Leitch neglected to make the premonition required by the interlocutor; but, a few days before Martinmas 1767, informed the tutors by letter, that he intended to redeem the lands on the term-day, when he accordingly tendered the money; and, upon their refusal, consigned it in the Bank of Scotland, in December following, and brought a process of declarator of redemption. No 53.

Pleaded in defence; The pursuer did not obtemper the order of redemption prescribed in the interlocutor; and though, from equity, the court is in use to allow penal irritancies to be purged, at any time before declarator, or the lapse of the long prescription, yet there is no example of admitting a power of redemption, after decree of declarator has been pronounced. There is no longer any room for equity; and, were the reverser again indulged in a power to redeem, declarators of irritancy never could be brought to a conclusion; there would still be the same claim for a new indulgence as before.

Answered; The order of redemption pointed out in the interlocutor, and the irritancy adjected to it, cannot have greater force than a conventional irritancy stipulated by the parties; and, whatever may have been the rigour of the ancient law, it is now established in practice, that there is no necessity of observing the specific terms of the order of redemption, but that it may be supplied by equivalents. The intimation by letter was as effectual a notification as a formal premonition under form of instrument, and must, at any rate, be sustained to the effect of saving against a penal irritancy.

"THE LORDS found, that the lands are still redeemable, and found the defender liable in expenses of process."

Act. *Rae, G. Buchan-Hepburn.* Alt. *Crosbie, George Fergusson*
Reporter, *Monboddo.*

G. F. *Fac. Col. No 82. p. 331.*

1771. *March* 7.

JOHN BOYD, of Easter Greenrig, *against* JAMES STEEL, Son of the deceased John Steel, of Easter Greenrig.

No 54.
The seller of land for an adequate price, took a back-bond, declaring the lands redeemable at certain terms, upon three months premonition. He gave premonition, but

ON the 28th of November 1752, John Boyd disponed the half of the lands of Greenrig to the deceased John Steel, his heirs and assignees, heritably and irredeemably, without any manner of reversion, redemption, or regress whatsoever; but of the same date with this disposition, Steel, the purchaser, granted a bond of reversion, declaring that the said lands should be redeemable by John Boyd and his heirs, on payment of the price, at the term of Martinmas 1753, or at any term of Martinmas or Whitsunday thereafter, in the years 1754, 1755, 1756, and 1757; the seller, or those in his right, always giving premonition three months at least before the term at which he shall redeem the lands. It

No 54.
within less than three months of the last term. Found that his right of reversion was lost.

was farther declared, 'That if the said lands be not redeemed at some one or 'other of the terms above-mentioned, within the years above expressed, they 'shall be irredeemable thereafter, and this bond of reversion shall thereafter be 'void and null to all intents and purposes whatsomever, the said lands being 'bought from the said John Boyd, and nowise wadset for security of the said 'price.'

No steps were taken by John Boyd for redemption till the 27th of August 1757, being a few days within the three months of Martinmas 1757, the last term of redemption; when, as appeared from the attestation of a notary, premonition had been made in presence of two witnesses. Nothing farther was done till the year 1766, when Boyd brought an action against James Steel, then in possession of the lands by disposition from his father, for having it found, that he had still full right to redeem the land in the terms and conditions of the bond. Steel, upon the other hand, brought a counter-declarator against Boyd, for having it found that the lands were irredeemable, and that the bond of reversion was an incumbrance thereon.

THE LORD ORDINARY found, "That the lands were redeemable in terms of the bond of reversion." Upon advising a petition and answers, the COURT, on the 6th February 1771, "adhered to the Lord Ordinary's judgment." When Steel, in a reclaiming petition, pleaded,

The decision of this question depended entirely upon what was truly the nature of the transaction. If the right was construed to be a wadset or right in security, it was still redeemable before declarator; but if it fell to be regarded as a proper sale, burdened with a temporary right of redemption, it could not, after the term limited was elapsed, be redeemed. According to the principles of the Roman law, the rigid observance of agreements of this nature, was relaxed only in the case of a pledge; but when a power of redemption, within a certain time, was adjected to a bargain of sale, it was strictly interpreted and adhered to. L. 7. § 1. D. De Distract. Pig. L. 2. Cod. eod. tit. L. 7. Cod. De Pact. conventis tam super dote, &c.

The law of Scotland had adopted the same principles and distinction with respect to pledges, and wadsets, and proper sales. In the first, redemption was allowed *ex æquitate* even after the term was expired; but, in a fair sale, with a limited right to redeem, it was a fixed rule, that redemption was only competent within the time, and in the terms expressed in the bond of reversion, Stair, b. 2. t. 10. § 6. 17th Jan. 1679, Beatson against Harrower, No 44. p. 7208. Bankton, v. 1. p. 385. § 6. v. 2. p. 125. § 11. Dalrymple, 4th Nov. 1718, Cutler against Malcolm, No 50. p. 7215.

