and that the principal may satisfy the debt, and extinguish the comprising as to both his own and the cautioner's lands, they found, that the said order did interrupt the comprising as to both.

No 52.

This appears to be heard; *1mo*, Because the act of Parliament indulges the favour foresaid to the debtors themselves, upon the conditions therein mentioned, viz. That they should ratify the compriser's possession, and deliver the evidents, and the same cannot be extended to donatars; *2do*, A comprising cannot be interrupted, but either by payment and actual intromission, or by using and declaring an order of redemption; until which be done, the comprising cannot be thought to be unexpired.

Reporter, *Craigie.*

Dirleton, No 251. *p.* 121.

1676. *June* 16. DR FRAZER *against* HOG.

No 53. Whether usury could be pleaded, to obviate the plea that less had been offered for redemption than stipulated?

IN anno 1593, contractu permutationis seu excambii (ut loquimur) celebrato inter Georgium Comitem Mariscallum et Menonem Hog de Blaridryn; quia dictus Menon dederat et disposuerat dicto comiti quasdam terras villæ piscatorum vulgo of the fishertoun de Peterhead; et villa de Peterhead erecta fuerat in burgum baroniæ, adeo ut terris istis dicti Menonis commode comes carere nequiret: Et quia dictus Menon habebat jus ususfructus et locationem ad longum tempus terrarum de Blairidryn, ideo dictus comes disposuerat dicto Menoni et suis hæredibus prædictas terras de Blairidryn; sed redimendas a dicto comite et suis successoribus, solutione trium millium mercarum et locatione dictarum terrarum in annos novemdecem post redemptionem; pro mercede sedecem librarum singulis annis pro dictis terris pendi solita; ut in contractu asseritur: Et pro implemento dicti contractus, charta a dicto comite et filio ejus concessa in anno 1617, dictus Menon investitus et ejus hæredes, dictas terras possederant, donec Dominus Alexander Frazer archiatreus regius, acquisito jure reversionis seu retractus in dicto contractu et investitura contento, Jacobo Hog nepote dicti Menonis præmonito (ut moris est) ut dictam summam reciperet, et prædictas terras revenderet, actione declaratoria dictas terras vendicabat jure retractus, rite ut asserebat redemptas.

Excipiebat Reus retractum seu pactum de retrovendendo apud nos stricti juris esse et specifice implendum; eo autem pacto cautum terras dictas redimendas non solum solutione dictæ summæ, sed adjectum eas esse relocandas in tempus prædictum; locationem autem seu assedationem nec oblatam nec depositam.

Replicabat Actor pactum illud de relocatione injustum et usurarium et illicitum esse; terras siquidem ejus esse valoris ut merces relocationis tantum non imaginaria sit; colonum enim pro iis pendere aut pendere posse quotannis sex-

No. 53. centas minas; et si reo non solum dicta summa 3000 minarum, sed etiam locatio adeo diuturna et pro mercede adeo exili danda foret; specie locationis ipsam proprietatem vel ejus pretium consecuturum: Adhæc, constitutione Jacobi 2di. Parl. 6. cap. 19. statutum esse, in contractibus hypothecariis, quibus terræ alienantur sub pacto de retrovendendo, et relocando post redemptionem; conditiones et assedationes istas haud servandas, terris redemptis, nisi convenerit de justa mercede et pensione, saltem haud multum citra justam firmam, ut loquimur.

