

1696. July 16. LORD BARGENY against FERGUSON of Kilkerran.

CROGERIE reported a case between the Lord Bargeny and Ferguson of Kilkerran. My Lord refused to accept the money owing, because, by the reversion granted by his father to Kilkerran, it was expressly provided, it should be only redeemable 'with his own proper money,' and this was borrowed money; and being a favour he gave him, it must be taken precisely in the terms as it stands, and as it was given. *Alleged*, By the conception of the writ, there appears no formal design to bind him up in such terms; for that gloss would plainly render the favour elusory; and money, when borrowed, becomes the receiver's; *in omni mutuo inest alienatio, et rei transfert dominium*, and so becoming *dominus pecuniæ mutuatae*, the payment was still made with his own money. THE LORDS found no specialty or restriction laid on the debtor in this case, but that he might redeem from my Lord with any money, *cui nihil deerat cum suum recepit*, unless it had been more clearly cautioned and provided for.

Fountainhall, v. 1. p. 729.

No 58.

1697. December 29.

LIVINGSTON of Westquarter against The EARL of CALANDER.

LAUDERDALE reported James Livingston of Westquarter against the Earl of Calander. It was a declarator of an order of redemption of a wadset made by his father to the Earl's predecessor. *Alleged*, The instrument of premonition and consignation was null, for it did not bear six knocks given, nor to whom the copy was delivered; *2do*, It mentions not the production of the principal reversion, nor of the procuratory and warrant to require the wadsetter to accept his money. *Answered*, The act of Parliament does indeed require six knocks in the execution of summonses, but neither law nor practice has extended it to premonitions; and as to the copy, the instrument bears it was delivered, and in fortification he offers to prove the doors were open, and it was given to the Earl's governor, *et ea interpretatio sumenda est ut actus potius valeat quam pereat*. As to the second, there was no necessity to shew his procuratory and mandate, unless it had been questioned, and a sight of it demanded, as was found, 18th January 1662, Veitch *contra* Lyel of Bassenden, No 7. p. 12266.; and for the principal reversion, he was not master of it, but he had a copy, which has been sustained by the Lords, 19th February 1662, Children of Wolmet against Mr Mark Ker, No 41. p. 13463.; and 17th February 1663, Colonel Montgomery against the Heirs of Robert Haliburton, No 42. p. 13463. THE LORDS sustained the order of redemption, and granted him a diligence for recovering the principal reversion or wadset where it is engrossed; but in respect of the

No 59.

The objection, that the instrument of premonition did not bear production of a procuratory was repelled, a sight of it not having been demanded.

No 59. informalities, allowed the Ordinary to hear the parties, on whom the loss of the annualrent since the consignation should fall.

Fol. Dic. v. 2. p. 323. Fountainhall, v. 1. p. 806.

1698. January 5.

JAMES WATSON, and JAMES NICOLSON of Trabroun, late Dean of Guild of Edinburgh, against IRVINE of Drum.

No 60.
Who must be
premonished.

MERSINGTON reported James Watson, printer, and James Nicolson of Trabroun, late Dean of Guild of Edinburgh, against Irvine of Drum. There was a wadset of the lands of Balskevie, granted by Drum to Forbes of Tilliegreig, which, by progress, comes to Watson the printer, who is infest therein base, in 1677, and inhibits Forbes, his author, on the warrandice of his disposition, in 1678. After this, Drum enters into a transaction with Forbes, and obtains his renunciation of the wadset, which is duly registered. Watson pursuing on his right, Drum defends, that the wadset is extinct by the renunciation given him by Forbes Watson's author. *Answered*, No respect thereto, because long posterior, not only to my infestment, but likewise to my inhibition against Watson. *Replied*, Neither of these could put Drum, the reverser, *in mala fide*; for, *imo*, The sasine on the wadset, in Wason's person, was base, and never clad with possession; and for the inhibition, it was not intimated to Drum in terms of the act of sederunt 1680; and so there was nothing to hinder Drum, the reverser, to take a renunciation from Forbes, the first wadsetter, in 1686, being six years after the act of sederunt was made. *Duplied*, Watson could not obtain the possession, because his author's relict, liferenting the lands, debarred him; but this was sufficient to clothe his right with possession, seeing he bruiked *per usufructuariam*. See 13th February 1624, Sinclair *contra* Sinclair, *voce* SOLIDUM ET PRO RATA; and 2d July 1624, Hamilton *contra* Tenants, See APPENDIX. *Triplied*, The liferentrix's possession could never clothe Watson's right, with possession; for that were to induce a *fictio fictionis*, which law reprobates; for, *imo*, Her possession behoved to be construed the fiar's possession, and then the fiar's possession must be extended to be Watson's, his assignees possession, which were a double fiction. THE LORDS considered the reverser paid the money, redeemed his own lands, and accepted the renunciation, by virtue of obligations long prior to the inhibition, and so was not concerned therein, nor any way *in mala fide*, unless the method of the act of sederunt had been followed by the wadsetter's creditors intimating his inhibition to the reverser, that he should not pay nor redemption till he were called; and therefore found Drum was not *in mala fide*, neither by the inhibition, nor sasine, neither of which he was obliged to take notice of, though the liferentrix possessed; and for these reasons sustained the renunciation. And the Lords have oft found base infestments granted by wadsetters do not hinder redemption, 28th November 1635, the Relict of Mowat against