

salmon-fishing ; because it was a casual rent, like *jactus retis*, and so fell not under the act of Debtor and Creditor ; the act being only in relation to teinds and lands. *2do*. That he could not be liable but since the date of the act ; seeing the act could not be drawn back before the date. *3tio*. There was no caution offered for payment of the annualrent ; conform to the tenor of the act. *4to*. Albeit they were liable to count, that they behoved to have allowance of the annualrent of 700 merks, contained in the eik to the reversion.

Whereunto it was REPLIED by the pursuer, That his summons was not only founded upon the Act of Debtor and Creditor, but likewise upon the nature of his security ; which was for repayment of the money ; which clearly imports, that he being satisfied, either by intromission or otherwise, he should not bruik any longer the foresaid fishing. And this cannot be properly a wadset, seeing the wadsetter bears properly no hazard, but the same lies upon the granter of the wadset ; as appears by his own obligation, the time of the redemption, to consign, not only the principal sum, but likeways the haill bygone annualrents. And *2do*. Salmon-fishing is not such a casual rent, seeing it may be set in life-rent tack ; and so may be a certain rent. *3tio*. There is a like reason to count for salmon fishing as for teinds of land ; in respect of the Act of Parliament, bearing teinds of land and others. *4to*. Whatever the defender's author has intromitted with, more nor his annualrent, ought to be ascribed to payment *pro tanto* ; and so extinguish the wadset *pro tanto*.

The Lords found the wadset not to be a proper wadset, in regard of the conception thereof ; and that the granter of the wadset was obliged to consign the haill byrun annualrents, that should happen to be resting the time of the redemption ; notwithstanding of the eik to the reversion, whereby the wadsetter was put in the natural possession of the fishing : and therefore ordained the parties to count and reckon ; but reserved to themselves after count, *a quo tempore*, the surplus of the rents should be imputed *in sortem*.

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1667. February 2. CHARLES KERR against JOHN RUTHERFORD.

CHARLES KERR, being infest in the barony of Abbotrue, upon a right granted to him of the same by the Earl of Lothian, his father ; pursues a removing, against John Rutherford, from that part of the said lands possessed by him.

It was ALLEGED for the defender, That he cannot be decerned to remove ; because he has an assignation from ———, rentaller of the said lands, to his rental right of the same. *2do*. Because the said lands are kirk lands ; and he is acknowledged kindly rentaller and tenant therein.

To which it was REPLIED by the pursuer, That the first allegiance ought to be repelled, *1mo*. Because the rentaller had no farther right than his own life-time ; and, it being now many years since he went out of the country, and there being no word come from him since, *non constat* that he is living ; so that the rental is expired. *2do*. And if the rentaller were living as *non constat*, the foresaid allegiance ought to be repelled, because that rentals, of their own nature, are only in favours of persons rentalled ; and are not assignable or disponsible in favours of any other person ; but, *eo ipso*, that they are assigned and disponed, they become, *ipso facto*, void and null. And the second allegiance ought to be

repelled, because there is no need of acknowledgment of the defender to be rentaller and tenant condescended on; and, if it were, it only could be relevant as to bygones, but not as to times coming, since the interruption of the warning foresaid.

The Lords repelled the allegiances proponed for the defender, and found That a [rentaller] could not assign.

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1667. February 15. DONALD M'GILCHRIST against JOHN ROWAN and JOHN MUDIE.

DONALD M'Gilchrist did comprise certain tenements, within the burgh of Glasgow, from John Mudie, his debtor; and, upon his comprising, being infest therein by the bailies of Glasgow and town-clerk, pursues the possessors for payment of their duties. There is compearance made for one John Rowan, who has a clandestine disposition from the debtor, who is his brother-in-law; and upon it a seasine given, by virtue of the precept contained in the disposition, given by a bailie, constitute thereby, and a private notary; and ALLEGES he is infest, and in possession before the pursuer.

To this it was REPLIED, That Rowan's seasine is but one month before the pursuer's seasine, and is clandestine, *inter conjunctas personas*; and so cannot have force in judgment in prejudice of a lawful creditor, his possession not being legal by authority of a judge; and is but momentaneous, the pursuer being delayed, by process and advocacy, above one year. *2do.* Rowan's seasine is null, being within Glasgow, and not given by a bailie and town-clerk; which is the express law of the kingdom, by Act of Parliament *in anno 1567*, cap. 57.

It is DUPLIED, *1mo.* That the Act of Parliament is only of burgage lands. *2do.* That the pursuer cannot oppose the nullity of Rowan's seasine; because the pursuer his seasine is null, albeit it be given by a bailie and town-clerk; because the lands are not holden in burgage of the town of Glasgow, but of an hospital; and the pursuer's seasine bears to be holden burgage.

To which it was TRIPLIED, That the pursuer's nullity against the excipient's seasine is a nullity founded in law, and an express Act of Parliament, and verified by the excipient's seasine bearing to lie within the territory of Glasgow; but the nullity of the pursuer's seasine, alleged by the excipient, is not verified; for the holding of the tenement is not instructed. *2do.* The pursuer's seasine bears not to be holden burgage. *3tio.* The apprising bears *ex stilo*, both in the decerniture and allowance thereof, to be holden of any other lawful superior whatsoever; which, with the seasine given to the bailie of the burgh and town-clerk, is a perfect right; and the excipient's right both base and illegal, as is verified by the seasine itself.

The Lords preferred M'Gilchrist, the pursuer; unless Rowan would offer him to prove that the tenement, which was the subject of the controversy, was holden of the hospital; and that the hospital was infest therein, and not the town of Glasgow.

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