

1617. February. 3.

GORDON *against* GORDON.

No 196.

IN an action betwixt Agnes Gordon relict of John Grierson of Balgaitone, and Elizabeth Gordon, the LORDS found that a woman heretrix might be subject to a clause of requisition in a contract of wadset, made *stante matrimonio*.

*Fol. Dic. v. 1. p. 401. Kerse, MS. fol. 65.*

1672. November 14.

ALEXANDER LOCKHART *against* LADY BUTE.

No 197.

A wife subscribing a wadset with her husband, of her liferent lands, where there was a back-bond to her, and she obliged to pay the back-tack duty, that obligation was found effectual.

THE Sheriff of Bute having granted a wadset of certain lands to Alexander Lockhart, there is in the wadset a back-tack in favour of the Sheriff and his Lady, the longest liver of them two, and both of them are bound to pay the back-tack duty; whereupon he pursues the Lady for the back-tack duties, who *alleged* absolvitor, because her obligation being granted *stante matrimonio*, was null in itself. It was *answered*, That the privilege of wives not to be liable to their obligations, while clad with a husband, hath many exceptions; for if she hath right to any lands in fee, she may take wadsets thereupon, and may be obliged both for the annualrent, or back-tack duty, and for the principal sum, which will be effectual; and if she be a liferenter, she may affect her liferent; or if she consent with her husband to wadset her liferent-lands, and accept a back-tack, she may effectually oblige herself for the back-tack duty; yea though she had no right before accepting of the back-tack, which gives her a real right, and makes her obligation effectual to pay the back-tack duty. It was *replied*, That albeit a wife by accepting of a back-tack, or being obliged therein, may be liable, if after her husband's death she homologate her obligation by possession; but if she do not that, her obligation is void, otherways all wives may be ruined, by being induced by their husbands to become obliged for a back-tack duty, far above the value of the estate; but this Lady never possessed, and is content to renounce all right of liferent she hath.

THE LORDS found, That if the Lady had a right of liferent when she subscribed the wadset, her obligation in the back-tack was not void, as being a wife, whether she possessed or not, albeit she might have abstained, and reduced upon any other ground of lesion.

It was further *alleged*, That the pursuer had declared the back-tack void upon the clause irritant; and therefore seeing the Lady possessed not, nor could possess, the wadsetter having annulled her title to possession, she could not be liable. It was *answered*, That the clause irritant bore expressly, that it was in the wadsetter's option, even after committing of the clause, either to call for his annualrents by the back-tack, or enter in possession; and albeit he had declared the irritancy of the back-tack, he might renounce that which was in his own favour, and return to the said back-tack.

THE LORDS found, That the Lady not having possessed, the wadsetter could not return to the back-tack as to her, for the rent after the declarator.

*Fol. Dic. v. 1. p. 401. Stair, v. 2. p. 116.*

Gosford reports the same case :

No 197.

There being a wadset of the lands of Foord granted by the Lady and her deceased husband, to the said Alexander, with a back-tack set to the longest liver, for payment of the annualrent of 13,000 merks, for which the wadset was redeemable, there was a pursuit at the said Alexander's instance, against the Lady for payment of the back-tack duties, since her husband's decease, and in time coming. It was *alleged* for the Lady first, she did subscribe the said wadset and obligation to pay the back-tack duty *stante matrimonio*, which in law could not oblige her unless she homologated the same after the dissolution of the marriage, whereas she never made use of her right of liferent, or entered to the possession of the wadset lands. It was *replied*, that the defence ought to be repelled, because albeit wives cannot be obliged by any bond subscribed during marriage, for payment of a sum of money, or contract debt, yet in this case where there being a right of wadset made by her, with a back-tack whereby she might possess the lands, and so intromit with more than would pay the back-tack duty, the case is far different from subscribing of bonds, or debt, against which by the civil law, *per senatus consultum Macedonianum*, and by the law and practise of this kingdom, wives are secured.

THE LORDS did repel the defence, especially upon this ground, that the Lady by her contract of marriage, was provided to the wadset lands, and had subscribed the wadset in place whereof she had accepted of the back-tack, whereas if a charter or any real right had been purchased by a husband to himself and his wife, in liferent for payment of a yearly duty, which she had never acknowledged after dissolution of the marriage, she could not have been liable for payment of the said duties. *2do*, It was *alleged*, that the pursuer having pursued and obtained declarator of expiration of the back-tack upon the clause irritant therein contained, whereby he had undoubted right to the whole mails and duties, he could never pursue the Lady, but for such years as she had intromitted with. It was *replied*, that the obtaining of a declarator did not prejudice him of his right to pursue for bygones, seeing he might make use either of the back-tack or declarator as he pleased, the declarator only being *ad majorem securitatem*.

THE LORDS did sustain the allegiance, and found that these two were inconsistent, seeing the declarator did extinguish the back-tack, and thereafter the Lady could have no right to intromit, but the pursuer only by virtue of his wadset, as if it had contained no back-tack, and therefore they assolizied the Lady from all bygones, unless they could prove that she intromitted.

Gosford, MS. p. 274. No. 518.