

1669. June 21.

WHITEHILL *against* KINTORE.

No 46.

The Court *ex proprio motu* fixed a precise day for purging an irritancy.

ARRRUCHELL reported Sir John Ramsay of Whitehill, against Mr William Kintore of Mount-Lothian, Advocate. Mr William disposes these his lands to Sir John, who gives him a back-bond or reversion, bearing that he had paid him 15,500 merks, and, if he did not redeem at Whitsunday 1698, the lands should irredeemably belong to Sir John on his paying in 2500 merks farther; which 18,000 merks is declared to be the adequate price of the lands. There being an offer made by Mr William, he raises a declarator of redemption. Sir John contends, the order was simulate, and objects sundry nullities against it; and therefore craves the lands may be declared his, on his paying up the remanent price, *Answered*, This was no absolute sale, but on the matter only a wadset, and the back-bond being of the same date is of the nature of a reversion, *et pars contractus*, and like a *pactum incontinenti adjectum*, and as good as if it had been *in gremio* of the right, and therefore it is still purgeable on payment at the bar, whether the consignation was formal or not, this being *pactum legis commissoriae*, which is odious in pledges, and reprobated by all laws. *Replied*, This was no wadset, but a conditional sale, as was found betwixt Earl of Tullibarden and Campbell, No 45. p. 7208., who was not allowed to purge; and though Mount-Lothian be offered now 4000 merks more by Prestongrange for the lands, yet that does not import but the price stipulated and agreed upon between Sir John and him was adequate; for a neighbour *ex æmulatione vicini* may out-bid the value. THE LORDS found it yet purgeable, but that Sir John might have no trouble, declared, if he were not paid betwixt and the 10th of March, the lands should be his, and that there must be no retention on the pretence of causing him compt and reckon for his intromissions with the rents of the lands, Sir John finding caution to repay what afterwards they should instruct against him, else they might keep up his money, and delay him with a tedious compt and reckoning.

Fol. Dic. v. 1. p. 487. Fountainhall, v. 2. p. 46.

1706. February 15.

GRISSEL YOUNG and her Husband *against* ADAM and WILLIAM CRAICKS.

No 47.

Redemption of lands was sustained several years after elapsing of the time fixed, by a back bond of reversion, for using redemption.

IN the process at the instance of Grissel Young and her Husband against Provost Craick's sons, for redeeming a house and some acres of land in Dumfries, disponed by James Young of Broomridge her father, to the defender's father in the year 1675, upon this ground, that he stood obliged by a back-bond to redispone to the disponer, upon his repaying the price;

Alleged for the defenders, that their father's back-bond was conditional in case the price were repaid betwixt and a precise term, which was so far

from being performed, that ten years thereafter James Young pursued the Provost for a small remainder of the price, and for a *jacobus* which he alleged was promised to his wife at making the bargain; and thereby had past from the reversion, which is *stricti juris*. *2do*, William Craick of Duchrae one of defenders being ignorant of any such back-bond, had accepted of a disposition to the house and acres from his father, and *bona fide* sold them to a third party; so that it is not in his power now to redispone, and the pursuer can only claim damage and interest *loco facti imprestabilis*.

Replied for the pursuer, that even temporary reversions of heritable rights may be pursued at any time before a declarator of extinction, though conceived by way of irritancy, if not claimed within a certain time. The reverser is still allowed to purge before decret; and even after a decret of declarator of the irritancy, the LORDS are in use to supersede extract for a time, within which the redemption may be made. Yea, lands were allowed to be redeemed after elapsing of the term in the back-bond; although it bore, that the reversion should be void and null without declarator, if the money was not paid within the time prefixed; July 8. 1636, Cleghorn *contra* Ferguson, No 41. p. 7204. February 1. 1677, Earl of Tullibardin *contra* Murray of Ouchtertyre, No 43. p. 7206.; such renunciations of the benefit of redemption being condemned and reprobated in law as odious, usurious and oppressive, of the nature of *pacta legis commissoriae*. For who would seek such a back-bond, if the lands disposed were not better than the price paid; and if better, why should an indigent person be so taken advantage of, when the other has no loss by getting his money. *2do*, A process for the remainder of the price was consistent with the bond of reversion, because the disposition and back-bond bore the receipt of the whole price, which might have been lost if not pursued while Provost Craick lived. And it is usual enough at the granting of redeemable as well as irredeemable rights, to promise some compliment or gratification to a wife, or other persons, for their interposing to help to make the bargain.

Duplied for the defenders, The reversion of this back-bond is not *pactum legis commissoriae*, which our law allows to be purged at any time before declarator; but an obligation to pass from a sale for a competent adequate price; which is only effectual if pursued within the limited time, January 17. 1679, Beatson *contra* Harrower, No 44. p. 7208.

Triplied for the pursuers, The obtruded decision betwixt Beatson and Harrower doth not meet; for there a person having right from G. Beans by progress, pursued the redemption contrary to the terms of the reversion which was personal to Beans.

THE LORDS found the lands still redeemable in respect of the back-bond, notwithstanding that the time prefixed for the redemption was long elapsed.

Fol. Dic. v. 1. p. 487. Forbes, p. 102.