

1792. May 18.

STEWART *against* HOME.

No 54.

STEWART of Argaty, by deed of entail, disposed his lands to his brother George and a series of substitutes, and appointed the following condition to be engrossed in the indentments, "That the said George Stewart shall be burdened with, and obliged to pay, the whole just and lawful debts owing by me at my death, &c. and certain provisions." George succeeded and made up titles under this deed, and having died, his widow claiming a terce out of the lands, it was *objected*, That the estate being settled on her husband under the burden of the entailor's debts and provisions, these must, *pro tanto*, diminish the terce. *Answered*, Where lands are disposed as burdened with certain debts, these are real liens; but where the disponee or heir is only taken bound to pay, as in the present case, they remain personal. THE LORDS found, That the burdens were personal on the heir, and not real on the lands.

Fol. Dic. v. 2. p. 51. Fac. Col

* * * This case is No 11. p. 4649, *voce* FOREIGNER.

SECT. V.

Clauses burdening Conveyances.

1661. December 20. HUGH MONTGOMERY *against* LORD KIRKCUDBRIGHT.

No 55.
A party was barred from pursuing a process of ejection, although the defender had no real right, but only a personal obligation of the pursuer to grant to the defender a real right.

HUGH MONTGOMERY of Craishaw, and — M'Clellan his spouse, pursue the Lady Kirkcudbright, for ejecting them out of the five pound land of Overlaw, and craved re-possession, and payment of the mails and duties intromitted with. The defender *alleged* no process, because it is not alleged that the pursuers were in natural possession; for only the natural possessors can have decreet of ejection, because, if there be no deed of violence libelled, but only intromitting with the mails and duties, ejection is not competent, nor any violent profits, but only action for mails and duties against tenants or intromitters. The pursuers *answered*, That the ejection may be competent though the pursuer was not in natural possession, when a tenant is ejected, and a stranger without interest enters in the natural possession; albeit the tenants should collude or neglect, the heritor having but civil possession, by uplifting of mails and duties, needs not warn the ejector, but may crave to be entered to the natural

possession and the violent profits. The defender *alleged*, the case is not here so, unless it were *alleged* the tenants were cast out; but the defender may defend the right to the mails and duties upon a better right than the pursuer. The pursuer *answered*, That he declared, he craved only re-possession to the ordinary profits. THE LORDS ordained the parties to dispute their rights to the mails and duties, and possession, as in a double pointing, and as if the duties were yet in the tenants hands. The defender *alleged* further, that she hath right to the mails and duties, because she offered her to prove, that the pursuer's father-in-law granted a back-bond, obliging himself and his heirs, to re-dispense these lands to umquhile Robert Lord Kirkcudbright, from whom the said lands were appraised, to which appraising the defender hath right, and thereby has right to the back-bond, and that the defender's wife represents her father as heir, or at least as lucrative successor after the back-bond; and so as he might thereupon have debarred the grant of the back-bond, so might the pursuer as representing him. The pursuer *alleged*, 1st, *Non relevat*, because the said back-bond is but a personal obligation, and the defender had thereupon no real right but only to the superiority; because, by discharge of the feuduty produced, he acknowledged the pursuer to be proprietor. 2dly, If any such backbond was (no way granting the same,) he offered him to prove that it was conditional, so soon as the said umquhile Robert Lord Kirkcudbright should require: *Ita est*, he has never required. The defender *alleged*, he had done the equivalent, because in a double pointing formerly pursued by the tenants, he had craved preference; and the pursuer *alleged*, upon the condition of requisition in the back-bond, and also that by the back-bond the granter and his wife's liferent was preserved; whereupon the defender was excluded.

THE LORDS found the allegiance of the said double pointing was not equivalent to the requisition; and therefore found the replies relevant, and assigned a day to the defender to produce the back-bond, and to the pursuer to prove the quality thereof; and so found the reply not to acknowledge the defence, but reserve it to either party to allege *contra producenda*, and found the personal obligation sufficient to debar the pursuer, albeit the defender had no other real right, seeing thereby she was obliged to grant a real right to the defender.

Stair, v. 1. p. 72.

1664. June 25.

CAUHAME against ADAMSON.

THOMAS CAUHAME having appraised a tenement in Dunbar, from Joseph Johnston, pursues James Adamson to remove therefrom; who *alleged* absolvitor, because this appraiser could be in no better case than Johnston, from whom he appraised, whose right is affected with this provision, that he should pay L. 6000

No 55.

No 56.