

1751. February 22. MARGARET SYMER against DAVID DOIG.

JOHN LIVINGSTON, in 1702, disposed his estate of Balrownie to Sir David Arnot, who was succeeded by Helen his sister: She disposed it to Mr James Ker, minister at Dun, who was infeft 1709; and having served the disponent heir to her brother, and infeft her, expedite a charter on her resignation, and was again infeft 1732.

Mr Ker acquired, amongst several other incumbrances on the estate, an heritable bond granted 1670 by David Livingston of Balrownie to John Symer, whereon infeftment had followed 1705, by purchase from Margaret Symer, John's grand-daughter, whom he infeft on his precept of *clare constat*; and, on her disposition, 3d July 1731, infeft himself 8th of that month.

David Doig of Cookston led an adjudication of these lands against Patrick Livingston, apparent heir to John, upon debts of John's, acquired by Patrick's trustee, and made over to Mr Doig; as also on Patrick's own bond; and another on Patrick's irredeemable disposition; as also another 1739, against David, Patrick's son, on a debt of John's; and, on this last title, insisted in a reduction of the disposition to Sir John Arnot, founding upon it as it was on a prior debt secured by inhibition, which would entitle him to reduce, in so far as it was prejudged, in case he failed in his total reduction, which, however, he prevailed in, 13th February 1741, the side-scriptions of the disposition being forged.

Mr Ker then founded on an adjudication in his person, which was sustained as a right in security; and insisting on *bona fides*, in the perception of the rents, to stop imputation of the excess over his annual rent, to the extinction of his principal, this was repelled; and, 27th January 1743, all his rights were found extinguished, he being charged with crop 1740, and precedings since his entry.

Margaret Symer, 23d October 1741, revoked her disposition, and pursued a reduction on the heads of minority and fraud; on which last she obtained decret, 11th January 1743. These processes, though at once pendent, were not conjoined.

Margaret Symer being reponed, pursued a pointing of the ground. To which it was answered for Mr Doig, The debt was extinguished by Mr Ker's intromissions while it stood in his person.

Pleaded for the pursuer; Mr Ker, beside the disposition which is now reduced, had in his person a title of property, to wit, the adjudication, the legal whereof was run, and thereon he was *bona fide* possessor. It is true this, when it was opened, could not hinder his intromissions from being imputed to the extinction of his capital secured thereby; but if he had had no other title, it would have saved him from repetition; consequently the rents *bona fide* consumed ought not to be imputed to the extinction of another incumbrance he

No 28.

A right to an heritable debt being reduced, payments made during the subsistence of the right were sustained against the reducer.

No 28. had on the estate, which he had purchased to disincumber his right, and not to make a title of possession; and therefore the heritable bond is not extinguished; especially it ought not to be found extinguished in prejudice of the pursuer: Mr Ker could not impute his intromissions to the extinction of the bond, which he had obtained the disposition of from her by fraud and circumvention; and though it is found against him, at the instance of Mr Doig, that they must be imputed to all the rights in his person; this cannot prejudice her a third party not in that process, and whose reduction was pendent before the interlocutor.

*Pleaded* for the defender; All Mr Ker's intromissions charged upon him, and wherewith the whole rights in his person were found extinguished, were before intending the pursuer's reduction; *bona fides* might save him from repetition, but not from imputing the rents to his whole incumbrances, and amongst the rest to this debt which he held from the pursuer by disposition, though reducible.

THE LORDS found, that the intromissions had by Mr Ker behoved to impute to the pursuer's heritable debt then in his person.

Reporter, *Kilkerran.*

Act. *H. Home.*

Alt. *A. Masdowal.*

Clerk, *Justice.*

*D. Falconer, v. 2. No 203. p. 245.*

Payment, when presumed. See PRESUMPTION.

See APPENDIX.