

The Lords in respect the contract 1672, restricted the comprising to a lesser sum; and in regard that the contract 1685 wadsets part of the comprised lands, redeemable for the sums in the comprising, and possession conform, both contracts being within the legal; and that the defender's purchase of the comprising was for the sum in the wadset, and not for a sum equivalent to the comprised lands; they repelled the defences, and found the comprising still redeemable.

Act. *Sir Walter Pringle.*

Alt. *Oliveston.*

Clerk. *Mackenzie.*

*Bruce, p. 127.*

No. 37.

1741. *December.* SINCLAIR *against* MURRAY.

Where one had acquired the reversion of a wadset, in so far as concerned a certain part of the lands, it was found that such partial purchaser could not redeem the wadset in part.

*Kilkerran, No. 1. p. 592.*

No. 38.

1747. *December 3.* GRAYS *against* BROWN.

David Gray, 14th March, 1672, wadset to Archibald Brown, flesher in Tra-nent, a tenement lying there, for 650 merks Scots, redeemable at any term of Lammas or Candlemas after Lammas then next to come, for payment of the principal, annual-rents and expenses; and the wadsetter, in the same deed, granted to the reverser a back-tack for 39 merks, the then interest of the wadset sum, with this provision, "That in case the said Archibald Brown and his foresaids should failzie in thankful payment of the said back-tack duty above written, and suffer two terms payment thereof to run in the third unsatisfied; that then, and in that case, that present back-tack should be extinct, void and null of itself, in such manner and form as if the same had never been made, given, or granted; and the said David Gray and his foresaids should have full ingress, access, and regress in and to the same lands, setting, raising, using, and disposing thereupon, without any declarator or further process of law, notwithstanding of any act or practick in the contrary; neither yet should the back-tack duty aforesaid be any ways restricted to any less than was above-mentioned, nor be affected with any public burden; and in case of declarator of nullity of the back-tack, should that present wadset be any ways restricted, nor be obliged to account with the said Archibald Brown or his foresaids; neither should the said David or his foresaids be obliged to grant any excrescence to them, or their assignees or creditors, during the not-redemption of the said lands, notwithstanding of any acts of Parliament, law or practick to the contrary; all benefit whereof, the said Archibald Brown and his foresaids had renounced, and thereby did renounce for ever."

No. 39.

A wadset was granted and a back-tack let thereof, stipulating, that if the duty was not paid, the wadsetter should enter on the possession, and declarator of failure of payment was obtained. The wadset-ter having taken possession, it was found that thenceforth the wadset was a proper one.

No. 39.

The clause of redemption was upon payment of the principal sum, by-gone annual-rents, or back-tack duties ; and in like manner the requisition was to be of the sum, annual-rents or back-tack duties.

The wadsetter, as early as the year 1674, obtained a declarator of irritancy of the back-tack, and thereon entered to possess the subject, till that, *in anno* 1740, the heirs of the reverser pursued the wadsetter's heirs to account ; and the question came to be, Whether from the irritancy of the back-tack it was to be looked on as a proper wadset, or an improper one, which it was owned to have originally been.

The Lord Ordinary " sustained the defence upon the clause in the wadset-right, declaring the wadsetter, after declarator of the nullity of the back-tack, not accountable." And, 10th June, 1746, adhered to his former interlocutor, for the reasons therein recited, and that the decret of declarator therein mentioned had been the title of the defender's and his author's possession for the space of above 60 years, since the same was obtained, and before the commencement of this process."

Pleaded in a reclaiming bill: The wadset was improper, the interest of the money was to be paid as a back-tack duty, and in no case was the wadsetter's demand to be less ; the redemption could only be on payment of the principal and interest ; and therefore the provision, that the possession of the wadsetter, if the back-tack duty were not paid, should be unaccountable, could not be sustained, as he was not restricted to the profits.

Answered : The wadset was originally improper, and the clause of redemption which follows the dispositive, was conceived in the view of its continuing such ; whence it is observeable, the interest of the money and back-tack duty are mentioned as the same thing ; but as the reverser might fail in his payments, it was agreed it should in that case be lawful to the wadsetter to enter unaccountably to the possession, from which time his right changed its nature, and became proper ; this was evidently the meaning of the parties, and as it is no ways contrary to law, it ought to have its effect.

The Lords adhered.

Act. *A. Macdowall.*

Alt. *Brown.*

Clerk, *Forbes.*

*D. Falconer, No. 218. p. 301.*

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1754. *March 6.* CAMPBELL *against* STIRLING.

No. 40.

The subject of wadset, Whether proper or improper ? is discussed in this case, which is No. 8. p. 2439. *voce* COMMISSIONER of SUPPLY.