

discharge to the said Margaret of her intromissions with these. *3tio*, Offered to prove, by Thomas Robertsons's own oath, that he never paid or counted to the said Margaret, to Isobel, the liferentrix, or any other, for the maills and duties now acclaimed.

REPLIED to the first,—A general discharge was as valid and effectual to extinguish and take away a debt as a specific one. To the second, They behoved relevantly to say, that she liferented two different tenements beside this controverted; for if she liferented this and another, the discharge will extend to both, mentioning an acquittance of intromission with her liferent tenements *in plurali*. Find the third relevant, of consent.

This cause ended in an agreement; and Thomas Robertsons paid 600 merks for a discharge of it.

Advocates' MS. No. 483, folio 249.

1673 and 1676. SIR ANDREW RAMSAY, LORD ABBOTSHALL, *against* FRANCIS KINLOCH.

1673. *June*. SIR ANDREW RAMSAY, Lord Abbotshall, as standing infest in the barony of Waughton, pursues a reduction and improbation against F. Kinloch, of his right of the lands of Gilmerton. Wherein the terms being run, and the pursuer craving certification, *contra non producta*;

ALLEGED,—The same could not be granted, because he had produced sufficiently, in so far as he had produced a disposition and infestment granted to Mr J. Cockburne of these lands prior to the pursuer's interest, either of comprisings or inhibitions. *2do*, He had also produced a public infestment of the same, flowing on Waughton's resignation prior to any real right of comprising; and so needed produce no more, having produced a better and a more ancient right than the pursuer's title, and which excluded him. *Vide Dury, 26th February, 1622, Earl of Kinghorne against Inchtore.*

REPLIED,—The pursuer must have certification, notwithstanding of what is produced. *1mo*, Because Cockburne's infestment is but base. *2do*, It is but under reversion, and so can never stop the superior, and he who hath right to redeem, from having certification against all other latent rights of these lands; all that is produced being allenary a base right, though prior, and not a perpetual, but only a temporary exclusion of the pursuer's interest, who is stated both in the right of suspension and reversion; and so can never stop certification sought at his instance. And as for the public infestment, and which is both prior and irredeemable, no respect can be had thereto, because, *1mo*, The instrument of resignation whereon it proceeds is not produced, though, by act of Parliament, necessary to be produced, and without which be seen we conclude in law no public infestment ever was, but the same must fall in consequence. *2do*, The said infestment is posterior to Smeiton's inhibition, which is a part of the pursuer's interest, and therefore can never defend against the certification.

DUPLIED,—The right, though base and affected with a reversion, is sufficient to defend the property, and stop certification against any other rights, aye and while it be redeemed. As for the want of the instrument of resignation, it is not material:

they'll make up the tenor of it by adminicles. And as to the pretence that the inhibition is before the public right produced, it is answered, the same is good enough to afford a certification against the said public infestment in the reduction; but it was *inauditum*, and a ranversing of all the principles of law, to imagine that a personal right, such as an inhibition, or any right whatsoever, except a real right of infestment in lands, could ever be a ground to infer certification in an improbation *contra* real rights, in which case the only title must be a real right. See Dury, *3d March, 1626, Law against Lady Balgony*; and Craigie's consequence from that decision, in his Collections, *verbo Inhibitions*. And though there was a comprising and a public infestment taken thereon following upon the ground of the said inhibition, yet none ever dreamed of such an absurdity, as that these two could be conjoined to produce certification in an improbation, where a public and irredeemable infestment intervened, *tanquam medium impedimentum*, between the inhibition and the infestment on the comprising; and a retrotraction of the real right to the inhibition and fiction, supposing them both of one date, is a notion that surely no lawyer can be guilty of. See the Triply made to this in the informations beside me. *Vide infra, No. 508, § 10, November, 1676.*

At the advising, the Lords fell mightily divided. The Advocate adhered *mordicus* to form, that nothing but a real right was the ground whereon a certification in an improbation could be sought; whereon the Lords, unwilling to determine it downright, but to intimate their inclinations that the same were to have it waved, declared they would hear the advocates upon that point *in presentia*. It is most certain, if there had been nothing else standing in the way save only Cockburne's base and redeemable infestment, the same would have been repelled, as not sufficient to stop the certification *contra non producta*, though anterior to the pursuer's interest produced. *Vide 10th December, 1680, Earl of Home.* But the thing that stuck with the Lords, and which they could not win over, was the public and irredeemable infestment produced, which was prior to any real right in the pursuer or his author's person; and though the inhibition was before it, yet that can give no interest in law whereupon to crave certification in improbations. For, laying that aside, I saw a little time thereafter certification granted to the pursuer of an improbation, notwithstanding there was an infestment prior to the pursuer's produced, only because the same was base and redeemable, and the pursuer had the right both of the superiority and the reversion. And Sir George Lockhart affirmed the certification could never have been stopped in law by Cockburne's right; but that it was beyond all measure hard and unequal to think to carry a certification where the pursuer's real interest was so fully debarred and excluded by that public prior infestment, and that no justice could make an inhibition to produce such a certification.

The Advocate, having heard us, if Sir George Lockhart had been clear that certification should pass notwithstanding of the said public infestment, in a great passion affirmed, that Sir George abused the lieges, and made them believe that was law, which, in his own conscience and knowledge, he was persuaded to be just contrary. But he was in the wrong to him, for he was of the same opinion with the Advocate.

Vide infra, February, 1674, Dumfermeling and Calander, No. 445.

