

No 38.

What evidence
requisite of the
terms of re-
demption?

1637. March 21.

WOOD *against* STUART.

ELIZABETH WOOD, as being infeft by umquhile Ninian Stuart, her husband, in some lands in Glasgow, pursues Mr Robert Stuart, her husband's eldest son, for the mails and duties of the said lands, and produces for her title a charter granted by her husband to her thereof, which was sustained without a sasine for a title to her in this pursuit, moved against the defender, whom she offered to prove to be heir to the granter; and it being *alleged*, That the pursuer accepted of a sasine, which was given to her by her husband *propriis manibus*, she being then present, conform to a charter to be made thereupon, in which sasine there was express provision of a reversion introduced in the husband's favour, and this charter following after the sasine, must be esteemed that same whereto the sasine had respect; and although it bore no clause of reversion, yet the same must be limited with that clause of the sasine; seeing the pursuer can neither shew any charter or sasine, conform to the which clause of reversion, the husband in his own lifetime redeemed the said lands; likeas she accepted the sum of ten merks at that time, whereupon it was redeemable, as instruments taken upon the redemption, subscribed by two notaries before four witnesses, proport, which four witnesses are all subscribers of the instrument, which ought to be sustained, to take away this right from the pursuer, who is otherwise lawfully provided by her husband; especially where this right controverted depends not upon any contract of marriage, and so was revokeable, albeit there had been no such provision of reversion; and the pursuer *answering*, That the charter produced being after the alleged sasine, and containing no such clause of reversion, it must be sustained; seeing charters ought to rule sasines, and not *e contra*, especially the posterior charter to the sasine ought to be found to take away the clause of reversion contained in the preceding sasine, if any were; neither ought that sasine to be respected *quoad clausulam reversionis*, it being only the assertion of a notary, which he could not do *extra officium*, not having the warrant of the subscription of the party; for, albeit a notary may testify of a sasine, which is an act proper to his office, yet it is not so *in actibus*, not proper to his office, as are reversions; and the instrument of redemption has the same effect, that by the assertion of notaries her liferent cannot be taken from her. THE LORDS found the allegiance relevant, notwithstanding of the reply, and admitted the same to probation.

Act. Maxwell

Alt. Gibson

Clerk, Gibson.

Durie, p. 840.