

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.

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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

remains, and neither is he liable as an annualrenter, even though he did exclude others to do any diligence, because all the effect of an annualrent can only be to distress the ground, or poid the tenants for as much of their rent as is equivalent to the current annualrents, after which any other party having right may lift the superplus, and in this case the annualrenter hath not been preferred as to any bygone rents, but only in time coming, and for his current annualrents, and the bygones are appointed to be brought in accompt, which was never determined. The defender *answered*, That it were against all reason, that an appriser after he is satisfied, should be in better condition than before he is satisfied; and so as long as he meddles, he must compt by the rental, and it is his proper part, who knows when he is satisfied, to relinquish the possession, which other parties cannot know, till by a long process of compt and reckoning it be determined; and it were most absurd that in the mean time he should continue in possession, and though the rents did in a great part perish, he should not be comptable therefor, but only for what he actually lifted.

THE LORDS found the pursuer as appriser comptable according to the rental, not only for intromission but omission, both till the apprising be satisfied, and thereafter for all years of which he lifted any part; but found not the annualrenter liable for diligence, albeit he did exclude others; but the case came not to be determined, if the annualrenter had, by a personal action, insisted for more years annualrent past, to be preferred to the whole reats, till these bygones were satisfied, that not being the case here in question.

In this cause it had been formerly *alleged*, that the pursuer, after his majority, had received a part of the price of the lands, in so far as, having in his minority granted a commission to Mr John Smith, one of his curators, to uplift all sums due to him, and he having uplifted a part of the price of the land from the defender, and bonds for the rest, the pursuer, after his majority, had by his discharge produced, received from his curator and factor the said money and bonds, and discharged him thereof, and acknowledged that he and the remanent curators had acted faithfully in all their intromissions, whereby the pursuer hath approven, and homologated the disposition of the land, made by him and his curators, which he now quarrels. The pursuer *Answered*, *1st*, That the defence is not relevant, for homologation being a presumed or conjectured consent, not by word or writ, but by deeds done, which import the adhering to the disposition quarrelled, it cannot be inferred by any deeds, but such as can have no other intent or purpose consistent with the rejecting or dissapproving the disposition; but here the receiving of the money and bonds from the factor hath a consistency and congruity with this reduction; for the pursuer knowing that he could not be restored against his disposition, unless he did restore what was received by his warrant, might justly take up the same from his factor, that he might be in capacity to consign the same at the bar; as if a minor having bought lands to his lesion, and having wadset a part of the same, he might after his majority redeem the lands wadset by himself, which although it behoved to proceed upon the disposition as his title, yet it being a deed neces-

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sary to purge the wadset, and repon the disponer to his own land free thereof; it would never import homologation; or if he had in his minority excambed lands, and wadset a part of the lands he acquired thereby, the redeeming or purging of the wadset after his majority, would import no homologation; so neither can any deed import homologation, which upon any account can be consistent with the annulling of the right quarrelled upon minority. *2dly*, This discharge does bear expressly relation to Mr John Smith's account of intromission subscribed at the same time, and bears that the discharge should be as sufficient as if the account were insert: *Ita est* in the charge of the account, wherein only mention is made of the sums paid by the defender, there is an express reservation, that the account shall be but prejudice to the pursuer to insist in his reduction of the disposition. And as to that clause in the discharge, that the curators and factor had done faithfully; it relates only to their intromission, and not to their omission; and albeit it had borne simply, that they had acted faithfully, that can only import that they had not acted fraudulently; and that they had done for the minor what they conceived best; but does not import that they had acted providently or skilfully, so that the minor may still reduce their deed. The defender *answered*, That the defence was most relevant, being founded upon the pursuer's consent, after his majority; for consent may be adhibited, not only by word or writ, but by any deed importing the consent, as if a minor, giving a bond in his minority, should pay a term's annualrent thereof after his majority; or if a minor, intromitting with his father's moveable heirship, or rents of his lands in his minority, should continue to intromit for one term, or one point further after his majority, in neither case would he be restored; and yet such deeds might be consistent, and might be done to other intents; as if his payment of the annualrent did bear, lest before his reduction he might be distressed, or that he continued his possession, lest the rents or goods might perish to the damage of the party: Yea, though these were expressly mentioned in his discharge, and his reduction were reserved, it would be *protestatio contraria facto*, and would not free him; so neither can the reservation in this account, though it were repeated in the discharge, be sufficient; especially seeing he might have caused the factor consign the money in the clerk's hands, that it might be restored at the discussing of the reduction; so that inconsistent reservations or protestations operate nothing. *3dly*, The charge of this account, wherein only the reservation is mentioned, is a loose sheet of paper, subscribed with another hand than the discharge, and has neither date nor witnesses, and so cannot instruct that this is the very account mentioned in the discharge.

THE LORDS did not determine the point of homologation; but, before answer, ordained the curators and witnesses in the account to be examined upon oath, whether the charge produced be the same that was subscribed, *ab initio*, bearing the said reservation; but they inclined that the reservation would take off the homologation, and would not be void, as *contraria facto*. See HOMOLOGATION.

Fol. Dic. v. 1. p. 236. Stair, v. 1. p. 707.