

No. 81. 1767. *July.* LORD ELIBANK *against* BAILLIE and Others.

One having a right of security over an heritable property is entitled to insist that the subjects be not destroyed, and if destroyed, that they shall be replaced.

Fac. Coll.

* This case is No. 7. p. 7241. *voce* IRRITANCY.

1771: *January 24.*

JOHN WADDEL, Eldest Son and Heir of John Waddel of Knownoble, and his Tutor and Curator, *against* MAY LAURIE, Spouse of George Boyd, and him for his Interest.

No. 82.

Objection to the title of a pursuer of a ranking and sale, removed by the concurrence of the party having interest.

Alexander Brownlie having contracted various debts, his creditors severally obtained adjudications of his lands. John Waddel deceased, one of them, in 1754, obtained an adjudication and got infeft. William Laurie and certain other creditors assigned their debts to Alexander Waddel and John Davidson: Davidson died; and thereafter Lilius Aitken, his relict and executrix, joined in a conveyance with Alexander Waddel, the surviving trustee, of the debt due to Laurie, to Jean Law, Laurie's relict. In 1756, Alexander Waddel likewise assigned to Jean Law, in trust for his own behoof, an acceptance of Alexander Brownlie for 500 merks Scots, with power to her, "her heirs and donatars, to call, charge, and sue for, the sums before assigned, decreets to recover, and every thing to do, &c." In 1755 Jean Law got herself decerned executrix dative to her husband Laurie, but did not confirm; in 1758 she obtained decret of constitution for payment of the above sums so conveyed; and in 1759, she also adjudged the lands of Knownoble.

Jean Law having died, May Laurie her daughter and heir in general, served and retoured to her mother, on that title brought a process of ranking and sale of the estate of Knownoble; when an objection was stated to her title by John Waddel, son and heir of John Waddel deceased, who had obtained an adjudication, and was infeft in the said lands.

Jean Law's adjudication had, it seems, proceeded upon four different grounds of debt. As to the three first of them, it was stated, that the constitution and adjudication had been obtained upon a decret dative, but without confirmation; and to the fourth, viz. the bill due to Alexander Waddel, assigned to Jean Law in trust, it was objected that the trust was at an end when the adjudication was led.

The Lord Ordinary sustained "the objection, that the constitution and adjudication proceeded on a decree dative without confirmation." Thereafter the Court, upon advising a petition and answers, "sustained the objection to the pursuer's title, so far as the said title is founded on the bond and bill to William Laurie, upon the medium solely, that no confirmation of these debts is produced in the

person of Lilius Aitken, the alleged relict and executrix of Davidson, one of the trustees ; as also sustained the objection to the title, so far as it is founded on the bill assigned by Waddel to Jean Laurie ; upon this ground, that the assignation being in trust for the granter's behoof, the general service of Jean Laurie's daughter, as heir to her, could not vest in her this debt and adjudication on it, so as to entitle her to pursue the process of sale."

The pursuer having failed to recover and produce the confirmation of Lilius Aitken, the objection to the title, so far as founded on the three first grounds of debt, was thereby finally disposed of : And as to the fourth, a declaration of Alexander Waddel himself was produced, ratifying and approving of the process of sale, and agreeing that it should be carried on in May Laurie's name. Before judgment was given by the ordinary upon this last point, Alexander Waddel died ; upon which James Waddel his heir producing a conveyance from Alexander to him, sisted himself in process, and concurred with the pursuer. The Lord Ordinary pronounced an interlocutor, finding, " That the disposition by the said Alexander Waddel, in favour of James Waddel his son, produced, is sufficient to enable the son to give his concurrence to this action ; and in respect the said James Waddel has accordingly sisted himself in process, and does now concur therein, sustains the pursuer's title to carry on the present process of sale with his concurrence, so far as the title is founded on the bill which was due to the deceased Alexander Waddel, and by him assigned in trust to Jean Law the pursuer's mother."

John Waddel, the objector, in a reclaiming petition, maintained, that the appearance of James Waddel could have no effect to remove the objection to the pursuer's title, but was rather an acknowledgement that she had no proper one when the action was raised. If the pursuer denuded of the trust granted to her mother, and put James Waddel in the right of the adjudication, he might then have a title to insist ; but as matters stood at present, neither the one nor the other could. May Laurie had no title, because the debt due to Alexander Waddel being only assigned to her mother for the purpose of leading an adjudication, the powers vested in her were at an end, as soon as the adjudication was obtained.

The concurrence of James Waddel did not mend the matter ; for neither James Waddel nor his father had any title till they were put in their former place by a conveyance of the adjudication. There might indeed be a personal obligation upon Jean Law to convey to them ; but till this was done, they were not creditors upon the estate, but both, *quoad* the common debtor and the other creditors, were absolute strangers : And as neither party had a proper title by themselves, they could not, by thus concerting matters, establish one between them.

Answered,—The objection seemed to resolve into that of a no process ; which, however much it might have been regarded in former times, would not now be listened to in opposition to parties possessed of the real and substantial right, both concurring and consenting that the sale should take place. From the assignation in question, the trust was not personal to Jean Law, but went to her heirs and

No. 82. donatars; the adjudication devolved by succession to the heirs of Jean; so that even upon the supposition that Alexander Waddel should be retrocessed, it could not be done till the pursuer had made up her titles to her mother for that purpose. The adjudication being accordingly fully vested in the pursuer, a reconveyance to James Waddel was unnecessary; for as she was in the radical right, the bare consent of Waddel, who had the interest, was a sufficient mandate for insisting in the sale. The present case was precisely similar to one which had been frequently stated: When a person, for instance, vested in the feudal title, but who had no right to the subject, disposed it with the consent of the true heir; which always had been held a valid conveyance.

The Lords adhered to the interlocutor of the Lord Ordinary.

Lord Ordinary, *Kames*.
Clerk, *Gibson*.

For Waddel, *A. Wight*.
For Laurie, *D. Dalrymple*.

Fac. Coll. No. 68. p. 202.

1771. *December 13.*

ADAM WILSON, Merchant in Dundee, and Others, *against* DAVID JOBSON, Writer, in Dundee.

No. 83. An action sustained at the instance of a majority of private individuals, who had united themselves for religious purposes into a society called the Antiburger Associate Congregation of Dundee.

* * This case is No. 5. p. 14555. *voce* SOCIETY.

1774. *November 29.*

MAJOR RALPH DUNDAS *against* WILLIAM MURRAY of Touchadam, and Others.

No. 84.

A very remote substitute in a tailzie is entitled, at common law, to pursue a declarator of irritancy against the heir in possession.

* * This case is No. 48. p. 15430. *voce* TAILZIE.

1779. *February 4.*

GRAHAM *against* GRAHAM.

No. 85.

A party having made up a title by general service, as heir of tailzie to his brother, (the heir last infert,) brought a reduction of a tack and removing from the lands on various grounds. Objected by the defender, The pursuer has no title to carry on this action; the property of the lands under lease is still *in*