

REPLIED,—The allegiance ought to be repelled, because at the time of the leading of the comprising, compearance was made for Henry Seaton, who had got a disposition of the appraised land from the common debtor, and who by Mr. Thomas Hope, his procurator, craved preference; which was accordingly done, and the tenement appraised, but prejudice to Seaton's right. As also compeared a liferentrix of a part of that house, (who even excluded Seaton's self, so that he did not attain the possession of that part till her death,) and got preference *quoad* her liferent: so that this pursuer and his author being debarred by thir two rights from the possession of the comprised lands, no prescription could run against his right, *quia contra non valentem agere non currit prescriptio*.

DUPLIED,—This being only a partial defence, and there being more lands in his apprising than in thir two rights debarring him, and he not being able to show any impediment stopping him, why he might not have done something as to these; the remainder must be clearly prescribed. *2do*, What was liferented is also prescribed, because offers to prove that it is more than forty years since the liferentrix's death, and so since the removal of the impediment. *3tio*, In the comprising, neither is Seaton nor the liferentrix preferred, but only a declaration of the inquest that they apprise, but prejudice of these two rights; yea (which is more,) they could not judge on the competition of rights; and, therefore, seeing they could not debar your author, you ought to have pursued within the forty years, and not having done so, the right is prescribed.

My Lord Craigie found *quicquid erat residuum* more in the apprising than the two above-mentioned rights, prescribed; found the right also prescribed *quoad* what was liferented, we always proving her death above forty years ago. As for the declaration in the apprising about H. Seaton's disposition, whether the same was such an impediment as barred him from all action, he demurred thereon. *Vide infra*, No. 483, [*Macmorran* against *Robertson*, June, 1676.]

If this happen to be repelled, then it will resolve in a count and reckoning; in which (because H. Seaton paid other cautionries for Laury than those for which the disposition was expressly given,) it will fall to be debated if those who derive right from H. Seaton will be bound to renounce the lands, they being found paid of the sums and cautionries expressly enumerated in the disposition, and are the cause thereof; or if they may detain the land till they be paid of all other debts they were constrained to pay as cautioners for Laury the disponder. About which see a little *supra*, at No. 301, [*January* 16, 1672.]

*Advocates' MS. No. 333, folio 132.*

1672. *February.*

MAGNUS AYTOUN *against* JOHN LAUDER.

MAGNUS AYTOUN, pursuing for mails and duties upon his apprising of my Lord Ramsaye's lands of Dalhousy and Caringtoun, compearance was made for John Lauder, the first appriser, and it was alleged that Magnus could have no decret for mails and duties till the first appriser were satisfied by him of the expense of leading his comprising and expeding his infetment, conform to the act of Parliament in 1661.

To which it was ANSWERED, *1mo*,—That all he would be liable in would only be a proportional part, and that effeiring to his sum, there being no posterior apprisers beside him. This was sustained.

Then *2do*, He could pay no part of the said charges, because he offered him to prove, that John Lauder, the first appriser, had intromitted with more of the farms of thir launds since his apprising than the said expense would amount to, and so he could crave none of it from him.

REPLIED,—It is true he has intromitted with more than that expense would come to; but it is as true that any intromission had by him must be *primario* ascribed and imputed in payment of his annualrent, and then (*quod creditor percipit imputat in usuras, et post in sortem, per L.L. a Cujacio citatas in Titulo Cod. In quibus causis pignus tacite contrah.*) *2do tantum loco* for the expenses of his apprising; now all his possession will not pay the half of his annualrents due by virtue of his apprising.

My Lord Advocate, notwithstanding all the pains we took on him, found that the first appriser's intromission with the duties of the appraised lands must be *ante omnia* ascribed in payment to him of the expenses wared out in deducing and leading his apprising, (which expenses are *sors durior* and so must first be presumed paid,) and then next for payment of the annualrents. *Vide supra*, No. 118, [*Tailfer, January 31, 1671.*] and *infra*, No. 340, [*Home against Preston, June 15, 1672.*]

*Advocates' MS. No. 334, folio 133.*

1672. *February.*

ANENT WADSETS AND REVERSIONS.

IN using an order for reduction of a wadset, the order will apparently be null, if the user produce not the reversion; neither will a copy satisfy; and if he be not the person to whom the same was granted, then *de necessitate* he must also produce the right he has thereto, whether it be by assignation, comprising, adjudication, as heir retoured to the receiver of the reversion, or otherwise; only, if a man *ex titulo singulari, videlicet* by a comprising or the like, come to have right to a reversion, it seems hard in that case to force such a redeemer at his order to produce the principal contract of wadset or the principal reversion, seeing it is in his debtor's hands, and he cannot get it; only he should premonish the wadsetter to bring his reversion with him and exhibit it. See *Hope, tit. 10. of Wadsets and Reversions, folio mihi 73.* Yet others think no order can be sustained without production of the reversion, and, therefore, even a singular successor, ere he come to use an order, should recover the principal reversion by an exhibition. And Hadington seems to say no less; *19th January 1610, John Reull against Mr. William Brown: Parliament 1469, act 27.* Yet see *Dury, 28th June 1628. L. Newark; 21st February 1635, Earleston:* and see the same in *Balmanno, verbo Redemptions, p. 266.* See this same decision in the other collection I have beside me of that year 1610.