

No 4. failzie ought not to be sustained, to pursue a reduction thereon, but affoilzied therefrom, albeit it was so expressly convened betwixt the parties.

Act. Stuart & Lawrie.

Act. Nicolson.

Clark, Hay.

Fol. Dic. v. 1. p. 7. Durie, p. 491.

1631. July 19. E. KINGHORN against STRANG.

No 5.

A comprising led for more than due, being upon a decree, decerning for full mails and duties, as by-gone non-entry duties before declarator, was annulled *in totum*.

IN a reduction of a gift and declarator of non-entry, and of a comprising deduced thereupon, at the instance of George Strang, who was ever since in possession of the lands comprised; the declarator and comprising being deduced in anno 1574, or thereby, and this reduction being only lately intended by the E. of Kinghorn heritably infest in these lands; the reason of reduction being, that the barony of Kinghorn, whereof the lands libelled were but a small part, not being the 15th part of the whole, were disposed by the King to the Earl of Kinghorn's predecessors, in feu, for payment yearly of a feu-duty; so that before declarator of non-entry was decerned, the donator, pursuer of the non-entry, could not crave the mails and duties of the lands to be decerned to him, but only the proportional part of the feu-duty, contained in the vassal's infestments, for all years intervening, betwixt the time of the non-entry, and before the declarator; albeit, after the declarator for the subsequent terms, the donator might seek the mails and duties; and so that the decret being so given, and the comprising deduced thereupon were null.—THE LORDS found this reason relevant; albeit so long a time after this decret, comprising, and possession; and albeit the defender alleged, that this declarator might then well proceed for the mails and duties, of all years before the decret, since the non-entry, there being at that time, neither law nor custom to the contrary; for albeit the custom now kept, might seem to tend to the contrary, yet that custom ought not to be drawn back to such an ancient time, when there were not many such sentences given; which were hard now to evert, with all that has followed thereupon, *post tantum temporis* upon this ground; specially seeing that the pursuer has not alleged, nor can allege, that the whole barony was retoured ever, or that the lands libelled, which are alleged to be a part thereof, were ever retoured to any extent; without which had been retoured, he alleged, that the giving of the lands in feu, was no cause to have stayed the declarator, for the mails of the lands, for the years before the declarator. And if it had been proponed then, it would have been repelled, and so should not now be found relevant to reduce; and if it had been then relevant, being proponed, yet it would never have stayed the declarator; for the sentence would have proceeded for that proportion of the feu-duty, whereto the lands should have been proven to have extended, and for that quantity he might have comprised, so that it were iniquity now to evert his whole comprising upon this ground, because a part of that, for which he had comprising

fed, was not due; for it ought not to fall for that which was due through the pursuer's own default, who compared not then to propone this: Which allegiance was repelled, and the reason sustained.—For the LORDS found it not necessary to qualify, that the custom was then, to retrench the pursuit to the retoured duty, this being now the custom; which must pre-suppose, that it was ever so the custom, where nothing positive is shown otherwise. Likeas, the LORDS found it relevant to libel, that the lands were disposed in feu, so that before declarator, nothing could be craved, but this proportion of the feu-duty of the whole barony *pro rata*. And found there was no necessity in such cases to libel, or allege, that either the whole barony was retoured, or these lands particularly, which are controverted; but without retouring sustained the same. And found also, that the comprising being deduced for a debt, and cause, whereof one part was not due, was sufficient to cause the comprising to fall *in totum*. And so the reason was sustained; and the LORDS found, that after so long time, the party could not be urged to produce the warrants of comprising*.

A.G. *Advocatus & Nicolson.*Alt. *Stuart & Ruffel.*Clerk, *Gibson.**Fol. Dic. v. 1. p. 7. Durie, p. 597.*

* The same case is thus stated by Spottiswood.—There was a reduction of a declarator of non-entry, and of a comprising following thereupon, led by Robert Strang, of the lands of Easter Pitoddy, against the Lord Glamis, 1582, intended by the Earl of Kinghorn against George Strang, heir to Robert; for this reason, that by our law and custom, when lands are in non-entry, there is no more due to the superior or donator, before declarator, but only the retoured duty; but so it is, that the decret of non-entry libelled, was given, not for the retoured duty, but for the better avail of the lands, viz. five chalders of victual for all years bygone, that the lands were in non-entry, for which comprising was led, and so the comprising being for more than was justly owing, was null *in consequentiam*. The decret being reduced for this reason; *alleged, 1mo*, absolvitor, because albeit, now that custom is in use, that no more is due before declarator, but the retoured mail, yet the pursuer must prove, that it was the custom, at the time of the giving the decret, sought to be reduced, especially seeing the defender offers him to produce a number of decreets before that time, given after the same manner that this is. THE LORDS thought, that the present custom being notour, the presumption, that it was alike all times before, was for the pursuer, unless the defender would take upon him to prove *positive* the contrary custom at the time. *2do*, *Alleged*, The retoured duty is only due, where lands are particularly retoured; but, where there is no retour, there the worth of the land may be sought *etiam ante declaratoriam*; and so it is; that Easter Pitoddy was not retoured in special.—*Replied*, The whole barony of Pitoddy was retoured to L. 50 Sterling, whereof this was a part, and so the retour must be estimated for it *pro rata parte*.—THE LORDS repelled this allegiance also, in respect of the reply.—*3tio*, *Alleged*, albeit the decret was given for more than should have been, yet it must stand for that which was due, viz. the retoured duty, and consequently the comprising cannot fall *in totum*, as long as there was any thing owing; especially seeing, if the pursuer's predecessor, who was defender there, had compared and objected, this the obtainer of the decret might have restricted his decret to the retoured mail, which at that time he needed not to do, he thinking, probably, that the whole mails were due unto him.—THE LORDS found the comprising null *in totum*, being led for more than was due; for they thought it indivisible, and could not stand in part and fall in part, otherwise the legal being long before expired, it should have ever stood good.

Spottiswood, (COMPRISING.) p. 52.