Then, upon a bill given in by the pursuer, the Lords having declared they would instantly hear the reasons of reduction in their own presence at the calling, the de-

fenders proponed, upon the ninth and eleventh articles of the regulations, that they were not bound to answer till the same came in its ordinary course of the roll; which, after removing of parties, being considered and advised by the Lords, they, over the belly of the regulations, ordained them instantly to answer *in causa*. Which gave people occasion to say that the Lords should be sworn to the keeping of them as well as others. But there was an evasion, and the case met not that of the regulations.

They are bound to keep the regulations without swearing, because they are ratified by act of Parliament.

Advocates' MS. No. 400, folio 218.

1676. *July 27.* Sir Andrew Ramsay of Abbotshall *contra* Francis Kinloch. (See this cause mentioned, *supra*, in June, 1673, No. 400.) It is a reduction-improbation, and declarator of Francis his right to the lands of Gilmerton, wherein the case was deduced to the Lords in the Inner-house, thus:—

The deceased Jo. Hepburne of Waughton being forced by the necessity of his affairs, and the common iniquity of the times, *in anno* 1652, to wadset his lands of Gilmerton (which were a proper part and pertinent of the barony of Waughton,) to Mr John Cockburne, advocate; the manner of the surety and conveyance they agreed upon was, that Waughton should grant him an heritable and irredeemable right, and Mr Jo. should, by his back-bond and formal letter of reversion apart, declare there was no more intended but a wadset, redeemable upon the payment of L.15,000 Scots to him, his heirs or assignees, and of the expences he should ware and employ upon building, providing always the same did not exceed the sum of 1000 merks Scots. Waughton being one who trusted more to other men's management than his own, and Mr John being an exact man and an able lawyer, and punctual to have everything performed to him, it was no wonder that Waughton and he differed, and that Waughton, at any rate, desired to be rid of his neighbourhood.

F. Kinloch is persuaded, by one Henry Kinloch, a cousin of his own, and a domestic servant of Waughton's, to enter upon that game; Waughton and he strike hand, join issue, and agree that Francis shall pay Mr John Cockburne his money, and take Mr Cockburne's wadset right he had on these lands; whereupon Mr Jo. Cockburne is required to take his money, to which, after some difficulty, he condescends; so then Francis obtains an heritable and irredeemable right and disposition to the lands of Gilmerton from Mr John Cockburne and his wife, with consent of the Laird of Waughton; and for salving and securing all their interest, (just as Mr Jo. Cockburne's bargain and surety was,) he gives a back-bond or declaration of the same date with the disposition to him, and so is *pars contractus*, and more than *pactum incontinenti adjectum contractui bonæ fidei*; by which he confesses, albeit Mr John Cockburne had disposed these lands irredeemably to him, yet the truth was, Mr. Jo. had granted a reversion of them upon the payment or consignment of the foresaid sum of L.15,000 Scots; and therefore, lest that deed should be a contravention or commission of the warrandice given him by Mr Jo. from fact and deed, he excepted the said reversion from the warrandice, and then adds, Likeas he accepted of his own right and disposition with the burden of the said reversion: and which last words and clause was undoubtedly taken and intended for the security of Waughton, and for preserving and holding

up the reversion, which otherwise would have been extinguished by Waughton's consenting to Mr Jo. Cockburne's absolute disposition.

This being the state of F. Kinloch's right to the lands of Gilmerton, Sir A. Ramsay, having matched his son with the heiress of Waughton, and having, both with great pains and considerable sums of money, near adequate to the worth of the lands, acquired the haill apprisings and other real rights affecting that estate,—did first essay all soft and moderate courses of settlement with Francis: but these amicable overtures proving ineffectual, and being slighted, he was, much against his inclinations, forced to the *ratio ultima rerum*, to intent this reduction, improbation, and declarator against this defender; wherein the terms being all run, the production satisfied, and certification granted *contra non producta*, your Lordships are now to hear the reasons, and which are plain and short, and in sum resolves in this,—that Abbotshall and his son crave from your Lordships' justice that Francis Kinloch's right to the lands of Gilmerton may be declared to be qualified, affected, and burdened with Mr John Cockburne's reversion, as bottomed on the same foundation, as accepted upon the same conditions by his back-bond foresaid; and, consequently, it is redeemable by the pursuer, as having the undoubted right of reversion, upon the payment or consignment of L.15,000 Scots, and of 1000 merks for building. And really, when the Dean of Guild gets that, I hope neither he nor any other sober considering person will think he gets much wrong; for, *Imo*, It is evident from the narrative of his own disposition given him by Mr John Cockburne, with consent of Waughton, that the L.15,000 of the first sum on the wadset is what only was paid by him: it bears, for certain sums of money paid to Mr John Cockburne, but not one syllable of anything given to Waughton for his consent, which is without all onerous cause, and granted *sine omni causa*, save only Francis's acceptation of his right, with the burden of Mr John Cockburne's reversion. Not the value of a sixpence was paid to the Laird of Waughton beyond the price of a pint of wine; and however liberal Waughton was in the retailing his estate by piecemeal, yet he was not in use to give away such casualties as reversions in great to strangers, without any motive or onerosity. *2do*, This declarator, though it were not founded on express paction and stipulation as it is, yet it could not but be esteemed most rational, just, and equal; considering how lucrative, exorbitantly beneficial, yea, upon the matter, how usurious a wadset this defender has had these 21 years, of 14 chalders of victual. I pray you, my Lords, let us consider where it lies:—in East Lothian, our land of Goshen, where land usually sells at 3000 merks the chalder. He has bruiked it this 21 years, and in his own conceit had enhanced it as his own at 1600 merks the chalder, which afforded him ten of the 100, even when the prices of victual ran in their lowest channel; and what increase and profit he had these two years bypast, when the price of the victual ruled just double of what it was formerly, I blush to tell. I shall only leave you to consider, whether or no he may not be exuberantly recompensed by so great advantage, of any expense he has upon policy and building; for I abstract from his *mala fides* in building beyond 1000 merks value, because it is so notour, so gross, and palpable, it needs no illustration. The law says, *Quicquid solo inædificatur solo cedit; et qui in alieno ædificat donasse censetur, ut et diruta domo materiam vindicare nequit. Par. 30. Instit. de Rerum Divisione et Acquirendo Rerum Dominio.*