The rule of determining whether a redeemable right was to be held a *wadset*, or a *sale*, depended, in the *first* place, upon the nature and conception of the right; and, *2dly*, on there being an equivalent price or onerous cause. Where the conception of it was such as to correspond only to the idea of an actual pur-

chase and sale, and where the price at the same time was adequate, a temporary right of redemption, with an irritancy in case of failure, ought to have its full effect. The transaction, in this case, had every appearance of a total and complete alienation. It was declared to be a sale, not a wadset; it acknowledged the receipt of the sum paid as the agreed price and value of the lands; and these again were conveyed heritably and irredeemably, without reversion or regress whatsoever. The onerous cause of granting this right was also fully adequate. The 7100 merks, the price paid, amounted to about twenty-three years purchase of the rent of the lands as they stood in 1752: This was a full price for lands in general at that time; and it could be proved, as well by reference to other sales in the neighbourhood, as by persons acquainted with the lands, that the price given was universally considered at the time as their full value. No 54.

The case of the Earl of Balcarras against Scott in 1764, (not reported) was very different from the present question. The contract there did not contain a single expression which imported a sale, except the words *sell*, *annailzie*, and *dispone*, which were common words of style both in sales and wadsets. The sum advanced was not even expressed to be the *price of the lands*: It did not, besides, exceed above fourteen years purchase; and as the redemption was not foreclosed either by prescription or declarator, the Court had found it was not a proper sale, and that it was still competent for the Earl to redeem.

Boyd *answered*;

It was clear, from the whole circumstances of the case, and from the nature of the transaction, that no real or proper sale had been in contemplation of the parties. Less regard was due, as well in this case as in every other, to what was declared than to what was actually done. The seller or impignorator of the lands was a necessitous debtor, inhibited, under horning, his rents arrested, in debt to several creditors, and in particular to the person who had acquired the right. The nature also, the style and tenor of the right, were adverse to the proposition that it was a proper sale. The term *reversion* that had been made use of was technical, and was applicable only to certain qualified legal conveyances and voluntary impignorations, but never to the case of an absolute sale. In this case, a debt, viz. the principal sum and annualrents, was kept up against the seller; for this he was liable to the purchaser, and for this the purchaser held the lands in security, liable for his intromissions, for which he was accountable; circumstances which totally destroyed the idea of an acquired property, and proved that it was an impignoration or right in security merely that had been granted. The alleged equivalency of the onerous cause was without foundation. The present rent was L. 20: 5s. *per annum*; the price paid in the year 1752 was less than 20 years purchase; and several lands in the neighbourhood had been sold since that period, at twenty-six and twenty-eight years purchase, though the lands in question were in every respect as good.

No 54.

It being clear, therefore, that the right created was nothing else than an improper wadset or impignoration of the subject for the sums truly lent, the petitioner's legal authorities and decisions did not apply. It had, on the contrary, been the rule of the Court, *ex bono et equo*, to modify the exorbitancy of all irritant clauses, and restrict them to the just interest of the party claiming under them; nor could the irritancy take place *ipso facto*, but must be declared by a proper action, in which the defender had right to redeem and purge at the bar, or at such other time as should be appointed. The present case fell precisely within that aule; the pursuer had brought his declaration, the defender appeared, and offered to purge at the bar; so that the COURT could not fail, in so penal an irritancy, to interfere. The defender, besides, had actually used premonition, as was proved from a holograph note of the notary on the bond of reversion; and though this had been made a few days within the period of three months previous to Martinmas 1757, yet as it was avowedly before the expiry of the last term, full notice had been given *debito tempore*, that the defender was to redeem; which was all that *in re tam odiosa* was necessary.

The decisions of the Court had recognised and proceeded on these principles. In the case of the Earl of Balcarras *contra* Scot in 1764*, though much ingenious argument was drawn from the clauses of the contract, to shew that it was not a right in security, but a proper sale with a limited clause of redemption, yet the decision went on the plain and legal interpretation of the clause of reversion; and the lands were declared redeemable, though at the distance of eighty years from the date of the contract. Similar judgments were given in the case of Madrel *contra* Din, on the 20th December 1765*; in the case of Cuthbertson *contra* Lockhart of Cleghorn, on the 22d June 1768*; and in that Fac. Col. 3d Feb. 1769, Leitch *contra* Swan, No 53. p. 7220.

Upon advising this petition and answers, the LORDS remitted to the LORD ORDINARY to allow a proof of the value of the lands at the date of the sale; which turned out so favourably, that on the 8th December 1772, they altered their former interlocutor of the 6th February 1771, and found that the transaction was a fair sale.

Lord Ordinary, *Stonefield*. For Boyd, *D. Dalrymple*. For Steel, *W. Baillie*. Clerk, *Gibson*.

R. H. *Fac. Col. No 89. p. 260.*

* Not Reported. *See* APPENDIX.