

ment, to renounce their tack, so any private deed done by Sir Robert to his Lady, could not prejudice him, the granters of the wadset not being obliged to take notice of any right flowing from the wadsetter, unless it be intimated; so Sir Alexander might lawfully transact with Sir Robert, who was in public possession, and could not be prejudged by any private deed of his, albeit granted to his wife in remuneration. But if the case had been decided according to the dispute upon several rights made by that tacksman only by assignations, it had been of greater difficulty. Yet it seems Sir Robert's right being only personal, and his Lady's translation from him as assignee, that it ought to have been decided, as it would have been, in assignations to bonds and other rights, which necessarily require intimation or possession, such as may be known to any who contracts with their husbands, who, albeit they got posterior rights, yet are always preferred, if it be in the power of their wives to make that right known, either by intimation, or by obtaining a decret before any Judge competent for payment of the mails and duties to them after their husband's decease, otherways, in law, such deeds are presumed fraudulent, and ought not to be sustained, being far different where a husband being heritor of several lands, and having provided some of them by contract of marriage to his wife in liferent, gives her a private infestment in others upon her renunciation of her first right, or grants her a liferent tack, which is reputed to be clad with possession by her husband's possession; yet this last case is very disputable, where her right is a naked tack.

No 50.

Gosford, MS. p. 309.

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1674. February 19. LORD BORTHWICK *against* PRINGLE.

In *anno* 1593, the Lord Borthwick gave a wadset of Cumrig, redeemable for 700 merks. This Lord Borthwick used an order of redemption *in anno* 1665, and raised a declarator *in anno* 1660, and now insists. The defender *alleged*, That the order was null, this Lord Borthwick not being heir to the granter of the wadset, but assignee; and not having produced his assignation to the reversion, albeit the instrument of consignation bear that it was required, and the consignation was only simulate, my Lord having taken up the sums, and never insisted till now, so that the defender was *in bona fide* to continue in possession, and to enjoy the fruits; and though the order could be sustained now, when the assignation to the reversion is produced, the defender cannot be accountable for the mails and duties. It was *replied*, That the order is valid, and that the not production of the assignation cannot be respected, because the defender acknowledged the pursuer's right, by offering a charter to him as superior, to be received in this wadset. *2do*, The defender could pretend to be no more *in bona fide* after the assignation to the reversion was judicially

No 51.

An order of redemption used by an assignee to the reversion, was found defective, the assignation not being produced; but, upon subsequent production, the order was found to take effect.

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,