

No 49.

lands, in respect that the principal sum, with the whole annualrents, were re-funded.

Gosford, MS. p. 280.

* * * A similar decision was pronounced, 19th February 1674, *Borthwick* against Pringle, No 51. p. 13473.

1673. February 7. Dame ELIZABETH BURNET *against* FRAZER.

No 50.

A tack of lands was let, bearing a reversion upon payment of a certain sum. The tacksman assigned to his wife for her life-ent use. The sum was paid for redemption, and a translation taken from the original tacksman. The tack found evacuated *in toto*.

BURNET of Leys having granted a tack of certain lands to James Burnet his son, bearing a reversion upon payment of 10,000 merks, Tilliewhillie obtains assignation to the tack, and thereby possesses, and his Lady having renounced her life-ent lands at his desire, he gave her a translation to the tack, during her life, and now she, and Kinnever her second husband, pursue for mails and duties. Compearance is made for Sir Alexander Frazer, who craves preference, because the lands contained in the tack being wadsetted to Burnet of Leys by the Earl of Marischal, Sir Alexander hath acquired the right of reversion from the Earl of Marischal, and the property of the land, and for clearing the incumbrance of this tack, he made payment to Tilliewhillie, as assignee, of the whole sum of 10,000 merks, and took a translation from him, so that this being in effect a redemption, he was not obliged to know the translation made by the husband to the wife, being a latent deed betwixt them; for if he had used an order, and paid the wadsetter, his payment being *bona fide*, he could never be distressed by any latent right which he neither did, nor could know. *2do*, Although he had taken translation without any right of reversion, yet being for an onerous cause, he ought to be preferred to an anterior translation by the husband to his wife, which is latent and fraudulent, neither intimated nor clad with possession, nor so much as registered; and albeit the narrative thereof bear it to be in remuneration, yet such writs betwixt husband and wife prove not; unless they be otherwise instructed. *3tio*, It cannot be denied, that Tilliewhillie, who made double translations, was *in pessimo dolo*; and if need be, it is offered to be proved, that the Lady was *particeps fraudis*, because that she knew that her husband was receiving a great sum for a translation, whereas she had a private translation; and she not only concealed her right, but herself received a part of the sums, and wrote a letter to cause her husband get payment of some by-gones of the tack before the translation. It was *answered* to the *first*, That albeit Sir Alexander had right to the reversion from the Earl of Marischal, yet thereby he could not redeem this tack, but only Burnet of Leys to whom the reversion was granted. And to the *second*, The Lady's right by translation being valid and wanting no solemnity in law, it cannot be evacuated by any posterior deed of the husband; for albeit sasines must be registered, no law requires tacks to be registered; and as to possession, the

husband's possession in all cases it counted the wife's possession; and if this translation had been in the Lady's contract of marriage, it would have been beyond all question; and it is in a like case, being for a remuneration of the lands contained in the contract of marriage; neither can it be pretended, that latency alone can infer fraud, for so resignations *ad remanentiam*, before the late act of Parliament, were latent betwixt the superior and the vassal, and could be known by no record; and albeit latency amongst conjunct persons may infer fraud, that can only be in gratuitous deeds, without causes onerous; but where the cause is onerous, it purges all presumption and suspicion of fraud, as in this case; and as to the Lady's accession to her husband's fraud, her silence or service to her husband in receiving his money, cannot import it, it being *ex reverentia maritali*; for the husband having no other means remaining but this tack, if she should have discovered her right, it would have stopped her husband's payment, and distressed him upon the warrandice, and put her to necessity to quit her right, to save his imprisonment, and the starving of them both; and it had been much more proper for Sir Alexander to have enquired for the Lady's right, seeing her husband had no more but this tack. It was *replied*, That if acquirers for an onerous cause be obliged to obtain the wife's consent, it will make them so necessary in all their husband's actions, that they can do nothing without them; for who can know when a man sells land, whether he hath given a tack of the same land to his wife; and albeit custom hath allowed the husband's possession to be the wife's possession as to infeftments, yet never as to tacks.

THE LORDS found, That if Sir Alexander had the right of reversion, and might redeem the tack, that he having paid the sum, and taken translation, it was a voluntary redemption, and thereby he was secure, as paying *boda fide*, not being obliged to know the Lady's translation; but if he could not redeem, they found, that the latency of the tack was not sufficient to annul it as fraudulent betwixt conjunct persons, unless it were without a cause onerous, and that the cause onerous behoved to be proved otherways than by the narrative of the writ; and as to the Lady's accession to her husband's fraud, she was ordained to be examined thereupon, *ex officio*.

Fol. Dic. v. 2. p. 324. Stair, v. 2. p. 168.

