

## S E C T. H.

Infestment of Annualrent granted by one not infest, what it carries.

1631. March 8. L. CLACKMANNAN against L. ALLARDICE.

IN a poiding of the ground for an annualrent, the defender *alleging*, that he was infest before the pursuer's infestment; and the pursuer *replying*, that the defender's infestment was usury, and so null; because it being an infestment redeemable, the defender had set a back-tack of his lands to his debtors, the duty whereof being certain victual, yearly to be paid, and failzing thereof, the prices liquidated in the said back-tack, which extended to more than ten *per cent*, so that the most he could crave to be preferred to, was only ten *per cent*; that the rest of the profits of the lands might pertain to other creditors of their said common debtor; and the excipient *duplicy*, that this back-tack was renounced by his debtor, whereby he had right, by virtue of his infestment, to the whole duties of the land, which he might labour, either by himself, or set to tenants, as he pleased, and was not holden to take himself to ten for ilk hundred, and to make count of any overplus, to any other creditor; for any party having interest might redeem the lands from him, if they found that he had advantage by this wadset; and the pursuer *answering*, That albeit the common debtor had renounced the back-tack, yet being done after the pursuer's infestment, the same ought not to be respected; for nothing could be done after the pursuer's right, by the common debtor, being *non solvendo*, which could derogate to his right, and give advantage to the excipient, and to make him have advantage in the whole duties of the lands, beyond his ordinary profits, and thereby exclude the pursuer from all profit, and to derogate to the force of his infestment; for if this were lawful for him to do, it were also lawful for him to have discharged to the excipient the reversion, and so to make the lands irredeemable for ever, which were absurd to think he could do after his right; notwithstanding whereof the exception and duply was sustained; for the LORDS found, that the back-tack being renounced, albeit after the pursuer's right, yet it was sufficient to give the defender right to the whole profits of the lands, and that none infest after him could claim any thing thereof; and that he ought not to take himself to ten *per cent*, that the rest of the creditors might obtain the rest; for the back-tack being renounced *quocunque tempore*, the security was found lawful *in toto*, and not to be usury, which appears hard enough.

## No 17.

A person who had wadset his lands, and taken a back-tack for a rent equivalent to the interest of the wadset sum, afterwards granted an infestment of annualrent out of the same lands. This annualrent right was found not to imply a conveyance of the back-tack, and therefore a renunciation of the back-tack in favour of the wadsetter was found effectual, though granted after the infestment of annualrent.

No 17.

*March 18.—*

IN a pointing of the ground for an annualrent, wherein Clackmannan was infeft by Balnamoon, the lands out of which the same pointing was craved being wadset before the pursuer's right of his annualrent to this defender, under reversion; and the wadsetter having set a back-tack the time of the wadset, to the granter, for payment of a yearly tack-duty of victual; therefore the said defender in respect of the wadset infeftment *alleged*, That that ground could not be pointed for the pursuer's annualrent, disposed as said is, after interment of wadset. And the pursuer *replying*, That the said wadset was affected with a back-tack, so that he could not stop the pointing of the ground, but he had his action for the duty of the back-tack, either against the heritor, who received the back-tack, or otherwise might seek the ground therefor, as he best might of law; the defender *answered*, That the granter of the wadset, to whom the back-tack was set, had renounced the same. And the pursuer *replying*, That the renunciation being after the right of the annualrent was acquired by the pursuer, cannot be respected against him, he being a just and lawful creditor before that renunciation; which renunciation being made of the back-tack, tended to prejudice the pursuer of his annualrent (if it should be maintained,) and established the property of the land in the defender's person; whereas if it were yet subsisting unrenounced, as it ought to be found, the most that the excipient could claim, were the annualrent of his money, wherefore the wadset was granted, and not the back-tack duty, which is more than ten for the hundred, and so is against the act 251st Parliament 1597, and is usurious; so that if the back-tack were standing, the pursuer would get his annualrent, and the defender also the true annualrent for his money; whereas the renunciation tends to prejudice all the creditors, and to give the whole profits of the land to the excipient, which is unreasonable. THE LORDS found the exception and duply relevant, notwithstanding of the replies; for the LORDS found, that the back-tack might be effectually renounced to the wadsetter, which was found might be lawfully received by the wadsetter, albeit it was done after the pursuer's infeftment of annualrent; for after the wadset, the heritor, granter of the wadset, being thereby denuded of his heritable right, there remained no right in his person, except the right of the reversion, so that he could not effectually grant infeftment thereafter, of any annualrent out of that land, he being denuded, as said is, of the heritable right; and it was found, that he might give a renunciation, and the other might lawfully take the same after the infeftment of annualrent, he who renounced not being then inhibited, nor bankrupt; and the back-tack being so renounced, the party could not allege the right to be usurious.

*Act. Advocatus.**Alt. Stuart & Nairn.**Clerk, Hay.**Fol. Dic. v. 1. p. 423. Durie, p. 578. & 583.*