

deen ; but if willing to wait till a demand be made, the titulars must take delivery upon the ground.

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The charge accordingly was suspended, the COURT being of opinion, that the heritors were not bound to carry the teind-corn.

It is clear, that the corn must be delivered either where it grows or where the titular lives. If the latter, the heritor runs the risk of carriage, whether by sea or land. There appears no foundation for subjecting him to such a burden. *2dly*, A titularity is a subject of commerce, and the College of Aberdeen may acquire right to the teinds of a parish in Galloway. At that rate, heritors might be subjected to an intolerable burden. The chargers, it is true, confine their demand to the same carriage that the tenants perform to their landlords. But this voluntary concession cannot enter into the argument. If they have a right to any carriage, it must be to Aberdeen, where the titulars have their residence. The tenants are not bound ; and there is no law for subjecting the heritors. See TEINDS.

*Fol. Dic. v. 3. p. 306. Sel. Dec. No 144. p. 200.*

1781. December 20.

SIR CHARLES PRESTON *against* The EARL of DUNDONALD.

IN 1745, Sir George Preston feued out a small piece of ground to Mr Cochran of Culross, absolutely and irredeemably. In 1750 Mr Cochran, by bond, obliged himself and his heirs, 'that, whenever he or they should think fit to dispose of this subject, they should offer it to Sir George, or his heirs, for the sum of L. 307 : 13 : 4d Sterling.'

The estate of Culross, together with this pendicle, upon the demise of Mr Cochran, devolved to the Earl of Dundonald ; and his affairs having gone into disorder, Sir Charles Preston, son and heir of Sir George, commenced different processes for making the above mentioned obligation effectual. They concluded for having it declared, *1mo*, 'That the lands had been in non-entry since the death of Mr Cochran ; *2do*, That the Earl of Dundonald, as his representative, and his successors legal and voluntary, were obliged to make up titles thereto, so as to make this right of pre-emption effectual against singular successors, by inserting it in their charters and infestments ; and, *3tio*, That the Earl of Dundonald and his foresaids were obliged to subscribe a new deed *verbatim*, in terms of the obligation sued on, with the clauses proper for enabling the pursuer to register the same in the register of reversions, within sixty days from its date, according to the prescription of the statute 1617. c. 12.'

Against the two last conclusions the Earl.

No 22:

A superior granted a feu of ground absolutely and irredeemably, and the feu afterwards granted a bond obliging himself and his heirs, whenever he should think fit to dispose of the subject, to offer it to the superior at a stated price. Found, that the feu must insert the tenor of this back-bond in all the subsequent investitures of the ground, so as to make

No 22.  
the right of  
pre-emption  
effectual a-  
gainst singu-  
lar successors.

*Pleaded; imo,* This obligation tying down the vassal to sell his lands at a definite price, which in course of time must be greatly below their true value, in effect imports the clause *de non alienando sine consensu superioris*, which is prohibited by statute 20th George II cap. 50.

*Answered;* Clauses of pre-emption, by which the superior is entitled to the first offer of the lands when the vassal is inclined to dispose of them, do not fall under this enactment; Erskine, b. 2. tit. 5. § 28.

*Pleaded; 2do,* The superior is obliged to renew the investitures in the precise terms of the former one; Dict. of Dec. *voce* SUPERIOR and VASSAL.

*Answered;* This general rule suffers an exception in all cases where, since the last infestment, any agreement has taken place between the superior and vassal relative to the feu, which, in order to its completion, requires to be inserted in the infestment. In such cases, the superior is not obliged to renew the investiture, nor the vassal to accept a renewal, unless such agreement is made part thereof.

*Pleaded, 3tio,* Where parties have entered into a covenant complete *in suo genere*, the debtor is not bound to make the creditor's security broader than was originally stipulated; nor to convert a personal obligation into a real burden. A creditor in a personal bond, when the term of payment or performance arrives, may adjudge, or, by inhibition, he may prevent his debtor from voluntary alienations of his landed property. In cases of necessity, and where the obligation is not yet exigible, this Court allows adjudications in security; but there is no form known in law by which the creditor can insist that the debtor shall grant heritable security. The effect of such form would be, to change the nature and properties of contracts, which is far beyond the powers of any judicatory.

Nor can it give any force to the pursuer's plea, that the defender counter-acting his obligation by a voluntary sale, will subject himself in damages, and therefore can have no interest to oppose it. The bond in question possesses this quality in common with all obligations *ad factum præstandum*; yet it never was pretended, that a debtor in that sort of obligation, was bound to submit to his property being sequestered, or otherwise so limited, that he should always be in a capacity of specifically implementing his contract. In all such cases the rule is, '*Locum facti impræstabilis subit damnum et interesse.*' This too is the natural result of all *negative* obligations, where a person is taken bound to forbear a certain act. To give one noted instance; there are many entails where the prohibitions against selling the estate, although binding upon the heir, are unavailing against his onerous creditors. By contracting debt, for which the estate is evicted, or by selling it, the heir in such circumstances subjects himself to an action of damages at the suit of the substitutes. But was it ever heard, that these substitutes could demand, that the deed of entail should be completed in such a manner as to preclude the heir in possession from infringing the conditions on which he holds the estate?

