

## S E C T. IV.

One entitled to relief getting an ease upon payment, can claim no more than the transacted sum.

1639. February 9. HAMILTON of Broomhill *against* LAWDER.

ONE Lawder being debtor to sundry of his creditors, in divers sums of money, and to Broomhill's self, in a little sum, which he had paid for Lawder, as his cautioner; the right of all which sums being acquired from Lawder's creditors by Broomhill, he upon assignation of these debts, and for his own, comprises Lawder's lands; which comprising being near at expiring, Lawder intents an action for compt, reckoning, and payment against Broomhill, that after count he may be satisfied of his just sums, and so the said lands may be declared freed of that comprising; in this action it being controverted as Lawder alleged, that he ought to be subjected to pay no further sums, but such only as were debursed really by Broomhill to his creditors for their rights; for seeing he had unnecessarily bought these sums, and the rights thereof, from his creditors, and had needlessly and unkindly come in betwixt him and creditors, with whom he might have transacted upon more easy conditions, it were no reason that there-through he should take advantage, beyond that which he really and truly debursed, seeing he was content to pay him what he had truly paid therefor, with the annualrent thereof, ever since the time of his debursing. THE LORDS found, that they could not in law compel Broomhill to receive no more than he paid to the creditors; for if they had dispoined their debts to him for never so little a sum, or had gifted the same to him for nothing, the assignee could not be urged but at his own pleasure, to remit any part of that which was a just debt owing to the cedent. And it being also controverted, if Broomhill should be comptable for the mails and duties of such part of the comprised lands, as were tenantstead, and occupied by tenants, the time of the comprising, and thereafter were given over by the tenants, and lay waste; seeing Broomhill alleged, that by the act of parliament 1621, anent comprisings, the compriser is not holden to count for any more profits of the lands, than wherewith he actually intromitted, and is not comptable for any thing wherewith he may intromit, far less can he be comptable for that which was waste, not in his default, but by the tenants over-giving and deserting the room;—THE LORDS found, that seeing, after the comprising, the room was laboured by tenants, who had a tack of endurance of more years than these years controverted, and standing yet unexpired; that the laying waste of the rooms, and giving over of it by the tenant, ought not to prejudge the debtor, but that the compriser ought to be comptable therefor, seeing after the over-giving, he ought either to have laboured the room, or set it to some other tenant, to the best advantage he

No 41.

A party *tanquam quilibet* buying debts, is not bound to communicate the eases to the debtor.

might, and done therein, as *bonus pater-familias fecisset in re sua*, or else he should have made some intimation to the debtor, and required him to provide for the room, and given way to him to make use of it, for his best profit, if the compriser had not been willing to make use of it himself;—but doing no diligence to make profit of the land, in these years when it was waste; the LORDS found, that notwithstanding of the act of parliament, which met not this case, the compriser remained comptable.

Act. Mowat & Sandilands.

Alt. Hamilton.

Clerk, Gibson.

Fol. Dic. v. 1. p. 227. Durie, p. 874.

1662. February 4. LAIRD OF ELPHINGSTONE *against* SIR MUNGO MURRAY.

## No 42.

The seller was obliged to relieve the purchaser of the composition for his entry to the lands. It was found that the purchaser could have no claim, if the composition was remitted to him by the superior, although he got it for other good services.

THE laird of Elphingstone having charged Sir Mungo Murray, for the price of some lands bought from him, he suspends, and *alleges*, that by the disposition the charger is obliged to relieve him, of all inhibitions; and now produces several inhibitions. The charger *answered, non relevat*, unless there were a distress, seeing the disposition bears not to purge but only to relieve, or to warrant against inhibitions.

THE LORDS considering that the charger *vergebat ad inopiam*, found the reasons relevant, till caution were found to warrant the suspender from these inhibitions. They found also, that where the charger was obliged to pay to the suspender, the composition for his entry to the lands; that the suspender should have no composition if he got it *gratis*; albeit he alleged he got it for other good services.

Fol. Dic. v. 1. p. 227. Stair, v. 1. p. 91.

1664. July 8.

NISBET *against* LESLY.

## No 43.

A cautioner transacted a debt for a lesser sum, and obtained assignation. The Lords found his co-cautioner was bound to relieve him of the half of the whole debt.

JOHN NISBET as assignee constitute by Major Drummond, charges Lauchlan Lesly to pay four dollars for each soldier of sixty, conform to a contract betwixt Major Drummond and Lodovic Lesly, for whom Lauchlan was cautioner. Lauchlan suspends on this reason, that the charge is to the behoof of Francis Arneil, who was conjunct cautioner, and bound for mutual relief, and therefore he can ask no more than his share of what he truly paid in composition. The charger *answered*, that he nor Francis Arneil, were not charging on the clause of relief, but on the principal contract, as assignee; and though he had gotten assignation thereto *gratis*, he might crave the same, except his own part,

Which THE LORDS found relevant.

Fol. Dic. v. 1. p. 227. Stair, v. 1. p. 211.