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nevertheless, That this tack should not extend to the whole quarter, but only to so much of the quarter of that land, as was possessed by him the time of the acquiring of that heritable right and sasine, and not to any more of the land, seeing the defender bruiked only a three merk land and a half of that quarter, and the other four merk land was bruiked synsine by other two tenants, nor never paid duty to him. THE LORDS found, That this tack should extend to be a tack of that which he possessed, viz. whereby to bruik the three merk land and an half, and no more; and so by this decision, albeit the reversion be to redeem the four merk land, and the heritable right was of the whole quarter, and that the quarter consisted of a seven merk and half merk land; and that the reversion appointed a tack to be given of the four merk land; yet because the defender possessed only three merk and an half of that quarter, and had no possession of the rest; it was found, that the wadset extended, and was effectual for no more than that proportion which he possessed then, and continually synsine; and the tack should comprehend no more, notwithstanding of any thing contained in the reversion and wadset; albeit also the other tenants had a contract of the pursuer's author, whereby they bruiked the rest of the quarter, viz. the other four merk land, and which being personal, defended not against the pursuer, who was a singular successor, and which right of theirs, and possession, this defender present also allowed to them.

No 31.

Act. Baird.

Alt. Hart.

Clerk, Hay.

Durie, p. 547.

1631. February 12.

MURRAY against LORD YESTER.

DAVID MURRAY having acquired the heritable right of the lands of Drumelzier, from the Laird of Drumelzier, and being made assignee by him to all the legal reversions of any comprisings, of any of the lands of the said barony of Drumelzier, deduced either by the Lord Yester's self, or any other creditors, pursues the Lord Yester to hear the lands redeemed from him, not only for the comprising at the Lord Yester's own instance, but also for all other comprisings deduced by whatsoever other creditor, the right whereof is become in the person of the Lord Yester, by assignation, or other right made thereof to him, by the comprisers of their rights; which summons being so generally libelled and conceived, and not bearing the names of the persons creditors specially who had comprised, nor yet the special sums, for which these creditors had comprised, but only that the pursuer had consigned such a special sum, whereto he affirmed the whole comprising did extend, and if the same did extend to any greater sum, that he was content instantly to consign and pay the same, they being condescended on, and instructed by the Lord Yester; and it being alleged that such a redemption ought not to be sustained, and that the defender could not in law be compelled to instruct the pursuer to libel a pursuit against himself;

No 32:

An heritor offered to redeem not only the comprising held by a particular creditor, but generally all other comprisings. This offer, although not specific, was sustained.

No 32. for except both the comprisers and their sums were specially expressed in the order of redemption, and declarator intented thereon, he alleged no process could be granted;—the LORDS repelled the allegiance, and sustained the order and action, in respect that the pursuer offered instantly to consign all sums, whereupon comprisings were deduced, whereof the rights were established in the defender's person, if the same were more than the sums consigned in that order; and it was probable ignorance in this pursuer not to know them all, being a singular successor, and the danger of the expiring of the legal reversion, required in equity this action to be sustained, which otherwise might expire; likeas the defender could have no prejudice to receive complete payment of all his debts, for which the comprising was deduced as was offered; and if there was any other comprising, whereof the right is not become in the Lord Yester's person, this action would not extend thereto, nor prejudge the same; therefore the action was sustained, and the defender was ordained to condescend and qualify the particular sums, whereto he had right by any comprising, competent in his person, as said is.

Act. *Nicolson and Baird.*

Alt. *Stuart.*

Clerk, *Gibson.*

Fol. Dic. v. 2. p. 322. Durie, p. 568.

* * * Spottiswood reports this case :

My Lord Yester both having comprised the lands of Drumelzier himself, and being made assignee to sundry other comprisings led at other men's instances; David Murray of Halmyers having right to the legal reversions, used an order of redemption, and pursued a declarator thereupon against the Lord Yester; wherein the pursuer libelled, that the Lord Yester had comprised the lands libelled himself, at least others in his name, and to his behoof, or at least has transmitted the same in his person, which whole comprisings he sought to redeem; for doing whereof he had consigned the sum of 24000 merks, whereunto the whole comprisings will not extend, or at least if they did exceed it, the pursuer was content presently to consign the rest. *Alleged*, The summons was not relevant, being altogether general, not condescending what comprising were led of the lands libelled, nor what sums, nor at whose instance. THE LORDS repelled the allegiance, for they thought the pursuer could not be more special, comprisings not being such public deeds as every one can know of them, but they that are at the leading of them.

Again *alleged*, The pursuer's summons concluded, that the defender might be decerned to renounce all right competent in his person, but also because he had gotten the gift of Drumelzier's liferent, the pursuer craved, that the said right of liferent might be comprehend within the said order, and the defender ordained to renounce it as well as his comprisings; because, said he, the defender having gotten the liferent first, and after having comprised the lands, the former right of liferent was absorbed by the following comprising, and subsisted no longer. The defender *alleged*, Nothing could fall under the redemption, but

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the comprisings, which were subject to reversion, and not the liferent, which was diverse right, and of a different nature from the former. Which *allegance* the LORDS found relevant.

No 32.

Spottiswood, p. 265.

* * The latter part of this case is reported by Durie, No 45. p. 3711. *voce* EXECUTOR.

1631. December 8. CLEISH against SANDERS.

In a redemption, whereof the reversion was produced, bridled in the date, and the defender *alleging*, That no process could be granted, while the same were discovered, that he might see the date and whole contents thereof; and the pursuer *replying*, That the defender should declare if he had any discharge thereof, and should condescend on the date of the discharge, which being done *simul et semel*, he was content that the date of his reversion should be opened, as is usually done in improbations; the LORDS found, that no process could be granted while the date of the reversion were seen; and that the defender could not be compelled to declare if he had a discharge thereof, or condescend on the date thereof, but that he might do the same or not as he himself pleased; for there was no more reason that the date of his reversion should be kept obscure, than that the date of any other obligation, or writ, whereupon actions are founded, should be so kept; and the case of improbation is not alike, where the pursuer calls for the defender's writs oftentimes *ad fundandam litem*, and therefore there is required mutual condescending.

Act. *Nicolson.*

Alt. *Stuart.*

Clerk, *Hay.*

1631. December 8.—In the above-written cause of the Laird of Cleish, the LORDS sustained the premonition made by the procurator, constituted to that effect, albeit at that time of the using of the order, the procuratory was not read and shewn, without which had been done, the defender *alleged*, The order could not be found lawfully used; which was repelled; seeing now the constituent confirmed the procuratory, and deed done by virtue thereof, and when the premonition was made, the party enquired not for the procuratory, nor desired to see it, or to have it read: *Item*, A service of one as heir to him to whom the reversion was granted, being deduced before the Bailie of the regality of Dunfermline, was sustained, albeit it was not retoured to the chancellery, seeing it was deduced before the Bailie of the regality of Dunfermline, who has their own chapel, and so it was not necessary to be retoured to the King's Chancellery. *Partibus ut supra comparentibus* See SERVICE OF HEIRS.

Fol. Dic. v. 2. p. 322. Durie, p. 605.

No 33.

An order of redemption was sustained, though the procuratory was not read nor seen, it not being required.