

The Lords repelled the defence, and found the debtor of the wadset was not liable for the wadsetter's ward, nor so much as the composition paid for the gift.

No. 71.

Harcarse, No. 108. p. 285.

1687. *June.*SOUTHESK *against* SINCLAIR.

Sir Robert Sinclair of Lockermacus having granted to my Lord Caithness a back-bond of reversion of an expired apprising of the lordship of Caithness, at Sir Robert's instance, obliging himself to denude upon payment of 108,000 merks to himself, and 12,000 merks to Orton; and Sir Robert having thereafter made over his adjudication to Breadalbane, upon payment of the 108,000 merks, and burdened the transmission with the reversion, in so far as concerned Orton's debt; Southesk, as come in place of Orton, pursued Sir Robert Sinclair's son upon contravention of the warrantice, by his father's so denuding himself of the adjudication.

No. 72.
Contravention of a back-bond.

Alleged for the defender: The reversion contained no obligation in favours of Orton, but was only an act of kindness in Sir Robert, which cannot be interpreted to the prejudice of his own right, to hinder to take payment before Orton got payment of his debt; nor is Orton's right prejudged by the transmission of the adjudication, which is burdened therewith.

Answered: After the back-bond, Sir Robert entered into articles with my Lord, whereby he was obliged to denude upon payment of his own debt only.

Replied: These articles were but a paper depositated in my Lord Hatton's hand upon conditions; *2do*, Whatever was in these articles, yet Breadalbane's right was, *de facto*, burdened with Orton's debt. And Orton had not apprised the lands, nor could have done any effectual diligence the time of the first back-bond, the adjudication being expired.

Duplied: Breadalbane's affairs are perplexed; and therefore the burdening his right will not so effectually secure Orton, as if the right had remained with Sir Robert.

The Lords found, That the said articles were a contravention of the back-bond. But thereafter, upon the defender's offering to purge the contravention, and dis-pone the adjudication for that effect, the interlocutor was stopped till June.

Harcarse, No. 1019. p. 289.

1687. *June.*DUNBAITH *against* BALNAGOUN.

Balnagoun having in the year 1617, granted a disposition of some lands to Sir John Sinclair of Stevenstoun, who by a back-bond, apart to Alexander Ross, trustee for Balnagoun, declared them redeemable upon payment of 25,000 merks at Whitsunday 1629, otherwise to remain irredeemable; the right of the lands came by progress in the person of Andrew Ross of Ginies, in the year 1643.

No. 73.
Double alienation.
See No. 69.

No. 73. Alexander Ross disposed the reversion, with Balnagoun's consent, to Dunbaith, and took his back-bond, that the reversion should be redeemable for 36,000 merks. In the year 1645, Balnagoun disposed the lands irredeemably to Mr. Alexander M'Kenzie for 50,000 merks; and thereafter disposed the lands again to Dunbaith, upon payment of 14,000 merks, and delivered up to him his former back-bond. Dunbaith finding that Balnagoun had made double alienations, pursued this Balnagoun for warrantice, and for damage and interest.

Alleged for the defender: *1st*, It was the obligation of reversion granted by Dunbaith, *in anno* 1648, that it was disposed to Mr. Alexander M'Kenzie, and the property was disposed to Dunbaith, which are consistent, not being *de eodem subjecto*; *2do*, Dunbaith's right *in anno* 1643, was prior and preferable to Mr. Alexander's; and Mr. Alexander is not pursuing; *3tio*, The defender offers to purge M'Kenzie's right, as was sustained in the act 1672; *4to*, The eviction cannot exceed repetition of the 11,000 merks paid without annual-rent or damage because *usura non debentur nisi ex facto*; and Dunbaith having the right of reversion, might have used an order, and attained possession of the lands, which extended to twenty-five chalders of victual.

Answered for the pursuer: *1st*, Here are double alienations, which is punishable by act of Parliament; *2do*, The pursuer may either follow out his right, or *cedere juris*, as was decided ——— Sharp against ———. And Mr. Alexander got a right of property, and not a simple assignation to the reversion; *3tio*, The defender ought not to be allowed to purge, *res* not being *integra*; and were he indulged that favour, he behoved to purge instantly, which is impossible, part of the lands being in the possession of singular successors; *4to*, Not only ought the money paid (as being in effect the price of land) to bear annual-rent, but the worth of the lands ought to be considered, there being *damnum* or *lucrum cessans* to the pursuer, in so far as the rent of the land exceeds the annual-rent of the money. Again, The pursuer used an order, and consigned the wadset money, which was impeded by a deed of the defender's author, *viz.* a reduction of Alexander's right to Dunbaith *ex capite inhibitionis*.

Replied: Nothing in the act of Parliament allows recourse of warrantice upon other terms than before the act, but it irrogates a further punishment upon the seller of the lands; and the decision is but a single one; *2do*, The 11,000 merks paid to Alexander Ross was not the price of the land, but of the reversion; for Andrew Ross had the right of the wadset, and by the civil law, *interesse certum nunquam excedit duplum pretii in quo inest simplum*. Again, The pursuer's order was not legal, and the reduction *ex capite inhibitionis* was no impediment, but collusive, for not-production of a writ in Dunbaith's hand; besides, the ground of the inhibition was only £40 Scots a year, whereof no eviction ever followed.

The Lords having called Balnagoun, and finding that he could not purge M'Kenzie's right, they decerned for the 11,000 merks paid, and decerned 20,000 merks in name of damage.