

No 51.

produced in the process, *in anno* 1655. And as for the taking up of the money, it infers no simulation, and was very allowable, seeing the defender refused to receive it, and the consignation was upon the consigner's peril; and now he offers the same *cum omni causa*, the defender accounting for the rents, which is most reasonable, seeing by the act of Parliament betwixt debtor and creditor, all wadsetters, preceding the act of Parliament, are accountable for the surplus; and albeit the act require an offer of caution, which the pursuer did not, having used an order, yet the foresaid offer of the money was equivalent and more.

THE LORDS found the order defective *ab initio*, through not production of the assignation to the reversion; but found, that it was supplied so soon as the said assignation was judicially produced and seen by the defender; and found the defender accountable for the rents, from that time, in so far as exceeded his annualrents, and sustained the order, the pursuer producing the principal sum at the bar; but found no ground of an account upon the act of Parliament, there being no offer made conform thereto, and the offer of the money by the consignation was long before the said act.

*Fol. Dic. v. 2. p. 323. Stair, v. 2. p. 267.*

No 52.

The expiry of an apprising found interrupted by an order of redemption.

1675. February 11. LADY TORWOODHEAD *against* The TENANTS.

THE Lady Torwoodhead having gotten aliment modified to her by the Lords of Council of 600 merks yearly; and, for surety of the same, having gotten the gift of her husband's liferent escheat, did pursue the Tenants for mails and duties.

It was *alleged* for Florence Gairner, That he had right to the lands libelled and mails and duties of the same by comprising and infestments thereupon expired.

It was *answered*, That the mails and duties of the lands exceed the annualrents of the sums contained in the comprising; and, by the act of Parliament 1661, for ordering the payment of debts betwixt creditor and creditor, where the lands comprised exceed the annualrents of the sums contained in the comprising, the comprisingers are restricted to the possession of such of the lands during the legal as the Lords of Session should think just; and that the expiring of the said Florence's comprising was interrupted by an order used by Edward Ruthven, son to the Lord Forrester.

It was *answered* for Gairner, That the Lord Forrester had no right to the reversion of Torwoodhead's lands, so that no order used by him, as to these lands, could be valid to interrupt the said comprising; and the said order neither was, nor could be declared.

THE LORDS, in respect the Lord Forrester being principal, and his brother Torwoodhead cautioner, both their lands were comprised for the same debt,

and that the principal may satisfy the debt, and extinguish the comprising as to both his own and the cautioner's lands, they found, that the said order did interrupt the comprising as to both.

This appears to be heard; *imo*, Because the act of Parliament indulges the favour foresaid to the debtors themselves, upon the conditions therein-mentioned, viz. That they should ratify the compriser's possession, and deliver the evidents, and the same cannot be extended to donatars; *2do*, A comprising cannot be interrupted, but either by payment and actual intromission, or by using and declaring an order of redemption; until which be done, the comprising cannot be thought to be unexpired.

Reporter, *Craigie*.

*Dirleton, No 251. p. 121.*

1676. *June 16.*

DR FRAZER *against* HOG.

IN anno 1593, contractu permutationis seu excambii (ut loquimur) celebrato inter Georgium Comitem Mariscallum et Menonem Hog de Blairidyn; quia dictus Menon dederat et disposuerat dicto comiti quasdam terras villæ piscatorum vulgo of the fishertoun de Peterhead; et villa de Peterhead erecta fuerat in burgum baroniæ, adeo ut terris istis dicti Menonis commode comes carere nequiret. Et quia dictus Menon habebat jus ususfructus et locationem ad longum tempus terrarum de Blairidyn, ideo dictus comes disposuerat dicto Menoni et suis hæredibus prædictas terras de Blairidyn; sed redimendas a dicto comite et suis successoribus, solutione trium millium mercarum et locatione dictarum terrarum in annos novemdecem post redemptionem; pro mercede sedecem librarum singulis annis pro dictis terris pendi solita; ut in contractu assentit: Et pro implemento dicti contractus, charta a dicto comite et filio ejus concessa in anno 1617, dictus Menon investitus et ejus hæredes, dictas terras possederant, donec Dominus Alexander Frazer archiatreus regius, acquisito jure reversionis seu retractus in dicto contractu et investitura contento, Jacobo Hog nepote dicti Menonis præmonito (ut moris est) et dictam summam reciperet, et prædictas terras revenderet, actione declaratoria dictas terras vendicabat jure retractus, ritè ut asserebat redemptas.

*Excipiebat* Reus retractum seu pactum de retrovendo apud nos stricti juris esse et specificè implendum; eo autem pacto cautum terras dictas redimendas non solum solutione dictæ summæ, sed adjectum eas esse relocandas in tempus prædictam; locationem autem seu assedationem nec oblatam nec depositam.

*Repliebat* Actor pactum illud de relocatione injustum et usurarium et illicitum esse; terras siquidem ejus esse valoris ut merces relocationis tantum non imaginaria sit; eorum enim pro his pendere aut pendere posse quotannis sex.

No 52.

No 53.

Whether usury could be pleaded, to obviate the plea that less had been offered for redemption than stipulated?