

(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.*