

No. 10. public right of the wadset redeemable, as said is, conform to the reversion, and obtains a voluntary renunciation of the said right, no order of redemption being ever used thereupon; and thereafter the Earl Marshal, and William Gray, to whom the Earl disposed the lands irredeemably, became in possession after the decease of ——— Mowat, his relict, by virtue of her preceding base right, claiming and pursuing, for the mails and duties of the lands; and a defence being proponed upon the renunciation made by the said Mr. Rodger, successor in her husband's public right, which was under reversion, and which she had confessed to be redeemed by his receipt of the money, and renunciation of the wadset, in favours of the heritor; which was lawful for him to do, seeing the heritor could know no other but his own wadsetter, he not having received, nor acknowledged the wife, by virtue of her base right; so that as the heritor might have paid the husband the money, and received his renunciation valuably, *quo casu* the wife's right would have ceased, so might he do to the singular successor; and the wife answering, that her infestment being given, conform to a contract of marriage, her husband's possession behoved to be esteemed her possession, and this voluntary renunciation ought not to derogate to her right, except there had been an order of redemption used, and she warned to the order and declarator, that the money, instead of the land, might have been employed to her use;—the Lords sustained the exception, upon the preceding voluntary renunciation and reversion, and preferred the singular successor to the relict, in respect thereof and of his possession.

Act. Baird.

Alt. Mowat.

Durie, p. 779.

1662. January 29.

LAIRD OF LAMINGTON *against* SIR JOHN CHIESLY.

No. 11:

A wadsetter found liable to account for the surplus above his annual-rent, notwithstanding a stipulation to the contrary.

The Laird of Lamington pursues Sir John Chiesly, upon the late act of Parliament 1661, betwixt debtor and creditor, to restrict a proper wadset, granted by Lamington to him, of the lands of Symington, to his annual-rent. The defender excepted upon a back-bond granted by Lamington, whereby he expressly renounced the benefit of the usurper's act, betwixt debtor and creditor, and all such acts, made or to be made; and obliged himself, upon honour and conscience, not to prejudice Sir John of his bargain, to which no subsequent law could derogate, unless it had been specially, notwithstanding any such paction; *2dly*, The foresaid act has an express exception, that where such acts, made and to be made, are renounced, the benefit of that act shall not be competent to such. The pursuer answered to the *first*, That pactions, or renunciation of parties, cannot operate against a posterior law; *2dly*, The pursuit here is, for restricting of a wadset to the true annual-rent; for all that was done in the usurper's act, was to take land in satisfaction, and to delay payment; but this clause of the act is nothing such, and so is *casus incogitatus*, which could not be held to be renounced,

unless it had been expressed : As to the exception in the act it is not an exception general to the whole act, but to the antecedent part of the act ; and this clause, anent restricting of wadsets, posterior to the exception, and not derogated thereby.

No. 11.

The Lords repelled the defence, in respect of the reply, and found the exception not to derogate to the posterior clause concerning wadsets.

Stair, v. 1. p. 88.

1665. January 10. CAMPBELL against MARY BRYSON.

George Campbell having right by adjudication to the reversion of a wadset, of some of the lands of Newliston, wadset by the Laird of Newliston, to Andrew Bryson, Bailie of Edinburgh, whereupon he was publicly infest; and thereafter did dispoise the same to his daughter Mary Bryson, and she was infest, holden of her father; which disposition contained a power to the father, to dispoise on the sum in the wadset right, during his life-time, without her consent; after all, Andrew Bryson obtained a confirmation of the foresaid wadset, with addition of 16 acres of land more for the same sum, which was conceived in favours of himself and the heirs of the marriage, whereupon he was infest. The said George having used an order of redemption, craved declarator. Compearance is made for the said Mary, who craved the said sum to be delivered up to her. It was alleged by the pursuer, that she could not have up the sum, unless she were infest as heir to her father, both in the first and last wadset, and resigned the same; and so liberated the land of the burden thereof; for albeit she was infest *proprio nomine*, yet it was but base holden of her father; so that the superiority remained with her father, and she behoved to be infest as heir to him, and renounce the same; *2dly*, The corroborative wadset stood in her father's person, who by her disposition had a power to dispose of the first wadset, and so had altered the fee thereof to himself and his heirs. It was answered, That the second wadset was taken when Mary's mother was dead, and she the only child of that marriage, and so was alike as if her name had been expressed; *2dly*, The declarator itself will sufficiently secure the redeemer, albeit there was no resignation; *3dly*, The second wadset is but accessory to the first, so that the said Mary, having power to renounce the first wadset *proprio nomine*, the second may be declared to be extinct in consequence; and further, offered caution, if need were, to warrant the redeemer.

No. 12.
Form of re-
investing the
reverser upon
redemption.

The Lords found the lands to be redeemed, but ordained the money not to be given up, until the said Mary had infest herself, as heir to her father, and resigned, for they thought the redeemer ought to be put upon no hazard of repetition, or of the danger of the infestment unrenounced, seeing it was the ordinary course to be infest, and to renounce.

Stair, v. 1. p. 247.