

but, whether it should default yearly, or only *in cumulo* from the date of using the order, the Lords ordained the parties to debate, *a quo tempore* it should commence, and if it was a proper or improper wadset ; seeing, by the ignorance of the notary, who is the writer, it seems to participate something of the nature of both.

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1704. *January 4.* ALEXANDER PIPER of NEWGRANGE *against* SCOTT of HEDDERWICK.

THE said Alexander having, at the roup, bought the lands of Newgrange, formerly belonging to Sir Francis Ogilvie, he raises a reduction and improbation against sundry of the creditors, and particularly against Hedderwick ; and, seeking out certification against them, for not production, the creditors apply to the Lords by a bill, complaining, That Mr Piper had taken a very unusual method to pay them, in seeking to annul their rights ; and that a purchaser at the sale of bankrupts' lands could not pursue reductions and improbations, but only a multiplepoinding, in which he may call the creditors ; and, after they have debated their preferences, and are ranked conform to their respective interests and shares in the price, he may either consign or pay accordingly ;—and that they had produced their adjudications and registrate bonds ; but he was insisting against them for not producing the principals, and the grounds and warrants of their decreets, such as the summons and executions, &c. in which he had no interest ; and the production they had made was sufficient to exclude him.

ANSWERED,—He was necessitated to follow this course ; for Sir Francis, the former heritor, kept up the writs and charter-chest from him ; and thir creditors were not in the decret of ranking ; and he had paid out already a great part of the price, and ought to be secured in his purchase.

The Lords thought this remedy of pursuing the creditors by a reduction somewhat extraordinary, he having granted bond and caution to pay them according to their preferences ; and, to take the advantage of a certification, would be ill payment. But, remembering that William Hay of Drummelzier, who bought the barony of Dunse at the roup of Sir James Cockburn's estate, had pursued such an action of reduction and improbation, they desired to be informed, ere they proceeded farther, whether the act of roup was in his title in that process, or the real creditors' rights which he had transacted and bought in ; for, though such a pursuit, *qua* purchaser at the roup, may be unequal, yet, if the process be as assignee constituted by the creditors to their debts, that may be a sufficient title *ad fundandam litem*. And, how far a decret of sale may be the title, the Lords resolved to consider the same after a hearing.

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1704. *January 27.* EUPHAME CUNINGHAM *against* ALEXANDER CUNINGHAM of CULLELLAN.

By contract of marriage, in 1658, betwixt Mr William Cuningham, Minister

at Kilbride, and Euphame Cuningham, Mr William is obliged to employ as much of a principal sum as will pay, conform to the Acts of Parliament, 500 merks yearly, for her liferent-use, in such sort that she may be secured therein during her life. Her husband dying in 1669, his heirs and executors stock a sum, in sundry debtors' hands, of 8333 merks, as corresponding to 500 merks, for her liferent use, at 6 per cent. and whereof she receives payment. But retention of annualrents being first introduced by the Act in 1672, on this ground, That cess, and other public burdens, affected the land-rent, and the personal estates of monied men went free; therefore, to make some equality, debtors were first allowed retention of a sixth part, in 1672, 1690, 1695, and 1697, and then of a twelfth part ever since. And the said Euphame finding this to diminish her liferent of 500 merks, which, by the conception of her contract foresaid, she ALLEGED, must be a net and free annualrent of 500 merks yearly, not subject to retention or any burden whatsoever, she raises a process against Mr Alexander Cuningham of Cullellan, her husband's heir, for payment to her of 396 merks, as the retention he has kept off her these years bygone, on this ground, That her annualrent was liable to no such retention; and therefore he, as heir, ought to refund and make up the same to her; and to hear and see it found and declared, that her liferent can bear no retention in time coming; but that her 500 merks ought to be paid full and entire without any such deduction.

ANSWERED,---That he has implemented the clause of her contract, by securing her in as much of a principal sum as pays 500 merks yearly: and if, by a supervenient law, annualrents come to be lessened and diminished, none can be presumed to have given warrandice against such events as were neither *prævisa* nor *cogitata*. At the time of the said contract there was no retention, nor for sundry years after; and she must take her hazard as all the other lieges do; and this is to make the ease given to debtors, by the Acts of Parliament introducing retention, elusory.

