

(EXTINCTION.)

1626. July 25.

LO. LOVIT *against* L. PHILORTH.

No 4.
The same found. No action of declarator is necessary, notwithstanding of infestment and possession.

IN a removing, pursued at the instance of the Lord Lovit, who was infest upon the resignation of the L. Pitfligo, in the lands of Philorth; which Laird Pitfligo had comprised, the said lands from umquhile Sir Alexander Frazer of Philorth, against Alexander Frazer, son to the said Sir Alexander, who compearing, *alleged*, That he nor his tenants ought not to remove from the said comprised lands libelled, because the sums whereupon the comprising was deduced were paid to the pursuer, by the said umquhile Sir Alexander; at the least, the pursuer had accepted from him lands, in full satisfaction of the same comprising.— And it being *replied* for the pursuer, That the said exception could not be found relevant to stay this removing, in respect the said comprising and securities, and infestments following thereon, were neither renounced nor redeemed, and the same being standing, could not be so summarily taken away, by way of exception; but the farthest that the same might work, (albeit it were true) were only to produce action thereupon against the pursuer, seeing the comprising once led, denuded the Excipient's father of his right, to which he can never come again, except the defender first lawfully removed that impediment of the comprising, whereby himself might be infest in the lands.—THE LORDS found the exception relevant, notwithstanding of the reply; for the LORDS found it against reason, that the pursuer should both receive payment of the sums, for the which the lands were comprised, or satisfaction for these sums, and also the lands comprised, and so bruik both; but that he being so satisfied, as the exception bears, the comprising should cease.

Clerk, Hay.

Durie, p. 226.

1629. March 3.

HERRIS *against* STUART.

No 5.
The same exception allowed to be pleaded, in a removing, after the expiry of the seven years, the parties being mean and poor folk.

IN a removing, an exception being proponed upon an infestment, proceeding upon a comprising, it was found, That the comprising might be elided upon a reply, that conform to the act of Parliament anent comprisings, the compriser had intromitted with as many duties of the lands as completely paid him of his whole debt before the expiring of the seven years, as is prescribed by the said act of Parliament, whereby the comprising became extinct; which reply was found relevant, albeit the Excipient *alleged*, That this not being proponed in due time, before the expiring of the seven years, after deducing of the comprising, as he alleged it ought to have been, therefore he alleged that the said seven years being now all expired, diverse years before the proponing thereof, the party had no place to propone the same, and that the same was not quarrellable upon the same