I shall only say one word, that a very good gentleman, the last laird of Waughton's uncle, who was heritor of that land, and by his death returned again to the family, having been given in an appendage and portion, he dwelt in the house the Dean of Guild found there when he entered, and I believe Francis now wishes he had done the like. In respect of all which, the defender's right ought to be found

to be affected with Mr Cockburne's reversion, and redeemable in the terms thereof. As for his *mala fides* in building so sumptuous a house on wadset lands, to absorb the reversion, let the following citations be considered; for if the said Francis intended allowance for his necessary and profitable expenses, (voluptuary's ones he cannot seek,) then he must do it by way of action: this is not the place wherein that count can be received. He who buys after an inhibition, *contra jura publica mercatur, et sic mala fide possidet*; cap. *de Regulis Juris, in 6to, ibique Dynus in Commentario*; L. 7. *C. de Agricolis*; and therefore cannot repete his expenses, *per Legem 31. par. 3*; *Legem 36. par. 4 et 5*; *Leges 37, 38, et 39 D. de Hæreditatis Petitione*; *Tit. D. de Impensis in res dotales factis*; *parag: 35, ibique Vinnius, Harprechtus*, and my Poitier notes, *Institut. de Rerum Divisione*; anent waiving charges *super re aliena per bonæ vel malæ fidei possessores*, and how far their interest will be heard and admitted to repeat them. See if meliorations made upon houses may be taken away, *Hippolitus de Marsaliis singulari*, 410. If the vassal may deduct them when the feu returns to the superior; see Zoesius, *de Feudis, pag. 145*; and Gudelinus, *de Jure Feudorum, parte 5, cap. 5*, with the laws there cited, both Roman and feudal; *vide Legem 58 et seq. and 61, D. de Legatis, 1mo.** See Haddington, 10th of June, 1612, Laird of Blacater. See the informations beside me between Hugh Wat and Elizabeth Hacket; *item*, between Captain Guthry and M'Kerston in 1672. A man possessing after inhibition is not *in bona fide*; so Stairs in his System, tit. 12, of real rights, No. 33, mihi p. 162; Sinclair's Practicks in February, 1541, between two brothers called Monypennies: that their expenses must be pursued *via actionis, L. Impensæ, 79, D. de Verborum Significatione*; M'K.'s Observations on the Act of Parliament in 1621 anent Bankrupts, p. 141 *et sequentibus*; and for the fundamental law of our reversion, see act 27, Parliament 1649. Where an heritor consents to an absolute disposition made to one who had but a wadset before, how far it prejudices him, see Dury, 20th March, 1635, Bishop of Glasgow *contra* Mauld; 14th July, 1635, Monimus *contra* Lesly. If a wadsetter resolve to have his expenses bestowed on necessary building sustained to him that it may be eiked to the reversion, see what form of declarator he would raise; Dury, 22d July, 1626, *Morison of Prestongrange contra The Earl of Louthian's heirs*; 29th November, 1628, *Mr Leviston contra The Laird of Basse*.

To this conclusion of declarator it was ANSWERED for Francis Kinloch, defender, That the true matter of fact being considered, the arguments founded upon that ticket bearing a declaration and acknowledgment of Mr John Cockburne's reversion, to elicit and draw from it that his right was but a wadset and redeemable, will evanish in a mere notion and sophism. For, *1mo*, If a wadset was designed, why took Francis an irredeemable disposition? why did he not content himself with the assignation to Cockburne's old wadset? *2do*, The said ticket and declaration mentions only Cockburne's disposition, and takes no notice that the right did flow from Waughton, and therefore neither concerns him, nor can relate to his consent to qualify, burden, or affect the same; so it has only been designed to secure Mr Cockburne, (for his name, his right, his warrandice, are only mentioned in it,) upon the account he subscribed before Waughton, who was not then in town; and for his own security he required this paper. *3tio*, It was never a delivered evident to Waughton, but borrowed out of Mr John Cockburne's son's charter-kist; and neither mentions

* *Melioramenta tam magna ut dominus quasi iis cogatur habere rem pro derelicta non sunt refundenda. Gayll. lib. 2, Observatione 12, in fine.* See Leidington's Practiques, 30th July, 1564, *Bryce against Richardson and Fletcher*; and Balfour's Tit. Of Alienation and Infestment, cap. 19, about Bigging *bona fide*.

