

S E C T. II.

Leases granted after Denunciation, or during the dependence of a Ranking and Sale.

1629. February 17. BLACKBURN *against* GIBSON.

No 74.
After denunciation upon a comprising, the debtor cannot let tacks, or do any other voluntary deed in prejudice of the denouncer, if he lawfully and timeously perfect his diligence.

A REMOVING being pursued by a compriser, and the defender excepting upon a tack set by the debtor before the date of the comprising, albeit it was after denunciation, the LORDS repelled the allegiance, seeing the tack, set after the comprising, was found not to be a valid right, to exclude the compriser's right, and comprising following upon the denunciation, the said denunciation made before the tack being found by the Lords to be such a diligence, that albeit no inhibition was served against the debtor, yet that he could do no deed after the denunciation which might prejudice the compriser, and derogate to the force of the comprising depending thereon; neither was it respected that the said debtor was not a bankrupt the time of the said denunciation or tack, for it was found, that albeit he was neither bankrupt, nor at the horn by the party, nor yet prohibited by inhibition, yet that after the denunciation he could do no deed in that which was denounced to be comprised, by any voluntary act and fact of his own, which might be prejudicial to the party denouncer therein, he having lawfully and timeously perfected his comprising thereafter.

Act. *M'Gill.*Alt. *Mowat.*Clerk, *Hay.**Fol. Dic. v. 1. p. 557. Durie, p. 427.*

* * * Spottiswood reports this case :

1629. January 30.—PETER BLACKBURN having comprised from Walter Balvaird certain acres beside Pittenweem, pertaining to him *jure mariti*, as spouse to Catharine Martin liferenter thereof; and being infest thereupon, made warning, and sought a decreet of removing. Compeared William Gibson, and *alleged* for himself, and in name of the Tenants, That they ought not to be decerned to remove, because he had likewise comprised the same acres, and by virtue thereof he was in possession before the warning. *Replied*, His comprising could not defend him in this removing, because it was posterior to the pursuer's, viz. the pursuer's being in January 1625, and the defender's in April thereafter; so that the common debtor was denuded of all right and title he had to the land before the defender's comprising. As for the possession, if he had any, it was a voluntary possession given to him by Walter, in prejudice of the pursuer's former comprising, and so ought not to be respected; except he

would allege, that, conform to his posterior comprising, he had obtained sentence against the tenants, and, by virtue thereof, had entered in possession, and so had done more timeous diligence than the pursuer; especially seeing the pursuer did all lawful diligence, by making of warning to the tenants before the defender's comprising, Whitsunday 1625 obtaining decret of removing, in January 1627 arresting the mails and duties, &c. *Duplied*, Notwithstanding of all this, his posterior comprising clothed with possession must be preferred ay and while it be reduced, seeing he offered to prove he was in possession before the pursuer's comprising and denunciation in October 1624, by virtue of a tack; which possession it was lawful for him to continue in after his comprising. *Triplied*, No respect can be had to that possession which he had not apprehended by virtue of his comprising, but by another right before, *quia non potest mutare causam possessionis*.—THE LORDS repelled the exception in respect of the reply, and preferred the first compriser.

1629. February 17.—In the action of removing pursued by Peter Blackburn *contra* Walter Balvaire, *alleged* further by William Gibson, That he possesst the same lands by virtue of a tack set to him by Walter Balvaire, before the pursuer's comprising, whereof there were yet terms to run. *Replied*, Not relevant, unless it were alleged set before the denunciation.—THE LORDS repelled the exception in respect of the reply; and found, that lands being once denounced to be apprised, the heritor could not dispoñe the same to any body; and that it was not necessary to the compriser to allege and prove, that the debtor was bankrupt, or fugitive, the time of the disposition, but that it was sufficient to annul the disposition, that it was made after denunciation, albeit the dispoñer were otherwise respõsal enough.

1629. February 20.—Afterwards, in the same cause, *alleged*, That Walter Balvaire, from whom the lands were comprised *jure mariti*, was dead, and so the pursuer's process behoved to cease. *Replied*, Albeit he were dead, yet that should not stay the removing of the tenants and tacksmen, because the warning will produce to the pursuer, after he have obtained sentence, the mails and duties of all years before his decease. *Duplied*, The decret would be altogether ineffectual, because the warning, whereupon he pursued, was only before Whitsunday last, and he died after the term. *Triplied*, Let it work what it may, he ought to have decret against the tenants.—THE LORDS repelled the exception.

Spottiswood, (COMPRISING.) p. 51, & 52.