

1675. June 25.

The DUKE of LAUDERDALE *against* The LORD and LADY YESTER, and the
EARL of TWEEDDALE.

IN a declarator of redemption at the instance of the said Duke against the Lord and Lady Yester, and the Earl of Tweeddale, craving that the Lady should denude herself, by a resignation in Exchequer, of the right she had disposed to her in *anno* 1665, of the whole estate of Lauderdale, and barony of Swinton, and of the title and dignity of the Earl of Lauderdale, conform to a special provision contained in the disposition and procuratory of resignation made in her favours, bearing, that it should be lawful to the Duke to redeem the said estate and dignity, upon consignment of a rose noble, whereupon he had used an order; and accordingly had consigned a rose noble in the hands of the Earl of Kincardine; it was *alleged* for the defenders, *imo*, That the Lady could not be decerned to subscribe a procuratory of resignation of the said estate, because there was no such obligation in the provision and grant of redemption, and that there could be no decret ordaining her to do the same; there being no warrant in the disposition or reversion. It was *replied*, That the said provision, bearing a power to redeem, and she being publicly infeft under the Great Seal, it was necessarily implied in the reversion, as in all other reversions of lands or estates, that the defender should denude herself *omni habili modo* of all right that was disposed to her; and without subscribing a procuratory of resignation, the Lady had still the real right in her person, and the Duke her father could not have the benefit of redemption, thereby establishing, by charter under the Great Seal, the real right of the said estate to him and his heirs; likeas in all reversions of wadsets, upon a lawful redemption, the wadsetter, if publicly infeft by the pursuer, albeit there be no obligation to resign, yet decret was always given against them, to denude themselves by resignation, as being a necessary consequence. It was *duplicated*, That all reversions were *stricti juris*, and cannot be extended to any obligation but what is therein contained.—THE LORDS did find, that the Lady ought to resign, having nothing to say against the order of redemption, as being naturally implied in the grant of redemption as a necessary consequence thereof; especially considering, that it hath been usual to decern so in all redemptions of wadsets, albeit they bear no such obligations; and that, albeit reversions are, by our law, *stricti juris*, yet that is only interpreted where something is craved which is extraneous, and may extend the cause of reversion. Thereafter it was *alleged*, That the Lady was not obliged to grant a simple resignation, but only qualified and restricted with another provision contained in that same procuratory of resignation granted to her, bearing, that in case of redemption, she should be free of all her father's debts; and likewise bearing an obligation to pay to her L. 7000 Sterling after the Duke's decease. It was *replied*, The provision fore-

No 10.

Found in conformity with
Simpson against Boswell, No 5.
p. 6540.

No 10. said could only import an obligation against the Duke to fulfil, and so was only the ground of personal action ; so that the most that could be craved was, that the decreet should bear a reservation of all action competent to her, as accords of law.—THE LORDS did find, that she ought to grant a simple resignation of the estate *in communi forma*, and that the decreet should only bear a reservation, as accords, of all action competent to her upon the said provision ; which seems hard, seeing the said provision was inserted in the procuratory of resignation, as well as the clause of reversion, and so was real, and did affect the same ; especially seeing the Lady was the only apparent heir of the Duke her father, and so might be pursued by the creditors as successor *titulo lucrativo* ; as likewise that this disposition was not of the nature of a wadset granted for security of a sum of money advanced, but was an absolute disposition of the estate, made by a father to an apparent heir, affected with the said two provisions ; and that the reversion was a real right, as no-doubt it is, so likewise this provision for relief of the debts, and payment of the foresaid sum of L. 7000 Sterling, being subjoined to the reversion, and affecting the same, could not be of another nature, but both of them were real, and contained in that same disposition and procuratory of resignation.

Fol. Dic. v. 1. p. 440. Gosford, MS. No 763. p. 474.

* * Dirleton reports the same case.

THE Duke of Lauderdale having settled upon the Lady Yester, his daughter, his estate ; and, thereafter, by contract of marriage betwixt the said Lady and my Lord Yester, containing a procuratory of resignation, whereupon infestment followed, the said estate is disposed and resigned by her, with consent of her father, and him for his interest, in favours of the said Lady, and the heirs of her body of that marriage, and these failing, of any other marriage, with provisions contained in the said procuratory ; and in special, that the said lands should be redeemable by the Earl, upon a rose-noble ; and that upon an order used, the said right, in favours of the Lady and her foresaids, should be void : and two other provisions in case of redemption, viz. *1mo*, That in case the Duke of Lauderdale should think fit to redeem, that the Duke and his heirs should be liable, and obliged to pay, (likeas they bind themselves by the said provision to pay) to the Lady and her foresaids, besides the tocher, L. 7000 Sterling, at the first term after the Duke's decease ; and *2do*, That whereas by the said contract, the Lady, if the estate had not been redeemed, was obliged to pay all her father's debts and legacies, she should be free of the same, in case of redemption ; which provisions are contained in the infestment ;

