

1677. January 16. ROBERT HALYBURTON against WILLIAM CUNNINGHAM.

No 34.
An improper
wadsetter
may remove
tenants.

THE said Robert Halyburton having an improper wadset of a land in Edinburgh from William Cunningham, to whom he granted a back-bond for payment of the annualrent of his principal sum contained in the wadsett, and the said William having possessed many years without payment of the back-bond duty, thereafter he did grant an eik to the reversion for the sum of 779 merks as the annualrent thereof, to be paid the time of the redemption, with the principal sum contained in the wadset and the eik; whereupon he having pursued Mr Patrick Cunningham, the son of the wadsetter, who had a sub-tack of the said tenement by a comprising, after which the wadsetter could have no right but to the single tack-duty of the principal sum lent upon the wadset, and the wadsetter ought to have recourse against the common debtor, who was only liable.—it was *replied*, That the wadsetter had good right to pursue the present tenant for all the bygone back-tack duties, because albiet he was not in the case of an annualrenter, who might poind his ground against the present possessor for all bygone annualrents, yet he had a good personal action against the present possessor for the whole bygone tack duties, as was found 8th July 1626, Turnbull against Scott, *voce* TACK. observed by Durie. THE LORDS did find, that a sub-tacksman, who was possessed by virtue of a sub-tack from the first granter of the wadset, was liable to the wadsetters for all bygone mails and duties prior to a comprising of that tenement, but that after comprising led, the comprising had right to the superplus mails and duties exceeding the back-tack duties, which was only due to the wadsetter yearly. There was likewise a conclusion in this summons, that the sub-tacksman should either remove or find caution for the bygone mails and duties at the next term; against which it was *alleged*, That it could not be sustained at the instance of an improper wadsetter, but only at the instance of an absolute proprietor, who stood infeft by disposition or comprising. It was *answered* for the defender, being but a sub-tacksman, by a right granted from the tack by the wadsetter, he is obliged to remove or find caution. It was *replied*, That there was a difference betwixt burgh-lands, and lands set for labouring in the country. THE LORDS did find, that there was no difference in our law betwixt lands in burgh, and landwart, and therefore decerned the sub-tacksman to find caution, or remove at the next term.

Fol. Dic. v. 2. p. 334. Gosford MS. p. 618. Nos 940. & 941.

* * Stair reports this case.

ROBERT HALYBURTON being infeft in certain tenements in Edinburgh, with a back-tack, in the reversion whereof it is declared, that no redemption should be till all the back-tack duties were payed or consigned; thereafter William Cunningham deduced an apprising against the granter of the wadset, and

No 34.

therein is infeft; and thereafter the granter of the wadset gives an eik for several back-tack duties, bearing annualrents therefore; the granter of the wadset continued possessor of the tenement, and after him his son. The wadsetter pursues the son, as possessor, for payment of the tack-duties, and for the annualrents of the eik. The appriser appears, and *alleges*, That the eik being after his infeftment, cannot, in his prejudice, make the back-tack duty bear annualrent; *2do*, His apprising gives him a right, not only to the reversion of this wadset, but to the benefit of the back-tack, and thereby to the superplus mails and duties above the back-tack duty; and, though the wadsetter be preferable for the current back-tack duties, yet he cannot exhaust the superplus with bygone back-tack duties, which, though they affect the reversion, that the appriser cannot redeem till they be payed, as being conditions in the reversion, yet they are not *debita fundi*.

THE LORDS found, That as to the duties remaining unpaid in the possessors hands, the wadsetter is preferable for the back tack duty for all years unpaid, and that the appriser has right to the superplus, and that the eik hath no effect in prejudice of the appriser, as to the annualrents constituted thereby, but that the wadsetter must insist for the bygone back-tack duties in the eik that are due by the possessor defender; but that for any prior years the wadsetter could not affect the superplus in prejudice of the appriser, which would remain only as a condition and burden of the redemption.

Stair, v. 2. p. 495.

See Dirleton's report of this case, *vocè* TACK.

No 35.

1687. February. SIR PETER FRASER *against* STRACHAN.

In a process of removing, at the instance of an heritor against a wadsetter, as not being infeft, it was *alleged* for the defender, That the pursuer's right is acquired with the burden of the defender's wadset, which the LORDS sustained.

Harcarse, (REMOVING.) No 343. p. 241.

. Sir P. Home reports this case :

1686. December.—SIR PETER FRASER, as being infeft in the barony of Cabperso, which was a part of the Earl of Marishall's estate, upon a disposition from the apprisers, having obtained a decret of removing before the Sheriff of Kincardine, against Strachan of Glendie, for removing from the lands of Glendie, which are a part of the said barony; whereupon being charged, he suspended, upon this reason, That the decret was null, and that the suspender could not be obliged to remove, because the pursuer's disposition from the apprisers did bear an express reservation of the suspender's right. *Answered*, That