

No 88.

objected against the wadsetter, That his wadset was usurious in terms of the act 25th, Parliament 1597. *Answered*, The back tack was discharged, the only branch of the transaction that was usurious; and as the common debtor neither did, nor could now make the objection, it is not competent to any other by the said act. *Replied*, Supposing the back-tack still subsisting, it would be competent to the annualrenter to object usury to his debtor's right; and this privilege could not be taken from him by his debtor's voluntary discharging the back-tack. *Duplied*, There is nothing in law to bar a common debtor to pass from any of his privileges, even after he has contracted debts real or personal, though these privileges, if subsisting, might be beneficial to creditors. THE LORDS found, that the back tack being renounced, though after the infestment upon the annualrent right, the wadsetter had thereby right to the whole profits of the land, the objection of usury being thereby sopited.

Fol. Dic. v. 1. p. 559. Durie.

* * * This case is No 17. p. 6317, *voce* IMPLIED ASSIGNATION.

1631. December 10.

BENNET against BENNET.

No 89.

A reverser used an order of redemption against the wadsetter, and afterwards assigned the reversion and order. Found, that in this case, every personal exception competent against the reverser was competent against the assignee.

JOHN TURNBUL of Barnhill having wadset to Raguel Bennet some lands under reversion, and within the space of a year, or less, after the date of this reversion, having impignorated to the said Raguel another piece of land, for a sum lent to the said John Turnbull, conform to this bond, granted thereon to the said Raguel; in which bond, the said John Turnbull was obliged not to use any order of redemption of the prior wadset land, by virtue of the said reversion thereof, except he also redeemed the other land, impignorated, as said is, and that no redemption or order should be lawful, except both the lands were redeemed *simul*, and both the sums consigned;—the said John Turnbull uses an order for redeeming of the said first land, conform to the reversion granted thereon; and after the using of the order diverse years, he makes Mr William Bennet assignee to the said order and reversion, and disposes his right to him; whereupon the assignee intending declarator of redemption upon that order, the defender compearing, proponed his defence upon the said bond, *alleging* the order foresaid not to be lawful, in respect of the foresaid provision, contained in the said bond, which he alleged, as it would have been competent to have excluded the cedent, who granted the bond with the said provision, if he were insisting on that order, so it behoved to meet the assignee made to that same order;—and the pursuer *replying*, That this was a paction, *extra corpus reversionis*, done long after the reversion, and so cannot be reputed a part thereof, and which could not have been obruded against the granter of the bond, who, in the using of the order of redemption, was obliged to nothing, but to that which was within the body of his reversion, and which he has punctual-

ly fulfilled; far less can it be opposed against the pursuer, who is assignee, and singular successor, seeing also his author is responsal to fulfil his bond; the LORDS found, seeing the assignee who pursued, insisted to have declarator upon that order, which was used, not by himself, but by his author, who granted the bond excepted on; that therefore the same which might have been proponed against the user of the order, was competent against the assignee thereto, for the order being used by the cedent, the excipient quarrelled the order, that that order could not be sustained, whoever was the person user thereof; in which case the pursuer insisting on that order, he is not to be reputed a singular successor; whereas if he, as assignee to the reversion, had used an order at his own instance, *eo casu* the bond would have met him; therefore the LORDS found, that before any sentence of declarator should be pronounced upon that order, that the redeemer by virtue thereof should consign in the clerks hands, to be given up to the defender, that sum contained in the said last bond; but they sustained the order as lawful, and would not put the party to use any new order of redemption, the sum being consigned.

In this same process of Bennet against Bennet, the defender proponing another exception on another bond, by which, he to whom the reversion is granted, after the reversion, granted him to have received 280 pounds from the defender, and obliged him to repay the same at Whitsunday 1618, otherways he renounces the reversion, and the said sum not being paid, and the order used by him before the same Whitsunday; therefore, as this would have excluded the user of the order, so should it exclude the pursuer, insisting upon that order; likeas he *alleged*, That by the contract of wadset libelled, it was provided, that no redemption should be used, while he was refunded of all his costs, skaiths, and expenses, debursed by him, in Turnbull's default, and he had debursed the sum of 280 pounds, *ergo* the same should yet at least be repaid; THE LORDS found, that seeing the renunciation of the reversion was not registered, conform to the act of Parliament, that the allegiance thereupon could not be opposed against the pursuer, who is a singular successor, albeit it might have militated against the maker of the bond; and also repelled the other allegiance, seeing the sum of the bond being borrowed money, could not come under the clause of the contract, anent the expenses, which was of another nature; and also found, that it could not be proponed against this assignee.

Aet. Mowat.

Alt. Taylor.

Clerk, Gibson.

Fol. Dic. v. 1. p. 559. Durie, p. 606.

1676. February 12.

CRUICKSHANKS against WATT.

THE LORDS found, that a disposition being made after inhibition, but before the registration of the same, may be reduced *ex capite inhibitionis*, seeing the

No 90.