

1665. *January.*LAIRD of LINTON *against* LAIRD of TORSONCE.

No. 13.

A wadsetter must, after redemption, not only renounce, but procure free possession to the reverser.

The deceased Laird of Linton and Sunderlandhall gives a proper wadset of the lands of Kippilaw to the deceased Sir George Ramsay of Williecleugh, redeemable for 5,000 merks; which wadset is comprised by Pringle of Torsonce, who had married Williecleugh's daughter, from the heir of Sir George; and upon this comprising, he requires Sunderlandhall, as heir to his father, for payment of the 5,000 merks and charges; who suspends upon this reason, that conform to the proper wadset, his father had put Sir George Ramsay in possession these many years; and therefore, how, and by what conclusion he lost possession, he knows not, seeing Andrew Ker of Kippilaw is, and has been in possession these many years; and therefore, unless the pursuer not only renounce the wadset, but put the defender in possession, he ought not to be decerned to pay. It was answered, That the pursuer being a compriser, he was not, nor is obliged to seek possession, but finding the defender obliged to pay upon requisition, he may lawfully require, and upon payment he shall renounce the wadset; upon which renunciation, the defender may pursue the said Andrew Ker for possession, who bruiks by no deed of the pursuer. Replied, That the pursuer can be in no better case than his author Sir George Ramsay, his own father-in-law, who, if he had been pursuing, the defence would have been very relevant against him, seeing he was put in the possession by virtue of the wadset; nor can the defender know, how Andrew Ker got the possession, whether by a deed of the pursuer's or his authors, or what other way, it being clear, that the wadsetter, or compriser of the wadset, should put the granter of the wadset, upon his payment of his money, in his own place and possession, and the compriser should before the charge, first *agere* against the said Andrew, upon his real right, that it may be known *quo modo et jure* he possesses. The Lords found, that the pursuer should not only renounce, but re-possess before payment.

Gilmour, No. 138. p. 100.

1665. *July 27.*LILIAS HAMILTON *against* Her TENANTS.

No. 14.

Lilias Hamilton being infert by her husband, in life-rent, pursues her tenants. Compearance is made for their present master, who alleged, that her husband's right was only a wadset granted by him, and that he had used an order, and had redeemed the wadset, and paid the money to the pursuer's husband; and neither knew, nor was obliged to know the pursuer's base infertment from her husband, the wadsetter, which had never any other possession, but the husband's. It was answered, That the pursuer's sasine being registrated, he was obliged to know the same, as well as if it had been an inhibition, especially seeing there was no process

of declarator, in which case all parties having interest, should have been called at the market cross, but a voluntary redemption, albeit upon an order.

The Lords sustained the defence, notwithstanding of the reply.

Stair, v. 1. p. 303.

No. 14.

1666. February 15. MY LORD LEY *against* PORTEOUS.

My Lord Ley, having right by progress to the reversion of an old wadset, uses an order, and pursues declarator thereupon. The defender alleged no declarator, because by the reversion there is a tack to be granted, to begin after redemption, and to continue for so many years. It was answered, That tack was null and invalid, not only by common law, as an usury paction, giving the wadsetter more than his ordinary annual-rent, but by a special act of Parliament, James II. Parl. 1449. Cap. 19. whereby such tacks taken in wadsets, to endure long time after the redemption, for the half mail, or near thereby, shall not be kept; and as by the late act of Parliament, between debtor and creditor, it is provided, that where old wadsets were granted before 1650, when annual was at ten for each hundred, the wadsetter may, upon offer of caution for the annual-rent, take possession, unless the wadsetter offered himself to be countable for what exceeds his annual-rent. It was answered for the defender, That his defence stands yet relevant, notwithstanding the answer; for as to the old act of Parliament, it is in desuetude, and it hath been the common custom to grant such tacks in reversions, which have still been observed, and was never quarrelled; neither are they usury, seeing the tacksman has the hazard of the fruits, and all burdens; so his tack-duty, however small, unless it were elusory, can be no usury paction, more than taking lands in a proper wadset, which pay more than the true annual-rent, which was never found usury; *2dly*, This wadset is granted since that old act, whereby the benefit thereof is totally past from; as to the new act, the clause bears expressly, that during the non-redemption, or non-requisition, the conditions therein shall take place, which cannot be extended to a tack, to be granted after redemption. It was answered, That the first act bears, not only a regulation of wadsets already then granted, but to be granted, bearing expressly, who takes or has taken lands in wadsets, &c. and there is nothing in the wadset to renounce the benefit thereof; as for the custom, acts of Parliament are not derogated by custom of private parties, acquiescing in their agreements, but the custom of the Lords by current decisions; as to the last act, it ought to be drawn, *ad pares casus*, and the lands are not effectually redeemed till the tack be ended.

The Lords found the last act no ground for annulling such tacks, but found the first act a good ground, if it were subsumed according to it, that the lands were set for half mail or thereby.

Stair, v. 1. p. 356.

No. 15.

Tacks to endure after redemption reducible.