Further, The insertion of this bond in the vassal's infeftments could neither prevent a voluntary nor a judicial sale of the estate. It is only by means of prohibitory, irritant, and resolute clauses, that the commerce of land can be restrained, in exclusion of onerous purchasers; Erskine, *loc. sup. cit.* Hence it was found, 4th January 1757, Sir William Stirling *contra* Johnston, No 70. p. 2342. that an obligation in a feu-charter to offer the lands to the superior at a certain price, although fortified by a claim irritating the right of a purchaser, was ineffectual against the vassal's singular successor.

*Answered*; Wherever a person grants a right, or subjects himself to a stipulation, there is an implied obligation to execute every legal form which is necessary to make such right complete and effectual *in suo genere*. Hence, lands being wadset under reversion, and the infeftment public, although there was no obligation to resign upon an order of redemption, the wadsetter was found obliged to subscribe a procuratory and resignation, this being implied as a necessary consequence of the grant of redemption; Duke of Lauderdale against Lord and Lady Yester, No 10. p. 6545. Upon the same principle, where a personal obligation has a reference to land, the subject matter of the contract naturally calls upon the debtor to complete it in such a manner as to render it effectual against the estate. Thus, where a proprietor of lands, after entering into a minute of sale, refuses to execute the deeds requisite for transferring the property; or where a husband in a marriage-contract, has become bound to secure his wife's jointure upon lands, and declines or has neglected to do so, action is sustained against him or his representatives for fulfilling the obligation. The intention of the contracting parties in this case, was surely not to create a claim of damages against the feuer or his heirs contravening the obligation, but to give the seller an opportunity of repurchasing his property whenever Mr Cochrane or his representatives inclined to dispose of it. Had this meaning of the parties been properly carried into execution, this obligation would have been formed in such a way as would have rendered it effectual against the estate. The defender, therefore, ought to be obliged to follow out what was really in the view of the parties, by concurring in the measures here insisted for.

In entails, clauses irritant and resolute are necessary, by statute, to enable the substitutes to make up titles to the estate without representing the person contravening; but, at common law, every lawful condition may be inserted by a superior in infeftments granted to his vassal; and, without any such clauses, will be effectual against all the world. In the case quoted, the superior did not, in the manner here adopted, insist against the vassal for perfecting his right of pre-emption; but, in virtue of the obligation in the feu-charter, but which was not to be found in the infeftment, refused to admit the vassal's singular successor.

*Pleaded, 4to*, This obligation can receive no support from the statute 1617. About that period, loans of money were entered into in the form of wadsets in this manner; the creditor got an absolute conveyance to the property of his

No 22. debtor, containing, at the same time, a clause enabling him to call for his money; and the debtor, by a bond apart, was entitled to redeem upon payment of the money advanced. These bonds of reversion, of their nature personal, were made real, by statute 1469, cap. 27.; and the legislature, for the security of third parties, required their publication in a record, by the statute 1617. But the right here granted has no sort of affinity to these reversions. By it a person, not proprietor, stipulates, in a particular event, and which may never happen, the first offer in the sale of a subject. The pursuer has no option to redeem; neither is it in the power of the defender, as in the case of a wadsetter, to call for his money.

At any rate, a debtor is not obliged to restore his creditor against the effects of his own negligence. An acceptor of a bill, in order to entitle the holder to summary diligence, cannot be compelled, after the six months, to renew the document of debt. If the pursuer has allowed his right of pre-emption to lose its privileges against singular successors, he has himself to blame. This alternative too, equally with the former, would be of no avail against onerous purchasers.

*Answered*; It surely will not deprive a former proprietor of the benefit of the statute 1469, that his right of reversion is not absolute and unconditional, but depending on a certain event. If then, the obligation sued on is within the sanction of the statute, the demand here made is not only supported by the principles laid down in the third branch of the argument, but is likewise justified by numberless precedents in this Court. Thus, before the statute 1693, cap. 15. allowing registrations after the death of the debtor, actions of registration were in daily use; and, at present, where solemn deeds, as instruments of sasine, have been lost, action is always sustained against the granters for a renewal of them, in the precise terms of those amissing.

THE LORDS had no doubt of the irrelevancy of the two first defences. By their first interlocutor, they sustained the two last; but upon advising a reclaiming petition, with answers, they found, 'That the tenor of the back-bond in question ought to be inserted in all the subsequent titles and investitures of this piece of ground.'

N. B. THE LORDS were also of opinion, that the third conclusion was well founded; but the decision in favour of the pursuer, on the second, made a decerniture on that ground unnecessary.

Lord Ordinary, *Alva*. Act. *Blair, Maconochie*. Alt. *Rae*. Clerk, *Orme*.  
C. *Fol. Dic. v. 3. p. 305. Fac. Col. No 15. p. 29.*

\* \* This case having been appealed, was remitted to the Court of Session, where, in winter session 1803-4, it had not been finally decided. See APPENDIX.