

(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

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ground, not being quarrelled thereon before the expiring of these years; which allegiance was repelled, and the comprising was found might be taken away upon the foresaid ground, albeit not proponed before these years, but after the same were all expired; and the same was received by way of reply, being betwixt mean and poor folks; whereas otherways the Lords were of opinion, That it could not have been taken away but by way of declarator.

No 5.

Act. —.

Alt. *Mowat.**Durie, p. 432.*1630. *January 13.* L. ESSILIS *against* WALLACE.

A COMPRISING deduced before the act of Parliament 1621, not expired the time of the act, the compriser is subject at all times after the expiring of the seven years, to account for his intromission of all the years duties of the lands intromitted with by him, of all years before expiring thereof; and which account he is obliged to make at all times after the expiring of the comprising, to any party having interest to seek the same, whether he be major or minor, that alleges the comprising to be extinct, and against whom the same was deduced.

No 6.

Act 1621.  
How, and to whom comprisers accountable.  
See No 1.

*Durie, p. 479.*1662. *January 4.* JAMES SEATON *against* ANTHONIE ROSEWALL.

JAMES SEATON and others, pursue Anthonie Rosewall, to hear it found and declared, That two apprisings, to which he had right, were fully satisfied, by his, and his author's intromission, within the legals *respective*, in the account. The defender *alleged*, he was only accountable, according to his intromission, conform to the act of Parliament 1621, anent apprisings, and not according to a rental of the lands, as they paid when he entered. — The pursuers *answered*, That they could not charge him by his yearly intromissions, which they could not know, but he behoved to charge himself with the rent of the lands, as they paid at his entry thereto; and if any deductions, or defalcations, were, in subsequent years, by necessary setting of the lands at a lower rate, poverty of the tenants, or waste, he behoved to condescend thereupon, and there the reasons, and verity thereof; for, in law, an apprising giving *jus pignoris pratorii*, the apprifer is accountable for his diligence, having once entered in possession, and thereby excluded the debtor and con-creditors from the possession. It were against law and conscience to say, That if he should abstain, and suffer the tenants to keep the rent, or depauperat, or the lands to be waste, without any diligence, that his legal should thereby expire, and the debtor and creditor should be excluded; as was

No 7.

Apprifer must account by a rental.

For what degree of diligence he is liable.

A second apprifer is allowed the composition paid to the superior, though a prior apprifer had paid a composition, if both together exceed not a year's rent.