The Duke having used an order, and having intented thereupon a declarator of redemption, concluding that the lands should be declared lawfully redeemed, and that his daughter should be decerned to denude herself, and

to grant a procuratory for resigning, since she was infest by public infestment,

It was *alleged*, That as to that conclusion, that she should renounce, there was no warrant for the same; seeing there was not a reversion in these terms, that she should grant the lands orderly redeemed and renounce; in which terms, reversions, which are *pacta de retrovendendo*, are ordinarily conceived; but that the reversion, whereupon the order is used, is only a provision contained in the said contract of the tenor foresaid, with a resolute clause, in case of redemption, which imports no obligation upon the Lady, nor *pactum de retrovendendo*, but only *jus retractus*, and a faculty and power to the father to redeem, and in case of redemption, the expiring and nullity of the right.

2do, It was *alleged*, That though the Lady were to renounce, her renunciation ought to be qualified and burdened with the provisions contained in her right; and in special, with the foresaid provision as to the securing to her L. 7000 Sterling, and the other provision foresaid for securing her relief of the debts.

It was *replied*, That as to the said first allegiance, that *inest* in all contracts bearing reversions, whether in the formal terms of a reversion, or provisions upon the matter importing a reversion; and *ex stylo* all decreets of redemption do contain the said decerniture to renounce. And the Duke being denuded in favours of his daughter by public infestment, the *habilis modus* to return again to his right upon redemption, is upon the resignation.

As to the *second*, it was *answered*, That the said provisions are not in the reversion, and amount only to a personal obligation upon the Duke and his heirs, but not to be a real burden and incumbrance upon the right.

As to the debts, it was *answered*, That there needs no other security for the Lady her relief of the same; seeing she was to be liable thereto in contemplation of the right, if it should stand effectual in her person. And it is provided, in case of redemption, she should be free thereof.

It was *duplied* as to the said provisions, That the same being in the body of the procuratory and infestment, are real; and they are inserted *unico contextu* with the provision, that the lands shall be redeemable, and do qualify the same. And that notwithstanding that it be provided, That in case of redemption, she should not be liable to the debts, yet she may be in hazard to be overtaken as *successor titulo lucrativo*, in respect, by the said right, it is provided, that in case of redemption, the said L. 7000 should be given to her and her foresaids, which being a provision introduced in her favours, and in effect, in lieu of the estate, and being so great, may fix upon her a passive title, as having gotten by her father, besides her tocher, so great a sum, which is not payable to her husband, but to her and her foresaids; and, therefore, could not renounce, but with the burden of the said provision for her relief.

No 10. THE LORDS found, That she ought to renounce, reserving to her the foresaid provision, as accords.

Reporter, *Castlehill.*

Clerk, *Gibson.*

Dirleton, No 276. p. 134.

No 11.

1677. *January 24.* DICK *against* OLIPHANT.

AN assignation being granted for relief, and payment of certain sums mentioned in the assignation, for which the assignee was cautioner for the cedent; the same was questioned upon that head, that it was never delivered, but was still in the cedent's hands. THE LORDS found, That the said assignation was never delivered; and yet they found, That it was an effectual evident in favours of the assignee, in respect the cedent had made the same public by a horning thereupon. *In presentia.*

Sir George Lockhart, &c.

Alt. Cunningham, &c.

Dirleton, No 442. p. 215.

* * * Stair reports the same case :

1677. *January 18.*—TYRIE of Drumkilbo being debtor to Douglas of Kilspindie, in a sum of money, the same was arrested by Janet Mackmath; and, in a competition betwixt her, as arrester, and Sir James Douglas, as having right to the sum by translation from Douglas of Lumsdale, as assignee by Kilspindie, Sir James was preferred, because, before the arrestment, Lumsdale's assignation was intimated by a charge of horning; in which process, improbation was proponed against Lumsdale's assignation, which was not sustained by exception, but reserved by action, whereupon reduction and improbation was intended, yet Sir Lawrence Oliphant of Gask purchased the right from Sir James Douglas, and did defend it in the improbation, till at last the assignation was improven. There is now a reduction and declarator intended against Sir Lawrence and others, for reducing the decret of preference founded upon the false assignation, and for decerning Sir Lawrence, and all those having right from him, to refund the arrested sum, and the annualrents thereof. It was *alleged* for the Defenders, That there is now produced a true assignation intimated by a horning, which therefore did denude Kilspindie before the arrestment, and so must defend these defenders deriving right from Lumsdale. The pursuer *answered, imo,* That Sir Lawrence Oliphant having taken a right after the matter was litigious, and having most tenaciously defended in the false assignation, he cannot now make use of this true assignation. *2do,* This true assignation was never Lumsdale's delivered evident, and therefore, did not denude Kilspindie; for albeit delivery is presumed, and needs not to be proved where the writ is in the hand of him in whose fa-