Respondebat Reus, multum interesse inter contractus mutui et alios puta venditionis et permutationis, &c. Ubi enim pecunia fœneratur et creditur, usurariæ stipulationes illicitæ sunt; et pacta alioquin licita reprobantur, ut pacta legis commissoriæ; ea ratione, quod debitori obærato et inopi creditor nihil non exprimet; ea autem ratio in aliis contractibus cessat; et in hoc casu; nec enim in eo mutuum, et consequenter nec usura nec pactum usurarium nec debitor inops, sed contractus permutationis inter Rei avum, virum haud locupletem et comitem præpotentem, cui terras suas ut sibi si non necessarias, saltem commodas flagitanti recusare non potuit nedum leges inquiores dare: Constitutionem autem prædictam Jacobi 2di. in contractibus pignoratitiis locum habere, ubi terræ creditori impignorantur, ut ex verbis constitutionis liquet (when lands are wadset.) In casu prædicto nec creditum nec pignus esse; avum suum nec pecuniam comiti dedisse, nec repetere posse; cum dicto contractui clausula requisitionis (ut loquimur) non insit; nec reus prædictam summam petere possit; nec comes teneatur persolvere; avum suum permutasse terras suas de Blairidryn, ea lege et satis iniqua, ut reo haud liceat terras avitas reluere; cum penes actorem extraneum et singularem successorem facultas sit redimendi, si ea uti velit conditioni parendum; terras tempore permutationis incultas et forte steriles fuisse, in regione saltuosa et montana; si sua et parentum industria excultæ et meliores sunt, id in suum detrimentum haud retorquendum.

Quæstio ista, Domino de Castlehill referente, in domum interiorem introducta; et inter dominos disceptata; cum de ea sententiis variatum, visa est altiorem indaginem requirere; et, coram ipsis, partibus et patronis vocatis, audienda.

Act. *Lockhart*, &c. Alt. *Cuninghame*.

Dirleton, *No* 358. *p.* 173.

*** Gosford reports this case:

In a declarator of redemption of the lands of Blairidein, at the instance of Sir Alexander, as having right to the reversion of the lands given in wadset by the Earl Marshall to the defender's predecessors, *in anno* 1593, it was *alleged*, no declarator, because the reversion did bear, not only the payment of 3000 merks, but likewise a tack, to be granted to the wadsetter or his heirs, of 19

years, for payment of the sum of L. 19 yearly. It was *replied*, That the redemption being suspended during the wadsetter's lifetime, and the granter's lifetime only, and the lands being possessed thereafter by the space of many 19 years, the tack falls within the act of Parliament, King James the Second, ordaining tacks of wadset-lands set near to the half of the duty, and not near to the full value, to be void and null; but so it is, that the wadset-lands are worth of yearly value 1200 merks, and the tack-duty only L. 19, and some service, yearly. It was *duplied*, That the tack could not fall within the act of Parliament foresaid, because the act was only as to tacks where lands were given in wadset, for security of a sum lent upon the wadset, for which the duties of the lands were given in place of the annualrent, which was antichresis; but here no such wadset, for it was a contract, where the wadsetter disponed the absolute and irredeemable right of the heritage to the Earl of Marshall, as most necessary for his barony, and harbour of Peterhead; as likewise his right of other lands and milns, with the rental of the lands controverted and tacks thereof, so that they were in the case of an excambion; and it was expressly provided, that the 3000 merks should be paid in case of redemption, and a 19 years tack of the lands for the same duty they then paid the time of the contract, which is therein expressed; and, there being no order used by the Earl of Marshall himself, the pursuer could be in no better condition, who was in place of his right. This was not decided, but, before answer, the defender ordained to condescend upon the years of his tack and rental, which were to run the time of the contract.

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Gosford, MS. p. 543.

1677. *January* 5. The Earl of Glencairn *against* John Brisbane.

No 54.
Effect with regard to creditors, of a reversion in favour of the heirs of the reverser's own body allenarly.

There was a declarator raised at the instance of the Earl of Glencairn, as being a lawful creditor to Francis Freeland, prior to a disposition made by him to Robert Hamilton and John McNairn, two other creditors of his, of the lands of Freeland; which two creditors, with consent of the said Francis, the common debtor, and they all with one consent did dispone the same, for 8000 merks, to John Brisbane, under reversion, by a bond granting the same to be redeemable by the apparent heir of the said Francis' own body allenarly, upon payment of the foresaid sum; and therefore craved, that, upon requisition and payment made by the said Earl, the said John Brisbane might be decerned to denude himself of his right of the said lands in the Earl's favours. It was *alleged* for the defender, That no such declarator might be sustained, because all reversions, by our law, are *strictissimi juris*, and this bond of provision, being only granted in favours of the apparent heir, who never yet had existed, no creditor of the father's could have the power of redemption, the father being simply