

1639. February 9. HAMILTON against LAUDER.

No 4.

A TENANT who had a current tack, having, after a comprising, deserted his possession;—found, that the lying waste thereof ought not to prejudice the debtor, but that the compriser ought to be accountable for the same, since he neither laboured nor set it, nor made any intimation to the debtor to take care of it.

Fol. Dic. v. 1. 237. Durie.

* * * See This case, No 41. p. 3391.

1661. December. SETON against ROSEWEL.

No 5.

IN a compt and reckoning pursued at the instance of James Seton, being a third compriser of certain houses in Leith, from Mr James Gray, against Anthony Rosewel, who acquired a right to the two first comprising, and was in possession, it was *alleged* by the defender, That he was only comptable for his own and his author's intromission, and not according to the rental produced, bearing what the lands paid at the time of his author's entry thereto; and that by the act of Parliament 1621, he was tied to no farther; and alleged also some practiques, annis 1624, and 1625. It was *answered*, That the defender ought to be countable for subsequent or after years, according to the rental, whereby his author meddled the first year; else, it should be lawful to a compriser, after he has removed the debtor and entered to the possession, to lift, or not lift, what duties he pleased, and consequently to ruin the debtor; whereas, when he enters to the debtor's lands, he ought *tanquam bonus pater familias*, to make use of the comprised lands, &c. It was *replied*, That before the year 1621, the whole duties belonged to the compriser for his annualrent, had they been ever so great, nor any part counted *in sortem*: and this being restricted by the act, and the compriser having only his annualrent, and the superplus to be allowed in the principal sum; there the law did oblige the compriser to be comptable for more than he meddled with; against whom, within the time of the legal, the debtor may use an order of redemption when he will.

An appriser in possession was found accountable by a rental, as the lands paid at the time of his entry, without prejudice of just defalcations.

THE LORDS found the compriser comptable, according to the rental payable, and paid to the compriser the time of his entry, *but* prejudice of his lawful defences, upon probable reasons, wherefore defalcation ought to be allowed for after years.

Item, In the same cause it being *alleged*, That the second compriser should have allowance of the composition paid to the superior, it was *answered*, That the second comprising, being in effect, only of a legal reversion, it was *frustra*, and unnecessary to seek an infeftment from the superior; and the compriser

No 5. cannot seek superfluous expenses off his debtor. It was *replied*, That a second compriser has good reason to seek an infeftment; because, possibly the first infeftment might be reducible upon grounds not known to him, at the instance of a third compriser, as upon payment of the debt, informality, or falsehood; so that to secure himself, the second compriser has good right to seek an infeftment.

THE LORDS found, that the composition should be allowed to the second compriser, providing the same with the composition paid by the first compriser, do not both exceed a year's rent; and if they did not, then to allow *pro tanto*. For they found, that all the superior could have for comprisings, were they ever so many, was but one year's rent. See SUPERIOR and VASSAL.

Fol. Dic. v. 1. p. 236. Gilmour, No 11. p. 10.

* * * The same case is reported by Stair, No 7. p. 297.

1671. January 26. CHARLES CASSE *against* SIR ROBERT CUNNINGHAM.

No 6.

An appriser excluding other creditors in a competition, and entering to possession, is accountable according to the rental, not only for intromission but for omission, both till the apprising be satisfied, and thereafter, for all years of which he uplifts any part.

CHARLES CASSE having sold to Sir Robert Cunningham his right to the lands of Achinhervy in his minority, pursues a reduction of the same disposition upon lesion, and condescends upon his lesion thus, that being infeft for security of 40,000 merks, and in an annualrent effeiring thereto, whereof there were many bygone years annualrent resting, and yet he got only 40,000 merks for all. The defender *alleged*, absolvitor, because the pursuer was satisfied of all his bygone annualrents, in so far as he having apprised for five years' annualrents preceding the apprising, which was in anno 1655, he had entered in possession by virtue of the said apprising of the whole lands of Achinhervy, and so is comptable therefor according to the rental, until he cease to possess the same, which will fully satisfy all his bygoners, so that he will have no lesion. *adly*, He had not only in his person the said apprising, but the infeftment of annualrent, upon which he being preferred in a double-poiding, and excluding other parties having also real rights, he is thereby obliged to do diligence, and be comptable not only for what he intromitted with, but for what he ought to have intromitted with. The pursuer *answered*, That he was content to compt for what he had intromitted with, but upon neither ground was he obliged to compt for any further; especially as to his apprising, albeit law and custom had obliged him to compt for the whole rental, till the apprising were satisfied, yet he could not be comptable but for his intromission after he was satisfied, for then he had no title in his person, and it is clear that any intromitter without a title is only liable for his intromission, and all parties having interest might have hindered him to have intromitted after he was satisfied; and albeit a tenant or factor, after the expiring of the tack, or factory, may be comptable for a full rental, yet that is because they have a title *per tacitam relocationem*, or *tacitam commissionem*; but after the extinction of the apprising then no title