him, nor is conceived in his favours, otherwise he would have got another of them. *4to*, The formula of this back-bond is the most inept and informal to constitute a reversion of any ever writer drew ; for the true formula would have been to narrate, though Mr John Cockburne and Waughton had granted him an irredeemable right, yet it being truly designed that it should continue a wadset, therefore Francis obliged himself either to grant a formal reversion, or that his land should be redeemable in the terms of Mr John Cockburne's reversion. *5to*, If nothing had been designed but a wadset, then Waughton would never have given up to Francis the two principal contracts containing the reversion. *6to*, If he had merely intended to have surrogated Francis only in Mr John Cockburne's room as a wadsetter, he would not have resigned the superiority to Francis, to be holden of the Exchequer, which he never did to Mr John Cockburne. *7mo*, If this paper under Francis his hand had been designed to make Francis his irredeemable right a wadset, then it would have been expressed, that it was to operate in favours of Waughton, of which it has not one jot. *8vo*, These words, on which the pursuer, by so remote and absurd consequences, lays the stress of this declarator, viz. that he accepts his right with the burden of that reversion, they are no more but an extension of style, and exegetical or explicatory of, and subjoined to the immediately preceding clause, excepting that reversion from Mr John Cockburne's warrandice ; and as no more was meant, (what is truly designed and acted between parties being what over-rules all writs and language,) so there is nothing more ordinary, than for writers to run out in several explications of the same thing, and to write twenty lines where one might serve : and God forbid honest people, ignorant of the laws, should be ensnared with such captious strains and detortions as this. So that it is a strange imagination to think, and confidence to say, that this trifling paper concerns Waughton, since, in the haill four corners of it, there is not one word of him, nor of the irredeemable right he had granted ; which evidently evinces, and makes it undeniable to any man having the use of reason, or knows form and practick, that this declaration has never been intended for Waughton, but only in relation to Mr John Cockburne's security ; so that he accepts his right with the burden of that reversion, in so far as concerns Mr John Cockburne, but not in so far as concerns Waughton.

To this it was REPLIED for the pursuer, *1mo*, There could be no more intended but a wadset, because Francis paid no more for it but the L.15,000 of the wadset. *2do*, If this clause of acceptation with the burden of that reversion, had been *in gremio* of Francis his heritable right, it would have unconvertedly made it a wadset ; *ergo*, being of the same date and relative, and so *pars contractus, et pactum incontinenti*, it must have the same efficacy and force. And as for the presumptions and probabilities adduced by the defender, to persuade us that it was an irredeemable right, and to the first, that then he would have rested on the assignation to the sum in the wadset which the defenders produce ; it is replied, that there is not under heaven a more convincing document, and more evident demonstration, that Francis his right was only a wadset to be affected with Mr John Cockburne's reversion. And after perusal of that assignation, it is impossible that any scruple can remain, either with lawyer or other rational person thereanent ; and we thank their lawyers for their sagacity in producing the same to us, whereby their defence is infallibly convellid ; for it narrates the irredeemable disposition, and assigns to the wadset money and clause of requisition, whereby Waughton was bound to give it when called for, and to the penalty in case of failyie ; which is downright incompatible and inconsistent with an irredeemable right : for a man cannot give both an heritable right, and a right to the price of that same land ; he could not both pay

Waughton the L.15,000 Scots, as the price of Gilmerton, and, by this assignation, have Waughton his debtor in that same L.15,000, and obliged to repay him the same when he should use requisition. If he had distressed Waughton for the money, as he might have done upon this assignation, he behoved, upon payment, to have denuded himself of the lands of Gilmerton; *ergo*, it was but a wadset: but the taking of that assignation was most proper, congruous, and consonant for a wadsetter's right.

As to the second qualification used by the defender, that this ticket produced mentions not Waughton, but only Mr John Cockburne, it is replied, The same is of no weight or moment, for style considers only the principal disponers, and finds no necessity to mention Waughton, who is but a consenter. But, *2do*, It is confessed upon all hands, that the reversion is kept up and preserved by this ticket and declaration, in so far as concerns Mr John Cockburne, and the right flows from him. Now, it is a manifest and infallible inference, that, *eo ipso*, it behoved to be preserved for Waughton; the reversion being conceived in his favours; and which could not be kept up for any other end or purpose but to give Waughton the benefit to redeem the lands when he thought fit. And it is an absolute contradiction and inconsistency to assert, that the reversion could be preserved or subsist *quoad* Mr John Cockburne, and not operate also in favours of Waughton, and those that succeed in his right; and which, to have been the main design of this writ, is clear and unanswerably evident, beyond all cavil and contradiction. As to the third, viz. that it was never delivered to Waughton, &c. it is replied, The pretence is frivolous; and we have seen it can have no other construction but to operate for Waughton. But, *2do*, Albeit by the subtilty of the civil law, *stipulatio alteri facta est invalida et inutilis*, yet, by the inviolable practick and custom of this and all other nations, now, writs conceived in the name, or containing clauses in favours, of third parties, are effectual, albeit they be not parties contractors, or the same be not delivered to them. *Vide parag. 4. Institut. de Inutilibus Stipulationibus, ibique Vinnium; vide Gudelinus, de Jure Novissimo, lib. 3, cap. 1, p. 97; item cap. 5. Imo per procuratorem, nobis tam absentibus quam ignorantibus, jus legibus Romanis acquiritur; par. 6, Instit. Per quas personas cuique acquiritur.* And how far one acquires right by a writ, though ignorant or absent; see Stairs, tit. 10, Of Conventional Obligations, § 3, 4, and 5; see Baptistæ *Additiones ad surdi Decisiones*, p. 165; see Dury, 9th January, 1627, *contra* Nimmo; *vide supra*, February, 1672, Laird of Cockburne and Haddow, No. 320, and the laws cited there; likewise, in the present case, this evident was truly common and mutual, and entrusted with Mr John Cockburne. To the fourth it is replied, That it is impossible that any writ could have been conceived in more effectual, positive, and valid terms than this declaration is, supposing the parties intend to preserve the old reversion without necessity of granting a new one, which is both ordinary and usual, and to affect dispositions with back-bonds and reversions, by writs apart. As to the fifth, Only who knew Waughton's negligence, will not admire to see how his papers squandered in confusion; but will conceive how easy it was for Francis to come by the principal reversions. Repeats the former replies to the sixth and seventh. As for the eighth, pretending the last clause is only exegetic of the first, anent the exception from the warrandice; it is replied, The assertion is so absurd and unwarrantable, that it can escape none who understands in the least what a security or the common style of any writ is; for it is undeniable but they are two separate and distinct clauses; the first, excepting Mr John Cockburne's reversion from his warrandice from proper fact and deed, was altogether unnecessary and superfluous, seeing he was secured against all imaginable hazard of recurring upon his warrandice by

