

1718. November 4. CUTLER against MALCOLM.

CUTLER pursues a declarator of redemption of certain lands, which, albeit sold, by an irredeemable disposition, yet, by a backbond of the same date, the purchaser was bound to denude, upon payment of the sum advanced at any time, within three years; which was afterwards prorogated for six months longer.

The defender having *alleged*, That the lands were sold irredeemably for a just price; and the purchaser, at the desire of the seller, had granted a qualified reversion; but the lands not being redeemed within the time limited, the sale was now become absolute; a probation was allowed for clearing, if the price was adequate, by which it did appear, that the lands were worth 100 merks yearly, besides kains, and ten pecks of meal, and the sum advanced 1600 merks.

It was *alleged* for the pursuer, That 16 years purchase was not an adequate price for the lands; beside, there were ten pecks of meal, which was valuable in so small a purchase; and the elapsing of the time limited in the reversion being penal, was purgeable at any time before declarator, for the same reason, that such failures are purgeable in a formal registered reversion.

It was *answered*, There was a very clear difference betwixt a sale and a wadset: In sales, the purchaser designs to obtain the property of the subject sold, for such a sum as the parties agree to be the value: In a wadset, the design of the wadsetter is to secure his money, and, in the mean time, to have the profit of the wadset. And, as the reverser may redeem, so the wadsetter may call for his money; and, though the reversion may be qualified, that the reversion must be within a certain time, yet, in that case, to take the advantage of the running of the time is penal, the land being generally and always presumed above the value of the sum advanced; and, therefore, the Lords have always taken great latitude with penal irritancies. *2do*, There is here a competent price, there being no certain fixed value of lands, some buy higher, some lower. If, indeed, there were any enorm lesion in the bargain, there might be place to reckon it really a wadset, under the figure of a sale; but no such thing appears in this case; but a bargain, fairly and freely made with the purchaser, who was not formerly a creditor, but advanced the money in contemplation of the sale. And, as to the ten pecks of victual, they are of no great value; and, beside, they are very unsecure, being sold as free, though liable for the thirlage of land, claimed by a neighbouring heritor. And the true cause of the process is, the legal interest was at six *per cent*. when the bargain was made, and during all the years allowed to redeem; which now is reduced to five *per cent*.

"THE LORDS assoilzied from the declarator."

*Fol. Dic. v. 1. p. 487. Dalrymple, No 180. p. 247.*

No 50.  
Lands being sold for an adequate price, a backbond, obliging the purchaser to denude, upon repayment of the price, within a limited time, was found not purgeable.