

It was ANSWERED, That the comprising, being led for a debt due by the uncle, who was fiar of the lands, and who had dispoſed the right of the annualrent to the ſaid Anna and Margaret's father, they could not be denuded thereof, unleſs they had been ſpecially charged to enter heir to the ſaid annualrent, as being a diſtinct ſeveral right from the lands: no more than, by a ſervice and retour, they could have right to the ſaid annualrent, as being infeft in the lands; which is contrary to our fundamental law as to conveyances of theſe ſeveral rights; having their diſtinct manner, both in their ſervices, retours, and infeftments. And as to the practick, it did not meet the caſe; becauſe the annualrent, as well as the lands, were deduced in the comprising; and all right that the debtor had: ſo that there was a great diſtinction betwixt an annualrenter who had acquired the rights of the lands, againſt whom the comprising was deduced, and this caſe, where the ſaid daughters, annualrenters, had never right to the ſaid lands, nor their father.

The Lords did not decide this point *in jure*, if the comprising the lands did carry the annualrent to which the apparent heirs were not ſpecially charged to enter; in reſpect that they found the ſaid William Lamb to have no right, by his comprising deduced at his inſtance, as heir to his father; whereas he had an elder brother then living, from whom Ruſſel had comprized the right of the ſaid lands. But it ſeems that a comprising, led againſt an apparent heir, both to an annualrenter and to the fiar of the land out of which the annualrent was due, ought not to carry the right of the annualrent, unleſs the right of the fee and annualrent did belong to one and the ſame perſon whom they did repreſent, who was ſole debtor in the ſums of money contained in the comprising: for, notwithstanding of that comprising, a creditor of the annualrenter, charging the ſame apparent heirs to enter ſpecially to the annualrent, and thereupon comprising, the right thereof will be preferred to a prior compriser of the right of the lands only, and not the annualrent.

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1673. November 27. ALEXANDER BEATTIE *againſt* The LAIRD of MORPHIE.

THE deceased Laird of Dunn, being debtor to Robert Beattie, in Montroſe, by bond, in the ſum of two thouſand and odd hundred pounds, which was aſſigned to the Earl of Ethie upon a back-bond; Ethie did tranſact with the Laird of Morphie, who acquired a right to the Laird of Dunn's eſtate, and obtained a bond from him, bearing, that, being ſatisfied of his own debts and cautionaries, he ſhould ſatisfy the Earl of Ethie of all ſums due to himſelf, or as aſſignee to any bonds granted by the Laird of Dunn: and thereafter did grant a new bond to the ſaid Earl, bearing, *per expreſſum*, his aſſignation to Beattie's debt: and, in corroboration of the firſt bond, and but any derogation thereto, of new, became bound and obliged to pay the ſaid debt, and all others due to Ethie, out of the firſt end of the price of the lands of Dunn, he being firſt ſatisfied of his own debts and cautionaries. After which the Earl of Ethie, having made a retroceſſion to Alexander Beattie, as executor to his father, and alſo aſſigned him to both the ſaid bonds granted by Morphie, he did thereupon purſue him, as repreſenting his goodsire, granter thereof, for payment.

It was ALLEGED for the defender, That both the said bonds were granted *intuitu* of a right, made to Morphie, of Dunn's estate, who was the only debtor; and, that the posterior bond, bearing, in the obligatory part, that he was only obliged to pay the said debt in case the price of the said lands disposed would satisfy Morphie and the Earl of Ethie's own debts, he was not obliged to make payment but in the case foresaid: which could never be made appear, the estate not amounting to the payment of all other debts, which were first to be paid before this debt.

It was REPLIED, That, by the first bond granted to the Earl of Ethie, albeit, in the narrative, Morphie became obliged, *intuitu* of the Laird of Dunn's estate disposed to him; yet, in the obligatory part, he becomes simply obliged to pay all sums to which Ethie was assigned, which did comprehend this debt; which is clear by the bond of corroboration, wherein it is expressly set down: and Morphie, of new, becomes obliged in corroboration of the first bond, and but any derogation thereto, to pay the said debt, which cannot be taken away by any declaration of the manner of payment out of the price of the lands.

The Lords did find, That the posterior bond of corroboration, notwithstanding that it did bear noways to derogate from the first bond, yet, in the obligatory part, being special and positive as to the way of payment out of the price of the lands, after the payment of Morphie's own debt, it did in effect derogate from the absolute obligation in the first bond; and qualified the manner of payment, that unless the estate of Dunn being sold, all private debts could be satisfied, and the debt now in question, Morphie was not liable; upon this reason, that *posteriora derogant prioribus*.

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1673. December 3. SIR ROBERT DALZELL *against* MAXWELL of TUNNEL.

THERE being mutual declarators pursued betwixt the said parties, one at the instance of the said Sir Robert Dalzell, for declaring the property of the Muir of Auchnean, and the moss therein contained; and the other at Tunnel's instance, for declaring that he had a right of commonty in the said muir, as being infest in his lands of Tunnel, *cum communi pastura*, and in continual possession, past memory of man;—the Lords, having granted a commission for examining of witnesses for both parties anent the manner of the possession, after report whereof, the cause being heard *in præsentia*:—

It was ALLEGED for Sir Robert, That his declarator of property ought to be sustained; and Tunnel's right of commonty could never be declared; because he stood infest in the barony of Hemsfield and the lands of Auchnean, as proper parts and pertinents thereof, by a special charter granted by the King, whereby the said lands are particularly bounded, and wherein the said muir and moss now in question did locally lie; and, by virtue thereof, he and his authors have been in the possession of the said muir as their property, by tilling and labouring of some parts thereof, and by debarring the Lairds of Tunnel, and their servants from pasturage, and receiving a yearly duty of kain fowls from his tenants for a tolerance, when they were not debarred.

It was ALLEGED for the Laird of Tunnel, That the said Sir Robert's infest-