dic. v. I. p. 459. Stair.

* * This case is No 10. p. 299. *voce* ADJUDICATION.

* * Gosford reports the same case :

IN a declarator at the instance of John Ross of Auchnacloch against Alexander M'Kenzie of Pitglassie, to hear and see it found, that two comprisings, led at M'Kenzie's author's instance, one of them in *anno* 1644, for the sum of 1200 and odd pounds, and the other in *anno* 1647, for the sum of L. 5000, were satisfied, by intromission or sale of lands within the legal; it being controverted, if the manner of counting should be for the annualrents of both the comprisings from the time that the second was deduced, and that the intromission should be only ascribed to the first apprising during the whole seven years of the legal thereof.—THE LORDS found, that the first comprising being *debitum gravius et antiquius*, and by virtue whereof the compriser entered to the possession, and the second comprising resolving only in a right of reversion, the debtor might force the compriser to ascribe his possession to the first comprising only, during the running of the legal thereof, notwithstanding it was alleged that there was a difference betwixt two comprisings led by one and the same creditor, and those deduced by several creditors; and that the defender will be prejudged of payment of the annualrents of the second comprising, during the legal of the first.

Gosford, MS. No 82. p. 29.

* * The like was decided 10th February 1674, Blyth against The Creditors of Dairsey, No 90. p. 2873. *voce* COMPETITION.

1683. November 22.

M'BRAIR against CRICHTON.

A GRANDFATHER'S debt being secured by apprising, and stated against the grandchild, the intermediate mails, which were *in bonis* of the father, were ascribed towards payment of the apprising, as being *durior sors*, and not in payment of the father's debt.

Fol. Dic. v. I. p. 459. P. Falc. Stair. Fount. Harc.

* * See P. Falconer's report of this case, No 123. p. 2655., and Stair, Fountainhall, and Harcarse's reports, No 13. p. 5245.

No 2.

No 3.