Waughton's consenting to the disposition he gives Francis, and therefore it is expressed only in a cursory and transient way. What was principally intended was the second clause, positively and expressly burdening his right with that reversion. *2do*, Where was it ever heard of, that the accepting of a right, with the burden of a reversion, is an explanation of warrandice from fact and deed? This were a nonsensical illustration,—it were *obscurum per obscurius*. The proper exegesis of warrandice from fact and deed that ever was heard of, or known in style, is, that they neither have done, nor shall do, in prejudice, &c. or to except a particular right or deed from it. *3tio*, If, by both clauses, no more be designed but to secure against the warrandice, that is so sufficiently done by the first clause, that the next is utterly unnecessary, and so designs something more. *4to*, The word likeas ever, in style, signifies and imports a new clause, and different from the former. *5to*, As the words of thir two clauses are different, so they produce very distinct and separate effects in law, and which cannot be confounded; for the first clause, bearing a naked exception from the warrandice, in the congruity and propriety of words in common style, does not hinder but the right so excepted by him may be quarrelled; but whoever accepts his right with the burden of another, which is the second clause, it is ridiculous to imagine, he will [be] heard to reduce or impugn the right he hath so accepted and acknowledged; and so Francis can never be admitted, in law, to question this reversion. *Vide supra*, June, 1676, Doctor Fraser *contra* Hog of Bledren, No. 481. And there is not a lawyer who understands what a security means, but, upon the sight of this declaration and acknowledgment, will immediately conclude against all the impertinent conjectures accumulated, that the reversion was to stand in being, and militate against this defender. And whereas it is alleged, that the disposition, whereto Waughton consents, bears for all right of property, superiority, or reversion; it is answered, The objection is most frivolous; and all these words import no more than if it had said, "I dispone heritably and irredeemably:" and sometimes in style there is no more expressed, and at other times, again, it is extended, enlarged, and paraphrased in the foresaid words, and which be nothing but the different variations, exuberancies, and expressions of style, having the same individual effects and signification in law; and if it were not for his ticket, and the assignation he took to the wadset, there is no doubt but his disposition would carry him to the irredeemable right, and have suppressed the old reversion. As to the pretence, that Waughton subscribed not of the same date with Mr John Cockburne; it is answered, This is but a pitiful mistake; and if it were so, it quarrels the date of his own disposition, and tends to make it a false right, and not so much as to subsist as a wadset.

DUPLIED to the first, that Francis paid no more for it but the sum in the wadset; *1mo*, It is denied. *2do*, The land in the usurper's time was cheap, because of the great burdens. *3tio*, It is but ten or eleven chalders of muir-land victual, and so cost 2000 merks the chalder. *4to*, Sellers, in their straits, (as Waughton was, not Mr John Cockburne,) will give a pennyworth for ready money; all which may serve to wipe off these false and calumnious representations of a lucrative bargain; and he offers a tack of it to any for ten chalders of victual. As to the second, it would have made a vast difference if this clause had been inserted in the body of Francis's right; for then it would have restricted and qualified every clause, and concerned every person therein; but being in a writ apart, it extends its influence and efficacy to no more than what is found expressed in that writ, and consequently cannot concern Waughton, who is not mentioned in it, as he is in the disposition. As for the assignation to the wadset, it is strange how any man endowed with

sense can obtrude it; since it is evident, the chief thing designed in that transaction in taking the said assignation was, in case any diligence had been done against Waughton between the date of Mr John Cockburne's wadset and his subscribing Francis his irredeemable right, Francis might at least have recurred to the wadset-right as anterior to encumbrances, and bruiked thereby. Neither was Waughton in any hazard, by personal or real diligence against him, upon this assignation; because it bears in the body and narrative of it, that Francis had also got an irredeemable right of the same lands and date from Waughton.

As to the clearness of the conception of this ticket to preserve and hold up the reversion, 'Sir George Mackenzie confessed, that he read [it] six times over ere he understood it: and the first five times he thought it sounded and imported a reversion; but the sixth time, by help of right information in point of fact, he became convinced it meant no such thing; to shew us how plausible falsehood may be, and at how small a distance, through our darkened understandings, it may seem to be removed from truth. Upon this, Sir George Lockhart had a smart repartee,—that the five parts of his judgment was more to be trusted and credited than the sixth part, which was but the dregs and taplash of his wit, though cleared by a new light; in another part, he bade the defender ranter the two ends of an inconsistency he was urging together. Sir Jo. Dalrymple had another fling,—that the controversy was not so much for the land, as for the gaudy mounting he had trimmed it with; meaning the house he had built.

