

1706. February 27. Colonel ERSKINE against Sir GEORGE HAMILTON.

No 48.

A purchaser of lands granted a bond of reversion, that he would renounce if repaid within a certain time, otherwise the property to be his, on paying a further sum. Many years after the term fixed, the lands were found still redeemable. The pursuer of the declarator of redemption was not the disponent himself, but a purchaser of his estate at judicial sale.

By contract in 1678, betwixt Bruce Earl of Kincardine and Sir Robert Miln, the Earl disposes Tulliallan, irredeemably, to Sir Robert, who gives him a reversion, that, if the Earl paid him L. 30,000 betwixt and Martinmas 1685, then he should renounce the lands, otherwise they were to be Sir Robert's in property, on paying L. 10,000 farther; in 1685, the lands are not redeemed, whereby Sir Robert and Sir George continue to possess. Colonel Erskine, as purchaser at the roup, pursues a declarator of redemption and extinction. *Alleged*, The redemption was expired, not being used within the time prefixed. *Answered*, The irritancy never being declared, it is yet purgeable and open. *Replied*, That holds in penal conventions, but this reversion was given *ex gratia* to the Earl, Sir Robert having the preferable rights to Tulliallan in his person, before that contract. THE LORDS found it yet redeemable; but it being started, whether he was not to be reputed a *bona fide* possessor after the 1685, so as he cannot be made countable for the superplus mails and duties, more than paid him his annual rent of the L. 30,000, *fructibus in sortem non computandi*, this point was continued till it should be farther heard.

1708. July 9.—IN the action mentioned 27th February, 1706, betwixt Colonel John Erskine and Sir George Hamilton of Tulliallan, the question being this day stated, (his right being then found redeemable,) whether he was not likewise countable for his intromissions above his annual rents of the L. 30,000? And though it was *contended*, That, in proper wadsets, they were unaccountable, albeit redeemable, and was so found in Mr Alexander Higgin's case, against Callendar of Craigforth, *voce* TRUST; yet the Lords here found Sir George accountable for the superplus rents more than paid his yearly annual rents. Then it was pressed, that he should account *ab initio* from the date of the contract in 1678; but this being laid aside, as too severe, the second vote was stated, whether *a lite mota*, from the citation in Colonel Erskine's process of declarator of extinction, in 1696, or only from the date of the interlocutor, finding his right redeemable, in February 1706; and the plurality carried it from the citation, and ordained him to count and reckon. In cheap years, the price of the victual did little more than pay his annual rent, with the minister's stipend, and other public burdens; but the dear years, from 1695 to 1700, will exhaust a great part of his principal sum, even counting at the fiars of the years, which are oft times below the current price.

*Fol. Dic. v. 1. p. 487. Fountainhall, v. 2. p. 332. & 450.*