

No 43. he offers to prove, that he offered 90,000 merks, which is 2000 merks more than Sir John's price.

THE LORDS found that they would only restrict the clause irritant, to the effect that the granter of the wadset might suffer no detriment, which they found to be effectual, if the wadsetter offered as great, or a greater sum than the other buyer, before any bargain agreed between them, either in word or writ; but found it not probable by witnesses, but by writ, or the Earl's oath; and found that a general offer was not sufficient, unless it had expressed a particular sum.

*Fol. Dic. v. 1. p. 487. Stair, p. 433. & 441.*

1679. January 17.

BEATSON *against* HARROWER.

No 44.

In a sale for a competent price, where the purchaser has no power to require his money, redemption is only competent within the time and in terms of the reversion.

THERE was a disposition of some tenements and roods in the Link-town of Kirkcaldy, granted by George Beans to one Kennedy, bearing the lands redeemable within five years, for payment of 700 merks, being Beans's own proper money, acquired by him, and not borrowed. Beatson now having right, pursues declarator of the land as his irredeemably, not having been redeemed within the time of the reversion. The defender *alleged*, That this being a wadset right, though it bears only a temporary reversion, yet that it is *pactum legis commissoriæ in pignoribus*, which the civil law rejecteth, and our law alloweth to be purgeable at any time before declarator, by consigning the sums in the reversion; as being exceedingly penal, procured from indigent debtors in their distress, and which therefore the Lords, *ex nobili officio*, modified to the true interest, as they do in all other penalties in bonds, though excluding all modifications. It was *answered*, that a reversion may be where there is no *pignus*, but a true vendition for a competent price; and then there is nothing penal, but favourable, which appears to be in this case, where there is no requisition, and therefore neither *creditum* nor *pignus*, and where the reversion is only competent upon the proper means and money of the disponent, without borrowing.

THE LORDS found, that if there were no requisition, but a sale for a competent price, the lands are not redeemable but within the time, and on the terms in the reversion.

*Fol. Dic. v. 1. p. 486. Stair, v. 2. p. 676.*

No 45.

A creditor who had an expired legal entered into an agreement with his debtor, re-

1697. July 20.

MARQUIS of ATHOLE and EARL of TULLIBARDINE *against* JOHN CAMPBELL of Glenlyon.

I reported the Marquis of Athole, and the Earl of Tullibardine, his eldest son, against John Campbell, now of Glenlyon; being a declarator of the ex-

tion and expiration of a reversion, in regard the irritancy was committed, in so far as the Marquis had granted a reversion for six years, on payment of L. 39,000, to which he had restricted his debts; and in case it were not redeemed within that time, then the lands were to belong irredeemably to the Marquis, on his paying L. 26,600 farther, as the liquidate additional price agreed on betwixt them for the value of the reversion; and that they had failed to pay the money at the term mentioned in the contract; and so the reversion was expired. The defence was, this being a wadset on the matter, to declare the irritancy were to sustain *pactum legis commissoriæ in pignoribus*, which is reprobated by the common law and our decisions; and the practice of all sovereign judicatories in Europe allows debtors to pay and purge at the bar; that being founded on a just equality and proportion, and all such penalties approach to usury; and when you get your money *cum omni causa, nihil tibi deest*, as the Emperor Constantine very justly determines even with a retrospect, *L. 3. C. De pact. pignor.* Answered, Penal irritancies are indeed odious and purgeable; but we are plainly in the case of a conditional sale, where the condition not existing, the emption vendition becomes simple and absolute, as is decided in *l. 16. § final. D. De pignor.* and *l. 81. D. De contrah. emp.* and was found by the Lords, 17th January 1679, Beatson *contra* Harrower, No 44. p. 7208. Replied, All that holds where there is a competent price paid, and the transaction is *inter majores*; but here what the Marquis is to pay for the lands of Glenlyon is far from amounting to an adequate price; in which case, Stair, in his institutions, shews the same is ever open and purgeable, and cites many decisions from Durie and others for it; likeas, this reversion is granted to a minor, and though he has renounced the exception of minority, that he shall not obtrude it against the expiration of the reversion; yet his case is always favourable, and he can renounce it no more than he may consent that the legal of an apprising or adjudication should run against him when he is minor. Duplied, When one is proprietor by expired comprisings, and *ex gratia* prorogates the legal to a minor, he must take this favour as it is given him, or he must want it. See Craig; *Feudor. B. 2. D. 6. § 29.*, and the case of Hamilton of Sanquhar and Chalmers there mentioned.\* THE LORDS found this transaction was not of the nature of a *pactum legis commissoriæ*, and that his minority gave him no interest to purge; and therefore declared the irritancy incurred.

1698. July 2.—CAMPBELL of Glenlyon having given in a new petition against the Earl of Tullibardine, concerning the cause mentioned 20th July 1697, and the same being refused, he this day protested for remeid of law to the Parliament.

*Fol. Dic. v. 1. p. 487. Fountainhall, v. 1. p. 787, & v. 2. p. 97.*

\* See APPENDIX.

No 45.  
 stricting his adjudication to a lower sum, and granting a reversion for six years, with this express clause, that if the restricted sum were not then paid, the reversion should *ipso facto* expire. The irritancy was found not purgeable after the reversion was expired.