

No 82.

1684. *March.* Mr ALEXANDER BIRNIE *against* FRAZER of Techmurie.

LANDS wadset being evicted by my Lord Errol the superior, for the not payment of the feu-duty for years before the wadset, the wadsetter agreed with, and got a great ease from the superior, being his advocate, and thereafter pursued a recourse of warrandice upon the eviction, claiming 2000 merks as the sum agreed to be paid to the superior, and 500 merks for his pains and expenses in agreeing with the superior.

Alleged for the defender; That he could be no further liable for eviction, but for the true damage sustained thereby. And had the superior confirmed the wadsetter *gratis*, there could have been no ground of eviction,

Answered; There being no abatement given at the agreement, but at the payment, upon personal considerations of services done to the superior, the defender can have no benefit thereby:

THE LORDS found, That the defender could be only liable for the sums truly paid out to the superior by the pursuer, and the expenses he was at, probable by his oath; but there being a part of the composition paid to the superior, they allowed large expenses, and modified 1000 merks instead of 2500 claimed—See PROOF.

Fol. Dic. v. I. p. 600. Harcarse, (WARRANTICE.) No 1017. p. 288.

No 83.

1685. *November.* GEORGE GALBREATH *against* Widow GIBB.

A WOMAN having procured a gift of bastardy from the Exchequer, was found liable to pay the bastard's debts *secundum vires*, as an *ultimus hæres*; and the decret being extracted, she procured a gift of the bastard's escheat, who died at the horn, and suspended upon that reason.

THE LORDS found, That the suspender having acquired a right to the goods from the King upon the title of bastardy, and having competed thereon with the creditors, she could not disappoint them, by thereafter acquiring another title to the same goods; and some thought the King was fully denuded by the first gift of bastardy, which *habili modo* conveyed the goods. The woman was allowed the expenses of the escheat.

Fol. Dic. v. I. p. 601. Harcarse, (BASTARDY.) No 158. p. 35.

* * * Sir P. Home reports this case :

December.—GEORGE GALBREATH, merchant in Edinburgh, as creditor to the deceased James Gib, postmaster, having obtained a decret against Abigail Deans, his relict, as donatar to her husband's bastardy, for payment of the debt; she suspends upon these reasons, That the decret was obtained against

her in absence, and that it was null for want of probation, neither the quantities of the husband's goods nor her intromission being proved, and that she was in the case of an executor, and so could only be liable *secundum vires* according to the value of the goods intromitted with belonging to the husband; as also, she had obtained a gift of her husband's escheat, and by her back-bond to the Exchequer, she was preferred to the household plenishing, and to as much of her husband's other goods as will pay the funeral charges, house-rents, servants-fees, and other privileged debts. *Answered*, That the suspender having intromitted as donatar to the bastardy, and the debt being constituted against her by a decret before she had obtained the gift of escheat, and there being thereby *jus quæsitum* to the charger, as a creditor, the suspender could not, *ex post facto*, acquire any supervenient right in prejudice of the creditors; that she, as donatar to her husband's bastardy, was liable to pay her husband's debts *secundum vires hæreditatis*. THE LORDS found that the debt being constituted against the suspender as donatar, she could not ascribe her intromission to any subsequent title of escheat that she had acquired in prejudice of the charger, and therefore ordained her to depone upon the quantity and species of her intromission, and allowed her to have retention as to the privileged debts, such as funeral charges, house-mails, servants-fees, and expenses of both the gifts of bastardy and escheat.

Sir Pat. Home, MS. v. 2. No. 733.

* * P. Falconer's report of this case is No 14. p. 1354, *voce* BASTARDY.

1699. June 16.

HELEN FERRY and Dr BETON of Tarvet *against* PATERSON of Dinmuir.

THOMAS FERRY buys seven acres of land beside Cupar, from Dinmuir's grandfather, and by the disposition he is obliged to infeft Thomas by the superior, which was never done, but the same acres were sold over again to Tarvet, who is infeft, and Helen Ferry, heir to the said Thomas, dispossessed. She afterwards assigns her right to Beton of Tarvet, who pursues Dinmuir on the passive titles, as representing his grandfather who disposed to Ferry, for refunding L. 1000 Scots as the price paid by her father, with the annual rent thereof from the time she was dispossessed. *Alleged*, This pursuit being on the matter for contravention of the warrandice of the first disposition, by granting a second, and the second purchaser having acquired it, he can claim no more than what he paid for it; for the Lords have always restricted these pursuits to what was truly paid for purging the incumbrance, and never extended them to the full value of the right warranted, as is marked by Durie, 1st July 1634, Glendinning *contra* the Laird of Barnbarroch, No 81. p. 9225; 26th January 1669,

No 83.

No 84.

A person granted two dispositions of the same property. The one disponent purchased the right of the other. Found to have done *sontanquam* *quilibet*, and entitled to insist upon the whole for the effects of