But, to return to the defender's duply.—He alleged, it was a silly ignorance to affirm, that *likeas* or *as also* ever imported and denoted a separate member, or a new clause in style; for, just contrary, it was copulative and connecting, and signified a continuation of the former subject: *likeas* it was convelled in a trivial instance in the dispositive words,—“wit ye me to have sold, analyied, and disponed, *likeas* I, by the tenor hereof, sell, analyie, and dispone;”—there it joins *verba de presenti* to the preterite time. As for the subtilty, that if Waughton subscribed after Mr John Cockburne, then the disposition will be of a false date; this is excessively ridiculous, since it behoved to be in the same month; for the resignation is past within a month: by which it appears how men obtrude their insolence upon the Lords for law, and press, with unparalleled violence, childish, foolish, and airy notions. In respect of all which this pursuer, who possesses 300,000 merks-worth of land, for 100,000 merks given out by him, and is but a mere compriser, (Waughton's daughter never having been heir, and being dead without issue,) in a strange and inhuman manner studying to grasp the defender's poor ten chalders of victual, like Naboth's vineyard, and torture the defender's ticket till it confess it is a wadset, though it was never meant nor intended among the parties,—ought to be debouted of his claim; and your Lordships, in justice, must find the defender, Francis Kinloch's right, to have been *ab initio* irredeemable, and not clogged with any reversion; and suffer him to enjoy his own house, (which is every man's sanctuary, and out of which he is not to be thrown,) built by him at the expense of L.20,000 Scots, and that in the eye and knowledge of this pursuer, without any challenge to interrupt his *bona fides*, though it be now the apple of contention, since without it the wadset were not desireable or worth the redeeming. The tenth commandment forbids us to covet our neighbour's house; and I hope your Lordships will not authorise the breach of that divine precept by a gratifying sentence. What was the old debate between the two ancient famous tribes of the Roman lawyers, the Sabini and the Proculiani, (of whose discords we have sundry vestiges in the law; as, in acquisition by specification,—in determining the years of puberty,—*et circa*

materiam emptionis, venditionis, &c.) the one inclining much to the equity, and the other to strict law, seems nearly to quadrate with the present case. In points of forms and adhibiting solemnities, judges ought to be severe exactors of them; but as to the interpretation of ambiguous clauses in writs or contracts, (which is the divination your Lordships are put to here,) an equitable and favourable conjecture *quid sit actum vel verisimiliter tractatum*, for eliciting the meaning of parties, is most to be followed and embraced; *benignior sensus rapiendus semper*, l. 56, D. *de Regulis Juris*.

When the foresaid debate was ready to be advised by the Lords, then Francis Kinloch, and Sir George Mackenzie, advocate, for him, desired to be farther heard upon a new point,—of a general discharge passed betwixt the pursuer and Francis, and which discharged and cutted off this reversion now acclaimed, and they would conjoin with their other defences, *ut quæ non prosunt singula multa juvent*. See the debate followed upon this general discharge in another manuscript *apud me*, both learned and neat, and the laws and authors there cited, viz. l. 5, D. *de Transaction.*; l. 6, D. *de Pignoribus*; act 62, Parliament 1503, and the marginal notes there: Dury's Practicks, *Dynus ad Regulas Juris Canonici*, Leithinton, and sundry others.

The Lords repelled the defence on the general discharge, unless Francis would prove by Abotshall's oath, &c.; and, before answer to the rest, ordained trial to be taken, what the land was set at, the time it was disposed to Francis Kinloch; inclining *actione quanti minoris* he had bought it, to cause him now supply and make up the ordinary price such land sells at in the country.

Then Abotshall, pursuer, sued for a farther hearing, upon a letter written by Mr James Anderson, Waughton's chamberlain, to the Laird of Waughton, and sent to him with this defender Francis Kinloch; bearing, that he had sent out, with the carrier of the letter, the disposition to be subscribed by him; but, before he subscribed it, desired him to take two lines under his hand, viz.—“ I, Francis Kinloch, factor and merchant, do hereby bind and oblige me, my heirs and successors, to give and grant to John Hepburne of Waughton a letter of reversion of the lands of Gilmer-ton, conform to a disposition of the saids lands made to him by Mr John Cockburne, whereto the said John Hepburne is consentor; and that how soon and whensoever I shall be required thereto, conform to the former reversion granted by Mr John Cockburne, he has promised to do this.”

This Abotshall produced, to clear beyond all rational contradiction and cavilation, that a reversion by Francis to Waughton was spoken of, treated, and communed on, at that time; for it was pretended Francis's ticket, produced, looked not like a reversion in favours of Waughton, but only a paper to secure Mr John Cockburne, (which I found to be the opinion of sundry indifferent lawyers, who were neither engaged on the one side nor other;) and that the assignation to the wadset was taken merely to shun intermediate diligences.

But it was ANSWERED to the letter, That there could be nothing produced more convincing that the former paper insisted on did not concern Waughton; for, if it had, what needed Mr James Anderson advise the laird to take this; which is an unanswerable demonstration, that Francis's acknowledgment, produced, has been singly and allennarly designed for Mr John Cockburne. *2do*, This letter infallibly proves, Waughton did not subscribe at the same time with Mr John Cockburne; but that Mr John subscribed first here at Edinburgh, and then Francis Kinloch

took out his disposition to Waughton, and got it subscribed there by the laird; and this ticket of Francis's was taken from him by Mr John Cockburne at Edinburgh, before Waughton had subscribed or consented, and so neither does nor indeed could relate to the right granted by Waughton, which was not then in being; and so, not being of the same date, but prior, cannot affect, burden, and qualify Waughton's consent to the irredeemable disposition with Mr John Cockburne's reversion, unless they had a paper under Francis's hand, either granted at the time, or after Waughton's subscription. *3tio*, This letter is *res inter alios acta*, and so cannot prejudge Francis a third party, who is content to depone, that a reversion was never sought of him; and *esto* there had been a communing anent his giving an obligation for reversion, (which is the most the import of this letter can be stretched to,) unless they will offer them to prove, that a reversion was actually taken, the allegiance is utterly irrelevant, for it might have been passed from after communing.

