

(DUE by *lucrati*.)1626. July 20. L. CLUNIE and STIRLING *against* OGILVIE.

IN an action betwixt L. Clunie, Thomas Paterfon, and James Stirling, his assignee, against Mr David Ogilvie, who had bought the lands of Frothie from the L. of Clunie for a certain price, and which price he was not obliged to pay while James Curie's renunciation of his right, to the lands disposed, were delivered to him; the Laird of Clunie, and his assignees, pursuing for the annualrent of the money conditioned for the price of the lands, or else for the profit of the land intromitted with by him since the alienation, seeing he both possessed the lands and kept the money without profit paying; and that they offered, in place of James Curie's renunciation, which was *factum impræstabile*, he being deceased, and there being no person who would be heir to him, to give sufficient and responfial cautioners, to warrand him at all hands, for all skaith and damage which-ever he might incur, for not delivery of the said renunciation; and the defender contending, that he could not pay any annualrent for the said money, except it had been so contracted betwixt the parties, which was not; or else that he had been *in mora* for not paying of the same, which could not be shown to be on the defender's part, seeing *non per eum sed per actorem stetit*, that the sums were not paid, in respect he had not procured the said renunciation, as he was obliged in their contract. The LORDS found, that albeit the contract bore nothing of paying of annualrents for the moneys; yet, that it was not equitable that the defender should possess both the lands, and retain the money, without paying of the annualrent, albeit the said renunciation was not obtained, seeing he had only possessed the said lands by virtue of the said contract, and right acquired thereby from the pursuer; but because the defender had paid to the pursuer a part of the price of the lands, and had retained another part of the price convened upon, while the said renunciation should be delivered, The LORDS found, that in so far as the profits of the lands, and the farms, and duties thereof, would exceed the annualrent of the sums which the defender had paid in part of payment of the price, as said is, that for the superplus of the profit and duties of the land, more than the ordinary annualrent of the moneys received by the pursuer would extend to, the said defender should refund and pay back the same again to the pursuer: But concerning the rest of the price, and profit thereof, the LORDS would not sustain the said pursuers action; and found that the said defender was not subject nor holden to pay the same, the said renunciation not being obtained, albeit that the pursuer offered caution to warrand the defender thereof, as said is; and so, by this decision, the LORDS had no respect to the bargain, that the same was perfected by buying and selling, and had taken effect by right and possession; but they thought it most reasonable, that what profit the buyer had, of the lands bought by him, more than the annualrent of the money which he had actually paid to the seller, the same should be refunded to the seller; but respect to any of the

No 81.

Found in conformity to the above.

(Dux by *lucrati.*)

No 81. rest of the money contracted to be paid, and retained unpaid, for not delivery of the said renunciation; and, for the which retained money, they found him not holden to pay any annualrent for the cause foresaid. (See SALE.)

Act. *Hope & Nicolson.*Alt. *Stuart & Fletcher.*Clerk, *Gibson.**Fol. Dic. v. 1. p. 42. Durie, p. 223.*1627. *March 8.*STIRLING *against* PAUNTER.

No 82.

The purchaser of lands, was allowed his option, when the seller was *in mora*, either to pay annualrent to the feller, or to account to him for the rents.

IN an action for mails and duties, at the instance of Stirling against Paunter, the defender cloathing himself with an infeftment of the lands, whereof the duties were acclaimed, proceeding from Mr David Ogilvie who had bought the lands, and who was found to be debtor of the said mails, for not paying of the price which he was obliged to pay, and which he retained unpaid, because certain deeds were not fulfilled to him; and, nevertheless, because the Lords found, that it was not equitable, that he should both keep the money and pay no profit thereof, and also uplift the duties of the lands; therefore the Lords, by their decret found, that he should pay to the pursuer who had acquired the annailzier's right in his person, either the profit of the principal money retained, or else the profit of the lands, wherein the said Mr David having his option, and having chused to be debtor in the mails of the lands, and so decret being given against him for payment thereof: This pursuit, upon that decret, was intended against this defender, as possessor of the said lands, by right from the said Mr David, to pay the said mails to the pursuer; wherein the defender *alleging*, That he was heritably infeft in the same, by the said Mr David, before that sentence; so that the personal sentence against the said Mr David could not make him subject to pay the said duties: And the pursuer *replying*, That that decret given upon a real cause, albeit personally against the said Mr David, ought to work for the pursuer against all possessors, by any right from the said Mr David; especially seeing the said Mr David was his debtor before the right made to the defender; and before the said right he had served inhibition against the said Mr David; likeas he was at the horn the time of the making of the said right, which was simulately made by him, being father-in-law to the defender, who had married his daughter; and so in respect of the act of Parliament against bankrupts, ought not to be respected against the pursuer: Notwithstanding of the which reply, the exception was found relevant, seeing the infeftment alleged by the defender could not be taken away *hoc ordine*, without prejudice to reduce thereupon; for albeit he was at the horn, yet he might sell his land; but I think not to the prejudice of his creditors. (See PERSONAL and REAL.)

A.G. *Hope & Nicolson.*Alt. *Haliburton & Stuart.*Clerk, *Gibson.**Fol. Dic. v. 1. p. 42. Durie, p. 286.*