

1673. *July.* SIR ALEXANDER HAMILTON of Hags, *against* FAIRLY.

SIR ALEXANDER HAMILTON of Hags, having sold some woods to one Black for 10,000 merks, one Fairly becomes cautioner in the contract for the price. Black, the principal, turning bankrupt, Hags charges Fairly, the cautioner, for 1218 merks, which, by an account fitted between him and Black, appeared to be yet owing. He suspends on this reason, that Hags, the charger, finding Black falling, he had taken a disposition of his own woods back again from Black, and by virtue thereof had intromitted with much more than that remainder of the price now charged for.

ANSWERED,—He had indeed got a disposition of some of them, and had intromitted, but it was in payment and satisfaction of some other sums Black was owing him beside this, and for relief of cautionaries he stood engaged in for him far above the value of any intromission he had by that disposition. And that he had deponed in thir terms before the Sheriff of Lanerk; being pursued by this Fairly, suspender, to grant him a discharge of this cautionry, because the said price (as he pretended) was all now paid: and so it is *res hactenus judicata*.

REPLIED,—That whatever was between Hags and Black, Black, the principal, could never invert the possession he had acquired for himself and his cautioners, by assigning it back to Hags; but Hags his intromission therewith must ever, in law, be ascribed and interpreted in payment of the price of these woods, for liberating the cautioners; and Hags can never be allowed to attribute the said intromission to any other cause of debt; and the subject matter out of which the price was to be paid returning to his own hand, the same, in all law and reason, must ever be, *primo loco*, liable and affected with that debt; the woods being that which naturally was to afford the price, and therefore could be misapplied to no other use till that was first satisfied, especially by the creditor retrocessed to his own place by a collusion betwixt him and the principal, to the evident defraud and prejudice of the cautioner.

The Lords inclined to sustain the reason of suspension; yet, before answer, ordained Hags to produce the said disposition, if he had it; and if not, then to depone upon the tenor of it, and if one of the causes thereof was not for satisfying what remained of the price of the woods.

Advocates' MS. No. 415, folio 224.

1673. *July.*

LORD FORBES *against* ———

MY Lord Forbes pursues a reduction, *ex capite inhibitionis*, of an eke to a wadset; ALLEGED, he cannot quarrel the said eke, because the pursuer, as superior, has granted a confirmation of the said wadset, since the eke; *et quod semel approbasti non licet amplius reprobare*.

ANSWERED,—These are *penitus disparata*, to confirm a wadset, and crave to reduce an eke. *2do*, It is an absolute inconsequence to argue from any person's deed, as superior, to their other actings; for as superior they refuse none, yea may be forced

to receive vassals: and therefore the common acts which they do under that reduplication as such, can never prejudice them of any rights that are competent to them as creditors or otherwise. And thus, lately, in the case betwixt my Lord Torphichen and Ja. Maison, younger, the Lords found Torphichen, as a creditor, had interest to reduce Maison's right and infeftment, though granted by himself as superior. And really the same is most just and consonant to law, by which *actus agentium non operantur ultra eorum intentionem*. And where a superior granted charter of an irredeemable right, without mentioning the right of reversion he then had, it was found not to prejudice his right of reversion; as *Dury* marks, 20th March, 1635, *Bishop of Glasgow against Mauld*.

I heard not if this was decided; but I think it ought not to hinder my Lord Forbes from quarrelling the eke, that he had confirmed the wadset.

Advocates' MS. No. 416, folio 224.

1673. July. The LORD LYON *against* ALEXANDER FORBES, of Auchintoull.

MY Lord Lyon pursuing declarator upon a gift of recognition of the lands of Auchintoull; ALLEGED, the right made by Alexander Forbes to Ja., his son, of these lands, can infer no recognition; because it is to his apparent heir, and who is *alioqui successurus*. 2do, For the base infeftments granted by Ja. to sundry persons, far beyond the worth of the lands, neither can they infer recognition; because only granted by Ja., who was never the king's vassal, but was infeft base holden of his father.

ANSWERED,—Though the infeftment given by the father to the son can be no ground of recognition, yet those made by the son must be as good a ground for it as if they had been made by the father, who is the King's immediate vassal, to strangers; because the fee goes, by this, *extra familiam vassalli*, and the vassal becomes unable, in construction of law, to serve the superior: else a compendious way shall be laid for frustrating all recognitions; the father shall infeft his son base, and he shall alienate without acknowledging the superior: which were most absurd; for the superior's interest shall be evacuated, himself contemned, and the vassal disabled to perform the services prestable by him to the superior: and it should be all one to the superior whether the fee be transmitted immediately to strangers by the vassal, or first to his son, and then by him to strangers; contrary to the solid and just maxims of law, *Quod directo non licet, nec per ambages fieri potest*. This is a pretty question.*

Advocates' MS. No. 417, folio 224.

1673. July.

A CAPER having rescued a Scots merchant ship which had been seized on by some Dutch caper, it fell to be questioned, whether or no, *jure postliminii quod obtinet*

* In July 1674, the Lords found the alienations made by the son, though he was only infeft base, were a ground of recognition.