* * * Gosford reports this case :

In a pursuit for mails and duties at the instance of the said Lady against the Tenants of the lands of Colliscire, as having right by translation from the husband, Sir Robert Douglas of Tillivhilly, who was assignee constituted to a tack of the said lands, granted by James Burnet, who was tacksman to his father the Laird of Leys, Burnet, comparance was made for Sir Alexander Frazer, who *alleged*, That he ought to be preferred to the mails and duties, be-

No 50.

cause he had right to the said tack from the pursuer's husband, and, by virtue thereof, had been in possession by the space of two years. It was *replied*, That the pursuer's was prior to the defender's right, and being granted in remuneration of her conjunct fee, which she had renounced at that time in favour of her husband's creditors, which was a most onerous cause, her husband's possession was her possession, and so in respect both of the priority and possession ought to be preferred; seeing she was assignee to a tack which was a real right, and such as may be conveyed by assignation, and needs no other intimation or solemnity, as hath been sustained in the case of wives who get a tack of land in remuneration of their liferents renounced, which were provided to them by their contract of marriage, which being prior to any right or disposition made by them thereafter, are ever sustained in favour of the wives, upon that ground of law, that the husband's possession is the wife's possession; so that there is no remedy left to any who contracts or acquires from the husband, but to try how she is provided by her contract of marriage; and, if she hath renounced, to see what she hath gotten in remuneration. It was *duplied* for the defender, That the pursuer's husband being only an assignee to a tack, and by virtue thereof in possession, any translation made to his wife was but a private and a latent deed, by a translation which might have been intimated to Sir Alexander when she knew he entered into a transaction with her husband, and from whom she received a part of the price given for the said tack; so that if such private conveyances were sustained, there could be no commerce or securities betwixt parties; and it would open a door to all husbands who were in a desperate and low condition, having only personal rights in their person by assignation to tacks or liferents of other men's lands, or to reversions, by making private transactions thereof, and thereafter disposing their rights for a just price to another, to circumvene and cheat them without all remedy of law, it being impossible to know such deeds, they not being to be found in any public register, nor any decret or intimation following thereupon. THE LORDS, after trial of the progress of Sir Robert Douglas's rights, finding, that these lands were a part of the barony of Strachan, which pertained heritably and irredeemably to the Earl Marischal, who had wadset the same to the Laird of Leys, Burnet, under reversion, and that the said Leys Burnet had granted a tack to James, his son, of the land controverted, redeemable by payment of the sum of 6000 merks, as a part of the sum lent upon the wadset, and that Sir Robert Douglas had got an assignation to the said tack from James, and transferred the same to his Lady, who thereupon founded her right after her husband's decease; and finding likewise, that Sir Alexander Frazer had purchased the right of the said lands from the Earl of Marischal, and so came in his place, being assigned to the reversion of the wadset granted to Leys; they found, That Sir Alexander being heritor, and come in place of the Earl of Marischal, as he might have used an order of redemption against Sir Robert Douglas and his author, and forced them, upon pay-

ment, to renounce their tack, so any private deed done by Sir Robert to his Lady, could not prejudice him, the granters of the wadset not being obliged to take notice of any right flowing from the wadsetter, unless it be intimated; so Sir Alexander might lawfully transact with Sir Robert, who was in public possession, and could not be prejudged by any private deed of his, albeit granted to his wife in remuneration. But if the case had been decided according to the dispute upon several rights made by that tacksman only by assignations, it had been of greater difficulty. Yet it seems Sir Robert's right being only personal, and his Lady's translation from him as assignee, that it ought to have been decided, as it would have been, in assignations to bonds and other rights, which necessarily require intimation or possession, such as may be known to any who contracts with their husbands, who, albeit they got posterior rights, yet are always preferred, if it be in the power of their wives to make that right known, either by intimation, or by obtaining a decret before any Judge competent for payment of the mails and duties to them after their husband's decease, otherways, in law, such deeds are presumed fraudulent, and ought not to be sustained, being far different where a husband being heritor of several lands, and having provided some of them by contract of marriage to his wife in liferent, gives her a private infestment in others upon her renunciation of her first right, or grants her a liferent tack, which is reputed to be clad with possession by her husband's possession; yet this last case is very disputable, where her right is a naked tack.

No 50.

Gosford, MS. p. 309.

1674. February 19. LORD BORTHWICK *against* PRINGLE.

In *anno* 1593, the Lord Borthwick gave a wadset of Cumrig, redeemable for 700 merks. This Lord Borthwick used an order of redemption *in anno* 1665, and raised a declarator *in anno* 1660, and now insists. The defender *alleged*, That the order was null, this Lord Borthwick not being heir to the granter of the wadset, but assignee; and not having produced his assignation to the reversion, albeit the instrument of consignation bear that it was required, and the consignation was only simulate, my Lord having taken up the sums, and never insisted till now, so that the defender was *in bona fide* to continue in possession, and to enjoy the fruits; and though the order could be sustained now, when the assignation to the reversion is produced, the defender cannot be accountable for the mails and duties. It was *replied*, That the order is valid, and that the not production of the assignation cannot be respected, because the defender acknowledged the pursuer's right, by offering a charter to him as superior, to be received in this wadset. *2do*, The defender could pretend to be no more *in bona fide* after the assignation to the reversion was judicially

No 51.

An order of redemption used by an assignee to the reversion, was found defective, the assignation not being produced; but, upon subsequent production, the order was found to take effect.