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"The Lords having considered the wadset, by which the wadsetter bore the public burden, found the said clause of the act not extended to make the defender countable since the date of the wadset, but only since the date of the offer to secure the wadsetter conform to the act of Parliament, by virtue of any other clauses of the said act, ordaining all wadsetters to count for the superplus, and to possess the granter of the wadset, he finding caution for the annualrents, or to restrict to his annualrent.

Fol. Dic. v. 1. *p.* 487. *Stair, v.* 1. *p.* 145.

1667. *February* 1.

Earl of Tullibardine *against* Murray of Ochtertyre.

No 43. Clauses irritant in wadsets purgeable before declarator.

The Earl of Tullibardine having wadset the lands of Logie-Almond, to Murray of Ochtertyre, he did thereafter discharge the reversion, and at that same time, got a back-bond, bearing, That for payment of 56,000 merks, with all other sums that should happen to be due to him by Tullibardine, and all expenses, that he should dispone the lands back to Tullibardine, or the heirs or assignees of his own body; but with this provision, that if he were not paid before Martinmas 1662, the bond should be null without declarator. Tullibardine premonishes, and after premonition, dispones the lands to Sir John Drummond, and they both jointly consign, and now pursue declarator. It was *alleged* for the defender, Ochtertyre, 1*mo*, No declarator upon this order, because the back-bond is personal to my Lord, and to the heirs or assignees, being of his body; so that Sir John Drummond, nor any stranger, can have right thereby to redeem. 2*do*, The back-bond is extinct, and null, by committing of the clause irritant, in so far as payment has not been made before 1662. The pursuer *answered* to the first, that albeit the reversion had been personal to my Lord, only excluding his heirs and assignees; yet my Lord, in his own lifetime, might redeem, and being redeemed, the right would belong to any to whom my Lord had, or should dispone. 2*do*, This clause irritant is *pactum legis commissoriæ in pignoribus*, which, by the civil law, and our custom, is void, at least may be still purged before declarator obtained, as being rigorous and penal, and so abiding the Lords' modification, as well as penalties in bonds modified of consent of parties, especially in this case, where the performance is not of a single liquid sum, but comprehends a general clause of all debts that were, or should be after due. The defender *answered*, that clauses irritant in wadsets are not rejected by our law, but are valid; only where declarators are requisite the Lords may reduce them to the just interest of parties before declarator; but here there needs no declarator, because the defender is in possession, and may except upon the clause irritant committed, and the clause bears to be effectual without declarator; and albeit this clause could now be reduced to the just interest, it is only this, that

seeing Tullibardine hath sold the land, the defender should give as great a price as it is sold for to Sir John Drummond, which the defender is willing to do.

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THE LORDS sustained the order, in so far as it is at the instance of Tullibardine, but not as to Sir John Drummond, without prejudice to Sir John Drummond's disposition; they found also, that this clause irritant might be purged now at the bar, or any time before declarator, which is always necessary, though renounced, that *medio tempore*, parties may purge; and the Lords inclined, that Ochtertyre should have the lands for the price Sir John Drummond gave, which is 80,000 merks; but, upon examining him and my Lord, it appeared, that my Lord had offered the land to him, *re integra*, and that he had never been special, as to so great a price as this; but only general, that he would give as great a price as any other would give, which they thought not sufficient, seeing any other thereby would be scarred from bargaining.

1667. *February* 12.—IN the declarator at the instance of Tullibardine against Murray of Ochtertyre, disputed the first of February last, it was now further *alleged* for Ochtertyre, That clauses irritant in wadsets, not being illegal, or null by our law, albeit the Lords do sometimes restrict the effect thereof, *ad bonum et æquum*, to the just interest of the parties against whom the same is conceived, they do never proceed any further; but here Ochtertyre is content to make up to the Earl his just interest, by paying a greater price for the land than Sir John Drummond; and whereas it was *alleged*, that this was not receivable now, after the Earl had made bargain with Sir John Drummond, Ochtertyre now offered to prove, that before any bargain was agreed, in word or writ, he did make offer to the Earl of fourscore ten thousand merks, which he offered to prove by witnesses above all exception, who communed betwixt them, viz. the Lord Stormont and the Laird of Kylar. It was *answered*, That the pursuers adhered to the Lords' former interlocutor, whereby they have restored the Earl against the clause irritant, he satisfying Ochtertyre his whole interest, *cum omni causa*, the same point being then alleged and disputed, and both parties being judicially called, and having declared their minds concerning any such offer, whereby the Earl, upon his honour, declared, that before the agreement with Sir John Drummond, Ochtertyre offered not so much by 4000 merks. 2*do*, Any such *allegeance*, albeit it were competent, were only probable *scripto vel juramento*, the Earl now having disponed to Sir John Drummond, so that the effect would be to draw him into double dispositions, which is of great consequence, both as to his honour and interest, especially seeing that Ochtertyre did not take an instrument upon the offer. It was *answered* for Ochtertyre, that the former interlocutor cannot exclude him, especially seeing he did only allege then that he made a general offer of as much for the land as Sir John Drummond would give therefor, but now

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he offers to prove, that he offered 90,000 merks, which is 2000 merks more than Sir John's price.

THE LORDS found that they would only restrict the clause irritant, to the effect that the granter of the wadset might suffer no detriment, which they found to be effectual, if the wadsetter offered as great, or a greater sum than the other buyer, before any bargain agreed between them, either in word or writ; but found it not probable by witnesses, but by writ, or the Earl's oath; and found that a general offer was not sufficient, unless it had expressed a particular sum.

Fol. Dic. v. 1. *p.* 487. *Stair, p.* 433. & 441.

1679. *January* 17. BEATSON *against* HARROWER.

No 44.
In a sale for a competent price, where the purchaser has no power to require his money, redemption is only competent within the time and in terms of the reversion.

THERE was a disposition of some tenements and roods in the Link-town of Kirkcaldy, granted by George Beans to one Kennedy, bearing the lands redeemable within five years, for payment of 700 merks, being Beans's own proper money, acquired by him, and not borrowed. Beatson now having right, pursues declarator of the land as his irredeemably, not having been redeemed within the time of the reversion. The defender *alleged*, That this being a wadset right, though it bears only a temporary reversion, yet that it is *pactum legis commissoriæ in pignoribus*, which the civil law rejecteth, and our law alloweth to be purgeable at any time before declarator, by consigning the sums in the reversion; as being exceedingly penal, procured from indigent debtors in their distress, and which therefore the Lords, *ex nobili officio*, modified to the true interest, as they do in all other penalties in bonds, though excluding all modifications. It was *answered*, that a reversion may be where there is no *pignus*, but a true vendition for a competent price; and then there is nothing penal, but favourable, which appears to be in this case, where there is no requisition, and therefore neither *creditum* nor *pignus*, and where the reversion is only competent upon the proper means and money of the disponer, without borrowing.

THE LORDS found, that if there were no requisition, but a sale for a competent price, the lands are not redeemable but within the time, and on the terms in the reversion.

Fol. Dic. v. 1. *p.* 486. *Stair,* v. 2. *p.* 676.

1697. *July* 20.

MARQUIS of ATHOLE and EARL of TULLIBARDINE *against* JOHN CAMPBELL of Glenlyon.

No 45.
A creditor who had an expired legal entered into an agreement with his debtor, re-

I reported the Marquis of Athole, and the Earl of Tullibardine, his eldest son, against John Campbell, now of Glenlyon; being a declarator of the ex-