

INDEFINITE INTROMISSION.

S E C T. I.

*Applicable in duriozem sortem.*1630. February 27. HELEN SCARLETT *against* PATERSON.

UMQUHILE JOHN PATERSON having given to Alexander Paterson, his creditor, infestment of a yearly annualrent of 400 merks, to be uplifted out of his lands in Edinburgh; thereafter the same lands are comprised by another of the said umquhile John Paterson his creditors; and after the annualrenter acquires from that compriser his right of the property comprised by that creditor; after this compriser, Helen Scarlett comprised the same lands, for debt owing to her by the said umquhile John; who contending with the prior persons for the right of the lands, and for the mails thereof; and the annualrenter who was before both the comprisings, and who also had acquired the right of the prior comprising, craving preference; and Scarlett, second compriser, allèging that the prior comprising was extinct, because by his intromission with the duties of the land, he was fully satisfied of the sums for the which he had comprised, and the annualrent and expenses of his comprising; and that for his annualrent he could not retain possession of the lands against her, who had now come in the place of the said first comprising, whereby she had only right to claim possession of the land; and that he could not retain the lands, nor come betwixt her and the possession thereof, for payment of his prior annualrent, because he might point or comprise the land therefor, but could not intervene betwixt her and the tenants, for the right to the lands and the mails thereof;—THE LORDS found, That the annualrenter having acquired the first compriser his right of the property comprised, had thereby confounded the property with the annualrent, and that the

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An annualrenter having purchased in a first apprising, it was found that his intromissions ought to be ascribed to the apprising and not to the annualrent, which was anterior to it, although his intromissions did not pay his by-gone annualrents. The apprising being thus found to be extinguished by intromission, a second appriser was preferred to the lands.

No 1.

intromission had by him ought first to be ascribed to the comprising, and for payment of the sums for which the lands were comprised, before he could claim payment of the annualrent, albeit the same preceded both the comprising; seeing the right of the property comprised was the most sovereign right, and therefore the intromission ought to be ascribed to that cause, and not to the right of the annualrent, by the which right he could never, as annualrenter, have attained to the possession of the land; for the first comprising, being become extinct by intromission with more than satisfied the same, it was found that the intromission could not be ascribed to the annualrent, albeit prior, as said is, but to the comprising of the property, albeit the whole intromission (the same being counted betwixt the parties), did not complete the annualrent of the terms owing to him; and albeit by the same the said comprising was satisfied, whereby the right of the property, which thereby was in his person, ceased, and by which the argument of confusion and consolidation of the property with the annualrent now ceased, the said comprising of the property being unexpired, and subject to the legal reversion, and found now in effect redeemed and extinct, wherethrough he alleged he ought to have the preference, and might have recourse to his right of annualrent; whereas the consolidation might only have place, if he might bruik the land as proprietor, which now he could not; notwithstanding whereof, the LORDS preferred the second compriser to the right of the land and the duties thereof, against the tenants, as said is; seeing they found, that the annualrenter might poid for the annualrent, or comprise the property therefor, after which comprising he would be preferred in the right to the land; but as an annualrenter he could not retain possession of the land before he had comprised; and so the second compriser might seek the tenants, or remove them from the lands, as she pleased; neither was it respected, where the annualrenter alleged, that if she removed the tenants, the lands might become waste and uninhabited and ruinous, whereby he would be prejudged of his annualrent; which was repelled, seeing he might comprise the lands therefor, as for all terms whereof he should be unpaid.

Act. *Cunninghame & Scot.*Alt. *Stuart.*Clerk, *Scot.**Fol. Dic. v. 1. p. 458. Durie, p. 496.*1669. *January 14.*M'KENZIE *against* ROSS.

No 2.

A CREDITOR having in his person two apprisings of the same subject, the one carrying only the reversion of the first, the question being, whether the whole mails and duties must be imputed to the first apprising, so as to extinguish it within the legal, or proportionally to both, whereby both would be kept up? It was *argued* for the appriser, That indefinite payment is first applicable to the annualrents, before it can be imputed to the stock. It was *pleaded* on the other