

thereof, he can have no right to the price by virtue of his comprising; but other creditors having right by assignation or arrestment can only have right to the money which is the price thereof. This case was thought to be of difficulty by some of the LORDS, and so was continued to be advised for some days, but thereafter it was concluded by vote that the assignees and arresters should be preferred to the comprisers, which was most just, upon this reason, that not only it would bring a great hazard and uncertainty upon all public concern and trade, as to merchants who buy victual for satisfying of their own debt, and become debtors to others upon precepts or assignations, but likewise because a comprising being only a legal disposition of lands, if the compriiser suffer his debtor to possess and dispose of the fruits before he do any diligence against the tenants for delivery of the same, all persons are *in bona fide* to contract with the common debtor, as being only possessor and heritor of the lands wherein he stands infest, and the merchant who becomes debtor to him can never be liable to a compriiser who hath only right to pursue the tenants or labourers of the ground for the fruits, as being *pars fundi*, but the price thereof after delivery can only be affected by arrestment or assignation.

*Gosford, MS. No 501. No 797. & 798.*

1677. November 22. GRAHAM and BOYD against MALLOCH.

GRAHAM and Boyd, apprisers of the Lady Barfoot's liferent, pursue a declarator against Robert Malloch a prior appriiser, that he is satisfied by intromission. *Alleged, 1mo*, This comprising is null *in toto*, because it is led both upon a bond and a decret, proceeding upon a count and reckoning, and which decret was turned into a libel, and the debt referred to the Lady's oath, who hath never yet deponed, and so that cannot be called due; and when a comprising is led for sums heritably not due, it is null *in toto*; *2do*, He cannot exhaust the mails and duties by the sums in the decret, but they must be ascribed to the payment of the sum in the bond. *Answered*, He was *in bona fide* to intromit for the annualrent of both. THE LORDS found he was not liable to refund the mails and duties intromitted with by him before intending this process, though the said decret was turned into a libel; and allowed him yet to prove the debt, in fortification of the apprising, for the LORDS considered that these pursuers had done little diligence, and if Malloch had not intromitted, the common debtor would have done it. A bill given in seeking a rectification of this was refused.

*Fol. Dic. v. 2. p. 353. Fountainball, MS.*

No 4.

No 5.

Found that a compriiser was not liable to refund mails and duties which he had intromitted with, before a decret, on which his comprising was founded, had been turned in a libel.