

No 77.

THE LORDS, notwithstanding, found the allegiance relevant, and that the pursuers should put the defenders in possession.

Fol. Dic. v. 1. p. 599. Dirleton, No 330. p. 158.

* * * Stair reports this case :

GEORGE CLAPPERTON, as having right to a wadset of the lands of Kippilaw, granted by Sir George Ramsay, wherein Ker of Sunderland-hall was cautioner in the requisition, pursues thereupon for payment of the sum. The defender *alleged* no process, until the pursuer denuded himself of the wadset-right, and return the granter of the wadset to the possession thereof. It was *answered*, That he was not obliged, unless by some deed of his the possession had been interverted ; but much less where it appears not, that the granter of the wadset did put the wadsetter in possession. It was *replied*, That it was sufficient that the wadsetter or his successors had ever obtained possession by the wadset-right : *Ita est*, Torsonce, who apprised from the wadsetter, attained possession of the wadset-lands. It was *duplied* for the pursuer, That Torsonce having apprised the wadsetter's whole estate, did only promiscuously possess the whole for a time ; and being satisfied by intromission, did cease, but the pursuer derives no right from him, but as a second appriser, from the wadsetter.

THE LORDS found, That if the granter of the wadset did put the wadsetter in possession, requisition could not be effectual till the possession were restored, unless the wadsetter had been excluded therefrom by a better right ; but found that the first appriser's promiscuous and temporary possession did not oblige the second appriser to return that possession.

Stair, v. 2. p. 412.

1677. November 22.

Sir ARCHIBALD STEWART *against* The DUKE of HAMILTON.

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The wadsetter upon redemption is bound to restore the possession, notwithstanding of any separate right he may have in his person, which will be reserved to him to insist upon as accords.

THE Laird of Minto and his Lady being infest in conjunct-fee of the five pound land of Coats, the Lady having obtained divorce upon her husband's fault, and thereby having right to her liferent, disponed her liferent-right to the Duke of Hamilton ; and before her death, there is a minute betwixt the Duke and Minto, wherein he dispones to the Duke his estate heritably, and therefore gives him an extended disposition, bearing the price to be paid, whereupon the Duke was infest, but gave a back-bond to Minto, bearing, ' That there was only L. 1000 of the price paid ;' and if that sum were repaid betwixt and such a day, he obliged himself to re-deliver the disposition, and to denude himself. Minto assigned this back-bond to William Stewart, writer, who thereupon inhibited Minto ; and, after the inhibition, Minto, by his disposition, relating the said minute and former disposition, and that Minto was

not able to fulfil, because both he and his Lady had disposed the fee to their son, reserving both their liferents; therefore he disposes his liferent-right to the Duke, who finding the first disposition was redeemable by the back-bond, and that the last was reducible upon the inhibition, obtained a gift from the Exchequer in name of James Small, to the Duke's behoof, of Minto's liferent escheat, and gave a back-bond, that being secured of the warrandice of Minto's disposition, there should be place to a second donatar. Small's gift is declared. Castlemilk, as having right to the Duke's back-bond, pursues a declarator of redemption, having used the ordinary way, and consigned the L. 1000, and concludes that the Duke ought to denude himself, and quit the possession. It was *alleged* for the Duke, That he was not obliged to quit the possession, whereunto he had right by the King's gift of the liferent-escheat declared; and there was nothing more just and ordinary; than that parties may take as many rights as they can purchase; and when they are excluded from one, they may defend their possession by another. The pursuer *answered*, That though that be true in absolute and irredeemable rights, yet it is an unquestionable rule, that whosoever takes a temporary or redeemable right from any person, and thereby attains that party's possession, he cannot super-induce any other right to intervert the possession he received, flowing from any other party; and so a tacksman attaining any possession by his tack, if after the ish he be pursued to remove, he cannot defend himself with either tack or heritable right from any other party, not flowing from his master, even though that right be evidently better than the master's right, and would recover possession from his master, but he behoved to restore the possession to his master, and recover it by way of action, which hath been ever sustained in all redemptions, the common style whereof is, 'That the wadsetter denude himself of his right and possession;' yea a wadsetter pursuing for his money was excluded, till he restored the possession, though taken from him by a third party by intrusion, the 17th of February 1665, *Torsonce contra Ker*, No 74. p. 9219. *Ita est*, The Duke did possess by virtue of this redeemable disposition, from Martinmas 1674, when the Lady Minto died, and did uplift the profit of the coal daily, and continued in the possession of the land before he got a gift from the Exchequer, which was not till July 1675, nor declared till February 1676; and so his possession was Minto's possession, not only because it began by the possession of Minto's Lady liferenter, which was his possession; but because, after her death, the Duke having, in his own person, Minto's own redeemable disposition, and being thereupon infest, can ascribe his possession to no other right, and so not to the gift and liferent, and therefore he cannot defend himself therewith, but must restore to the pursuer, Minto's assignee, Minto's possession, which he could not intervert. It was further *replied*, That the back-bond given to Exchequer, was taken by servants without warrant of Exchequer, who, according to the King's benevolence, give gifts with ordinary back-bonds, 'That the donatar being satisfied of his just interest, his gift should cease;' which was never extended to

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THE LORDS repelled the defence upon the gift of Minto's escheat; and according to the common forms of declarators of redemption, declaring the lands redeemed, and decerned the Duke to denude himself both of right and possession, reserving the Duke's gift of escheat and declarator thereupon, and all action of removing, and mails and duties for recovering possession, as accords of the law; but repelled the objections against his gift and declarator, which cannot be quarrelled by reply, but only by way of reduction.

Fol. Dic. v. 1. p. 599. Stair, v. 2. p. 561.

S E C T. VIII.

Incumbrances affecting the Subject, transacted by the Disponee, cannot be extended against the Disponer, bound in Warrandice, further than to pay the transacted Sum.

1610. February 7. Lady BAIKLIE *against* CRAWFURD.

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A LIFERENTER, whose liferent is evicted, pursued her author's heirs for warrandice of her liferent.—THE LORDS found an exception against the general warrandice, that it ought only to be restricted to one hundred merks a-year; because she had transacted and obtained right to bruik during her lifetime, for payment of an hundred merks yearly.

Fol. Dic. v. 1. p. 600. Haddington, MS. No 1792.

1632. March 8. LOGAN of Balvie *against* LAIRD of LUSS.

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Found in conformity with the above, that a person who has trans.

IN a suspension of charges, executed against Archibald Thomson, who was cautioner to the Laird of Luss, for relieving of the lands of Balvie, of all burden which might affect these lands, the same being sold by Logan of Balvie to the Laird of Luss, and ay and while the payment of the remanent of the price thereof by the Laird of Luss; the said Archibald was cautioner, to the effect