ANSWERED,—*Imo*, This might be the paper Waughton took from him in compliance with Mr James Anderson's letter; for though it differs as to words, yet not in substance and matter. But they seem to be quite different formulas. *2do*, *Non-refert* where, (whether at Edinburgh or Waughton,) or when, (whether before or after, or with Mr John Cockburne,) Waughton subscribed. He might have been in another house of the toun, and it carried to him; and the difference of hours, or a day, makes nothing, but Francis his ticket has been given and taken *eo intuitu*, to hold up and preserve the reversion *quandocunque* Waughton should sign the disposition: likeas Francis's own disposition is opposed, which bears them all to have subscribed at one time, on one day, and at one place, viz. Edinburgh, the 5th of January, 1655; and I hope he will not convell and redargue his own right of falsehood. But, *3tio*, All the use we make of this letter is for a document to adminiculate and instruct, together with Francis his own declaration, and his taking an assignation to the wadset, that a reversion runs through the whole thread of the bargain; and which three papers being conjoined together, states his right, in the case of a redeemable disposition and a wadset, so clearly and undeniably, that they amount to an ample and plenary probation; and a formal extended letter of reversion, under Francis's hand, would not be able to convince those who willingly continue unclear after so pregnant evidence. Besides, the *fama clamosa* of the whole country about was, it was only a wadset: and when he took the vanity to build that Babel for the glory of his name, his wife wept, and cried he would ruin himself, since he might be put out of it. But what encouraged him was, *1mo*, The negligence of Waughton, and confusion his affairs had run into. *2do*, By bribing, he had got up Mr John Cockburne's principal reversions. *3tio*, For his ticket, he thought a small paper like it was either lost, or, being in a minor's charter-kist, it would never be got wit of, to rise in judgment against him. And, to shew the pursuer's detachment from all covetousness, he offers, that Francis take away his house, and leave as much as he found. Yet the Lords would not permit this, if I offer him as much as the materials, taken down and lying *in cumulo*, can be estimated or valued with; for policy is not to be thrown down, *et malitiis hominum non est indulgendum*, say the laws I have already cited. But Francis threatened, he would wair L.5 sterling more upon it, to buy gunpowder with, to blow it up first; and yet that were criminal; *non licet re sua abuti, multo minus aliena*.

Sir A. Cockburne of Lanton, about this time, gave in a bill to the Lords, craving up his uncle's son's paper, which Abotshall had borrowed and made use of,

without his witting. See the answer I made to this bill, *apud me*. The Lords ordained the paper to lie, in the process till the conclusion.

Then they resumed, on the 25th of July, the advising the whole debate: the result whereof was, that, before answer, the witnesses alive, supposed to have been present at Waughton's subscription, should be examined anent the time and place of his subscription; if at Waughton, and if after Mr John Cockburne had subscribed it; *item*, if they heard anything spoken of a reversion or other paper to have been given by Francis to the laird. This nice and subtil evasion and distinction, cleaving a hair, and not of the weight of a hair in point of material justice and relevancy, was laid out as a plank to bring Francis off upon, and as a beacon and warning what Abotshall might expect if he would not settle amicably; for all thir delays were to draw them to an agreement; which upon reasons Abotshall merely declined, having been never so much abused, as under trysting and submission. Colinton offered to get him L.500 sterling, or 10,000 merks, if he would compons it; but he was inexorable, and told them, they got not salaries to be arbitrators but judges, and if he had minded to have trysted it, he had not troubled them. As this act before answer was irrelevant, so it was most unnecessary, had it not been to force a settlement; L. 84, *in fi. D. de Legatis, primo*; for Mr Ja. Anderson's letter produced, cleared that Waughton neither subscribed at Edinburgh, nor at the same time with Mr John Cockburne; and it was the production of this letter, (though done for clearing the President's scruples and at his desire,) that gave first umbrage and rise to that quiddity and wild notion, improving their disposition *in data*. However, in obedience to the interlocutor, the two witnesses, viz. John Stewart, then Waughton's servant, and Alexander Smith, his tenant in the mains of Waughton, are brought in and examined; and declare, so far as they remember, it was at Waughton they subscribed witnesses, and they saw subscriptions at it before the laird's, and mind no communing.

On the 27th of July the Lords advise thir depositions, and the whole process and debate, and by one vote find Francis his right irredeemable; and therefore assoilyied him from the declarator.

There were fourteen Lords sitting on the bench at the voting it; the five lawyers in the house voted it to be a redeemable right, and only a wadset, viz. the King's Advocate, Newbyth, Gosfuird, Glendoick, and Sir D. Falconer, Lord Newton. There were six votes for its being an irredeemable right, viz. Halton, Colinton, Strathuird, Pitreichie, Reidfurd, and Forret; Nevoy and Castlehill were *non-liquets* in the case; the President was not discovered, since it was gained by one vote for Francis ere it came to him, so he lurked; Craigie was Ordinary in the Outer-house.

There were two neckbrecks of this cause. The first was the Chancellor staying up stairs in the revising or treasury-chamber the time of the advising, (which he knew of,) and not only so, but detaining my Lord Kincarden with him, who was clear for Abotshall, (for Atholl, Argyle, Lauderdale, the other three extraordinaires, were two of them at London, the other attending on the committee between him and the name of Macclean,) and Castlehill's neutrality, contrary to many assurances. The Chancellor's faint trinketing and tergiversation, for fear of displeasing Halton, (who agented passionately for Francis,) has abated much of his reputation. The second rub in Abotshall's way was a largess and donative of L.5000 sterling, to be given to Halton and other persons furth of the town's revenue, for their many good ser-

vices done to the town; *vide decisionem immediate præcedentem, in calce*. By this they outshot Sir Andrew in his own bow, turned the cannon upon him, *et justo dei judicio*, defeated him by the town's public interest, with which weapons he was wont to do miracles, and had taught them the way. It seems scarce allowable that judges should be permitted to be *non-liquet*; in the Roman law, they behoved first to swear *iis non constare*, L. 36, D. de Re Judicata; see Calvin in *Lexico, verbis Ampliare, Amplius, Liquere*. See Ærodius, and a farther note about this *alibi*.

