

No 84.

Boyle *contra* Wilkie, *voce* WARRANDICE, &c. and the defender is willing to refund whatever Tarvet has given to the said Helen for her claim, but he must not seek it *in tota latitudine* of her right. *Answered*, He is not pursuing on the warrandice, but as assignee *et tanquam quilibet*; and as she would make him liable for the whole, as having incurred *crimen stellionatus*, by his grandfather's making double dispositions of the same land, so may he, especially seeing he did not look upon it as an incumbrance that could ever affect or distress his lands; for it was never completed by infeftment, but stood *in nudis finibus dispositionis et personalis juris*, and so could never compete with him who was infeft, though on the posterior disposition. THE LORDS considered that purchasers acquiring in rights affecting their lands, could never extend them beyond the price they cost them; yet, in this case, the said Helen's right could not be looked on as an incumbrance, seeing she could never distress or disturb Tarvet's possession; therefore the LORDS repelled the defence, and found he might crave repetition of the price paid, and its annualrents; whereas, if it had been a probable ground of eviction or distress, the LORDS inclined to think his purchasing it would have restricted him to what he truly paid; otherwise all such pursuits in time coming would be either in the cedent's name, or as assignee to the fuller action of repetition, and would forbear that action of warrandice competent to them as less profitable, which would evacuate that just ground of law restricting them to what they gave for the incumbrance purged; and the double alienations also moved the Lords to decern for the whole.

Fol. Dic. v. 1. p. 601. Fountainball, v. 2. p. 52.

1706. July 24.

JANET CARRUTHERS and JAMES MAXWELL of Barncleugh Her Husband,
against JOHN CARRUTHERS. of Dormount.

No 85.

A wife disposes her estate to her second husband upon his granting back-bond to provide her to a liferent of the whole, and their children to the fee of the half. The husband acquired a former right by his wife to her first husband's father.

SUSANNA MAXWELL, daughter of John Maxwell of Colignaw, having disposed her estate to John Carruthers of Dormount her second husband, upon his granting a back-bond to provide and secure her in the liferent of the whole, and the children to be procreate betwixt them in the fee of the equal half thereof; Janet Carruthers, only child of the marriage, and James Maxwell of Barncleugh, her present husband, pursued Dormount for implement of the back-bond.

Alleged for the defender; That he could not be obliged to implement, in regard the right made to him by his wife was ineffectual, she, with consent of her first husband, having formerly disposed the same lands to John Maxwell elder of Castlemilk, her first husband's father, which excluded the right made by her to the defender, and rendered the same altogether ineffectual, which obliged him to buy in Castlemilk's right.

Replied for the pursuer; The defender having entered to the peaceable possession of the lands disposed, and continued long therein by virtue of the right from his wife, he was *in mala fide* to acquire Castlemilk's right in prejudice of the pursuer, whose right he might have completed and rendered preferable to Castlemilk, by infesting or adjudging; which, by his back-bond, he was bound as trustee for the pursuer to have done; and hath industriously omitted to furnish him with a defence against this pursuit.

Duplied for the defender; It was impossible to make the defender's right from his wife preferable to her prior right in favours of Castlemilk; seeing the pursuer, as heir to her mother, would have been obliged to implement the disposition to Castlemilk, and the inhibition thereon would for ever have excluded the posterior disposition to the defender, whatever diligence had been done to complete it; so that the defender was *in optima fide* to acquire Castlemilk's right, his own right being reducible *ex capite inhibitionis*; and necessity has no law. *2do*, The main cause of Dormount's obliging himself for one half of the lands disposed to the heirs of the marriage, was his getting the other half to himself; and *ita est*, the inhibition upon Castlemilk's disposition did wholly evacuate Dormount's own half; therefore the obligation of the back-bond falls *ex causa data non secuta*, Arg. Decis. December 19. 1684, The Dutchess of Lauderdale *contra* The Earl, No 42. p. 6379. *3tio, et separatim*, The pursuer cannot insist against the defender for her half of the estate, because she may be repelled *personali objectione* as heir to her mother, who was obliged to warrant Dormount's half from fact and deed; and the one meets the other by compensation. For though *regulariter* compensation is only *in quantitibus*, yet *ubi mutue obligationes sunt ejusdem speciei* (as the obligations for the two equal halves are) they meet one another; and, where a person is necessitated to buy in a preferable right, which would evict a former right in his person, he who is liable in warrandice of that former right, can never claim the purchased right, without giving what was paid for it, and all expenses.

Duplied for the pursuer; Castlemilk's son, as the mother's heir of line, is liable *primo loco* to make good her warrandice, and the pursuer being only heir of provision, is liable in warrandice but according to the value of the succession; and not in that till the heir of line be discussed.

THE LORDS found, That the defender could not make use of the supervenient right acquired from Castlemilk to exclude the pursuer from the benefit of his back-bond, and that the necessary expenses must come off the whole estate, and not off the pursuer's half only.

Fol. Dic. v. 1. p. 600. Forbes, p. 131.

No 85.

The second husband had, before this, been many years in possession by virtue of his own disposition. Found that, by the supervenient right, he could not exclude the only child of the marriage from the benefit of the backbond.