

APPENDIX

PART I.

WADSET.

1777. *January 22.*

WILLIAM AYTON and DAVID KEIR *against* JANET VEITCH.

DAVID KEIR, the predecessor of the pursuer of that name, conveyed to Alexander Veitch the defender's predecessor, his lands of Bandrum in security, but qualified by a contract of reversion, by which the lands are declared to be redeemable at any time within twenty years, upon payment of the sum of 2700 merks. At the same time, a tack of these lands during the period of redemption was granted by Veitch to the heir, at a rent corresponding to the interest of the debt, upon payment of which the lands were redeemable.

David Kier possessed the lands till 1755, the period of his death, when none of his children having shown any inclination to represent him, Veitch applied to the Sheriff, setting furth that the lands would lye unpossessed for that year, unless a remedy were provided, and therefore craving a warrant to let the lands, which had been in Keir's possession at the time of his death. This petition was served upon Keir's children, and as none of them thought proper to appear, the Sheriff granted the warrant required. These lands were accordingly let by Veitch, not only for that year, but afterward for a term of years; and it appears by a proof afterward taken, that although these lands were not let by public roup, yet Veitch had endeavoured to let them at the highest rent which could be obtained, and that James Keir, the son and heir of David, had even been in terms with him for part of them; yet there was a deficiency in the rent of about £20 Sterling, less than the tack duty contained in the back tack to David Keir, and therefore a short coming annually of the interest of the wadset sum to that amount.

No. 1.
Particulars
of the case
No. 44.
p. 16551.

No. 1. William Ayton, Writer to the Signet, having purchased the right of reversion from David Keir the grand-son and representative of the original reverser, consigned the 2700 merks in terms of the bond of reversion, and brought an action against the defender as representing Alexander Veitch, concluding to have it found and declared that the lands were redeemed. David Keir, Mr. Ayton's author, was afterward made a party to this action by a multiple-pounding.

The representative of Veitch refused to comply with the order of redemption, until the sum in which the rents had been short coming of the interest, and also the money which had been expended by Veitch, in putting the houses in proper repair, which the original reverser by his back tack had been obliged to do, amounting altogether to about £500 Sterling, should also be consigned with the redemption money.

Pleaded for the pursuer, That as the terms of reversion had no reference whatever to the back tack, the defender's claims on that account, could not affect Mr. Ayton, an onerous purchaser of the right of reversion. Neither could it affect the other pursuer; for as Veitch upon the reverser's death, resumed the full possession of the lands by letting them for a term of years, and acting in every other respect as proprietor thereof, he must be considered as a proper wadsetter, and to have accepted of the rents of the land as interim proprietor, in lieu of the interest of his money. Although the wadset had become improper, by the back tack to the reverser, yet it again became proper when that tack was at an end by the wadsetter having assumed the property, by letting the lands after the reverser's death without using a protest, or any other legal means of showing that he did not mean to consider that back tack as entirely voided, Bankt. vol. 2. p. 129. § 22. Had he meant only to have retained the possession as an incumbrancer, and not as proprietor, he would have adjudged the right of reversion, and entered to the possession by a summons of mails and duties, in which case he would only have imputed what the lands actually produced to the interest of the incumbrance which affected them, whereas in the present case, had the lands yielded a much higher rent than the interest of the money, the heirs of the reverser could not have obliged him to account for it.

Answered: As this wadset, in consequence of the back-tack to the reverser, according to the opinion of all our lawyers, (Ersk. B. 2. Tit. 8. § 28.) was rendered improper, it could not well again become proper after the death of the reverser, by the wadsetter having been under the necessity, on account of the reverser's heirs having declined to enter, of applying *bona fide* to the Sheriff for a warrant to subset the lands. Although, by the opinion of our lawyers, (Bankt. vol. 2. p. 129. § 22.) a wadset rendered improper by a back-tack to the reverser, may again become proper by that tack being voided; yet, in the present case, this tack was never voided, and it is impossible to believe that it ever could have been the intention of Mr. Veitch to possess

the lands as *interim* proprietor instead of an incumbrancer, when he must have sustained the heavy loss of £20 per annum by so doing. Even the reverser's interest was benefited by Mr. Veitch's conduct. For had he not made the application to the Sheriff, and let the lands in consequence thereof, they must have lain waste and unprofitable to all parties, as the children of the reverser declined to enter heirs to their father. If Mr. Veitch had allowed the lands to lie waste, in a few years the accumulation of the interest must have been so great, as totally to exclude the reverser's heirs from all chance of redeeming them; and as they were let at a fair value, it could not with justice be alleged that they could have been better let at that time. A higher rent was obtained for part of them than the reverser's heir, James Keir, would give.

The Lord Ordinary ' Found, that the application to the Sheriff by the wadset-
' setter for a warrant to let, or in case he could not let, to possess the wadset
' lands upon the death of the original reverser, without any caveat in the appli-
' cation, that he should still be liable in terms of the tack; and having let the
' said lands for nineteen years in virtue of the warrant obtained, without pub-
' lic roup, or any protest against the heir, that this measure should not pre-
' clude any claim against him, or any new warrant from the Sheriff to let the
' lands for the above number of years, was virtually passing from the tack
' granted to the original reverser: Therefore finds, that neither his heir, nor
' William Ayton, the heir's disponee, are liable for any shortcomings of pay-
' ment of the annualrent of the wadset sum, nor for any other claims made
' by the heir of the wadsetter in consequence of the back-tack founded on by
' her; of new assoilzies David Keir, the heir of the reverser, and the said
' William Ayton from these claims, and decerns.' Upon advising a petition,
with answers, and also memorials for the parties, upon a proof being allowed, the Court adhered to this interlocutor.

In delivering their opinions, some of the Judges seemed to consider the equity of the case as so strong in favour of the wadsetter receiving the interest of his money, that it was principally with the view of instructing that the lands had been let at their full value, that the proof had been allowed before answer. Upon advising the memorials, the Court seemed to think, it was impossible to get the better of the conduct of the wadsetter, in possessing the lands clearly as *interim* proprietor after the death of the pursuer.

Lord Ordinary, *Monboddo*.

For the Pursuers, *Henry Dundas, Dav. Rae*.

Alt. *Ilay Campbell, Ad. Rolland*.

D. C.