This decision, for its strangeness, surprised all that heard of it; for scarce ever any who once heard the case doubted but it would be found a clear wadset; and it opened the mouths of all to cry out upon it, as a direct and downright subversion of all our rights and properties; though the Lords want not the pretences above set down wherewith to palliate it, beside the common topic of commiseration to deprive a man of his house, and that *jure naturæ, æquum est neminem cum alterius detrimento et injuria fieri locupletiore*; L. 206, D. de Regulis Juris; and that it would teach men to be more accurate in their bargains, since negligence is never encouraged in law, but rather punished. As there is no loss but it brings some benefit with it, so Abotshall learned a lesson how foolish it is to put confidence in great men; for if they had not clinshed, he had very good reason to hope the event. God (who disposes all to the best) saw it not convenient to gratify Abotshall with this morsel, lest it had made him vain and insolent. He saw something towering in his temper, that behoved to be plained and hammered down. His blessed will is to be magnified and adored in all his dispensations; it is our undoubted interest to make an absolute resignation to him; he knows best what is fit for us; we will never be content till our wills be moulded into his; *occultum Dei potest esse judicium, injustum vero nunquam*, says the devout Saint Augustin.

Castlehill pretended he was upon his penitentials, and offered his service to Abotshall, if he could procure a stop and another review: especially since it was their usual practice, where any of the Lords were *non-liquet*, to forbear that cause till another time upon thir grounds; and lest he should be precluded as to his other separate grounds of reduction, since the *absolvitor* was from the hail process and pursuit, and that a pursuer should scarce be allowed so to manage and spin out his action as to take an interlocutor upon each point *separatim*; (see more of this *alibi*.)

He gave in a bill the next day, being the 28th of July, craving the Lords would reconsider their interlocutor, (for the Lords' explanation of the King's letter 1674 permits to offer grounds and reasons against their interlocutors, to get them rectified, so long as they are unextracted,) especially since some of their number who were yesterday unclear are now better informed. This Halton stormed at, and said, if such retractions, *ex intervallo*, were sustained, no cause should take termination by plurality of votes, but might be reversed by head and shoulders after they were *functi officio*; and farther, desired to be farther heard, since he offered him to prove, by the defender Francis his oath, that he promised and conditioned to Waughton, (and which Francis acknowledged to Mr Jo. Scougall, Lord Whytkirk,) these lands should be redeemable from him; as also upon his other reasons of reduction, founded upon inhibitions served against Waughton before his disposition to Francis, and to which inhibitions the pursuer has right, and upon other grounds.

The Lords, by their deliverance, adhered to their former interlocutor, (this is turned their usual trick now,) and ordained it to be extracted; reserving always to the pursuer, and but prejudice to him, to prove the said lands of Gilmerton to have been

under reversion, either by Francis his own oath, or by any other writs and documents he can produce beside them he has already made use of, and which are already debated, discussed, and determined; as also reserving to him his interest upon the inhibitions, and all other his reasons not yet insisted on, as accords of the law.

Which grounds will make the subject of another discourse, for furnishing whereof the following citations may be considered.

1mo, That an inhibition cannot be purged by payment, where a comprising is led on the ground of it, and is expired. See the two practicks beside me, Grant *contra* Grant, in 1666; and Lady Lucy Hamilton, in 1670.

2do, That an infeftment may be conjoined with a preceding inhibition to exclude an intermediate infeftment, and which hinders not *extrema coire*; see Craigie's Collection, *verbo* Inhibition; out of Durie's Practicks, 3d March, 1626, Law *contra* Lady Balgonie.

3tio, Whether, upon payment of an inhibition, the inhibitor or his assignee will be obliged to assign it to the payer, especially where he has other rights still in his person; see Dynus and Antonius Faber; and Jo. Mitchell's case *against* Sir William Bruce, cited in a paper-book beside me.

4to, Whether possession must be ascribed to a comprising or to an infeftment of annualrent, (which can never properly attain the natural possession, though it may the civil and legal,) where one man has both rights in his person; see Dury, 27th February, 1630, Paterson *contra* Scarlet, and the cases there, for Handyside's Infeftment of annualrent furth of Linton.

5to, *Non licet idem approbare et reprobare*; L. 4 et 5. *D. de Legatis*, 2; L. 38. *D. de Legatis*, 1; L. 7. *D. de Bonis Libertorum*; L. 16. *D. de Administratione Tutorum*; L. 11. *D. de Usuris*. For Francis Kinloch's disposition of the lands of Cracho, of which, since we crave reduction, we cannot find on clauses therein contained; see Sir Robert Sinclair's Information for Abotshall *against* F. Kinloch.

6to, Where an apparent heir acquires a right of comprising, &c. upon his predecessor's estate, it is redeemable by act 62, Parliament 1661, from him, upon payment of the sums he gave for it. *Queritur*, If this can extend to the husband or father-in-law of the apparent heir buying in such rights. *Videtur quod non*, being both a statute, and that *exorbitans a jure communi*, it cannot suffer extension.

See 23d June, 1680, Mr John Maitland *against* the Lord Cardross. See A. Perezius, *ad Titulum Cod. de Fidejussoribus*, Numero 36. *Vide* Stair's System, Tit. 12. Of Real Rights, § 27, p. 182; and Nithsdale and Buccleuch's case there.

Advocates' MS. No. 488. folio 252.

1676. July.

LORD MORDINGTON, Petitioner.

THE Lord Mordington being incarcerated in the tolbooth of Edinburgh for debt, gives in a petition to the Lords, craving to be set at liberty, in regard his creditors apprisers, and other infefters, had all his estate in their possession, and he was content to dispone the reversion to any the Lords should think fit, to the effect it may