REPLIED,---The pursuer is in a special case; for it is confessed, if her 500 merks had been made relative to a specific sum, and a stock named, then it would have been liable to retention; but here it is expressly provided, that she must be secured in such a principal sum as will pay 500 merks, without defining the sum to 8333 merks; so that, if the 8333 merks will not pay 500 merks, because of the retention of a 6th or 12th part, then the stock must be proportionably augmented to make up that sum. And, put the case, that the annualrents had been cried up to eight or ten in the hundred, she would have got no benefit by that exaltation, but Provost Cuningham would have forced her to be content with the 500 merks; and so, *a pari*, the annuals being diminished, she must not be thereby prejudged: for *cujus est commodum, is debet et sentire incommodum; et pacta sunt interpretanda contra proferentem*, especially *in re matrimoniali, quæ sunt uberrimæ fidei*: and therefore an effective stock must be secured to her, productive of 500 merks free. And, though there be no warrandice against public laws, yet paction can over-rule these cases; and it is not usury to take the full annualrents, if paid, but only obliges them to restitution if redemanded and the retention be claimed.

The Lords found, by the conception of this contract, her liferent was not in the common case (where generally they suffer retention, being relative to a *sors* and principal sum;) and found it not liable to retention.

Then ALLEGED,---That she had homologated the same, by granting dis-

charges, allowing and deducing the retention. ANSWERED,---What was *per errorem* paid or remitted, may, *condictione indebiti*, be repeated; neither can that import a discharge of the right founded in her contract of marriage.

The Lords thought, however these discharges might preclude her *quoad* the years when she had allowed it, yet it could not as to others, and ordained them to be farther heard as to that point,

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1702 and 1704. GRIZEL KININMOUNT of that ilk *against* COLONEL FORBES of PITTENCRIEFF.

1702. *December 3.*—GRIZEL Kininmount of that ilk gives in a petition against Colonel Forbes of Pittencrieff, showing that her lands of Urquhart, lying contiguous with the said lands of Pittencrieff, the Colonel, under pretence of working his own coal, had invaded hers, and made use of her workmen's sinks: and craved he might be stopped.

The Lords would stop no work unheard; but allowing him to see, he had complained that they had taken the start of him, though he had more just reason to complain than she: for one Robertson, the Lady Kininmount's tacksman in her coal of Urquhart, had, under pretence of working her coal, entered far within Pittencrieff's march, and, under ground, wasted and embezzled his coal; for remedy whereof he had applied to the Justices of Peace at Dunfermline, and obtained their warrant to skilful men to try the matter of fact; upon whose report the Justices found Robertson's encroachment, and discharged his farther working; which act the lady had suspended.

The Lords saw a necessity for a new visitation; and named some of their number for that effect, who declined it at this season of the year; and, it requiring dispatch, they appointed Mr Alexander Gibson of Dury, one of their clerks, to go on Saturday next, and cause visit it, and bring back his report on Tuesday thereafter, without further delay: for though the Lords usually name some of their own number, or country gentlemen, in such cases, and use not to burden their clerks with such commission, they serving the lieges in another capacity, yet, in this case, they employed him, which seldom uses to fall out. But the Lords would invert neither of their possessions, *novi operis nunciatione*, till the matter were tried.

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1704. *January 28.*—In the mutual declarators of property, pursued betwixt Colonel Forbes of Pittencrieff and the heiress of Kininmount, (mentioned 3d December 1702,) for her lands of Urquhart, lying contiguous with Pittencrieff; the Lords having advised the indenture of marches, being a decreet-arbitral of division in 1578, with the testimonies of the witnesses, they found the gushet in controversy belonged in property to the Colonel, as a part of his lands of Pittencrieff, conform to the probation of the march-stones. The value of which ground, being a moor, was inconsiderable; but having a coal, Robertson of Gladney, the lady's tacksman, had wrought under it, for which the Colonel had a process of damages depending. And the Lords having refused a new visitation to perambulate the ground, in this process, it having been done twice al-