1736.

GORDON
v.
URQUHART.

SIR WILLIAM GORDON, Bart. ALEXANDER GORDON of Ardoch, Esq. and others, Tenants of Ardoch, } *Appellants;*

JANE MACKENZIE, Widow of JOHN URQUHART of Newhall, Esq. - } *Respondent.*

6th February, 1736.

PERSONAL AND REAL.—DISCHARGE.—A widow being infeft for her jointure in certain lands, agreed with the son to accept a restricted sum out of other lands, which being afterwards sequestrated by his creditors, she brought an action against the purchaser and tenants of the first estate for her jointure and bygones;—the claim was sustained.

The purchaser having acquired right to a wadset of the lands, in consideration of which he had reserved a part of the price,—found that the wadset, though prior in date, did not stand in the way of the claim.

COSTS, L.40, given to respondent.

No. 36. ALEXANDER URQUHART possessed the lands of Ardoch, subject to a wadset for 8000 merks Scots. In the marriage contract of his son John with the respondent, these lands were conveyed to her in liferent for her jointure, to the amount of nine chalders of victual, with customs and services, with other lands in case of eviction or non-redemption. In 1696, John sold the lands of Ardoch to Sir Adam Gordon, (father of the appellant,) who in consideration of the incumbrances with which they were charged, was allowed to retain a proportion of the price in his hands.

The respondent afterwards entered into an ar-

rangement with her son, whereby she agreed to restrict the jointure to six chalders and a mansion-house, and to accept the victual out of the lands of Newhall, in lieu of that payable to her from the lands of Ardoch; but she did not renounce her infeftment in Ardoch. In virtue of this agreement, she possessed the lands of Newhall, house and gardens, as her jointure, till about 1727, when her son's affairs having become embarrassed, the estate was sequestrated by the Court. He shortly afterwards died insolvent.

The respondent brought an action against the appellant, Alexander Gordon, who then possessed the estate, and against the tenants, for recovering the rents and profits of the lands; and also for reducing the conveyance by her husband, and all that had followed thereon, in so far as they stood in the way of her infeftment.

It was stated in defence, that as the respondent had, by the contract 1715, not only restricted her jointure to six chalders, but had accepted of a new allocation of the same, in full satisfaction of her jointure upon Ardoch, she could not afterwards have recourse upon Ardoch. To this it was answered, that that contract was only a personal engagement with her son, to be contented with a smaller payment out of the lands of Newhall than she was entitled to out of those of Ardoch. As she had not renounced her real right on Ardoch, so neither had she received any real security on Newhall; and even if the transaction had amounted to an excambion, the nature of that contract is such, that, upon eviction of the lands, the party suffering it is entitled to resume what he gave in exchange. The case being reported to the Court, it was found,

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(22d July 1730,) "that the pursuer had recourse "to her jointure lands of Ardoch;" and the Lord Ordinary (25th July,) "decerned in the mails and "duties against the tenants and possessors."

Various proceedings followed; and on the 24th June 1732, the Court found, "that the pursuer had "recourse to her jointure lands of Ardoch, to the "extent of six chalders of beer yearly, with the "customs, services, and carriages suitable thereto; "but found she had no recourse to the house or "gardens of Ardoch." Upon advising a petition against the latter part of this interlocutor, they found, (13th February 1733,) "that the pursuer "was not only entitled to six chalders of victual, "but also to a house; and decerned according-"ly," &c.

In the mean time, the appellant, Alexander Gordon, presented a petition, founding upon the wadset on the lands, which, he contended, being prior in time to the jointure, must be preferable to it; to which it being answered, that a part of the price had been retained by the purchaser, for paying off incumbrances, of which the wadset was one, and the estate was thereby cleared of it—the Lord Ordinary, to whom the cause was remitted, found, (19th January 1733,) "that the wadset right be-"ing paid by the price of the lands, could not com-"pete with the relict, and therefore preferred the "lady, and decerned."

Entered Feb. 7, 1735. Amended May 3.

The appeal was brought from part of the interlocutor of 24th June 1732, and from those of the 28th February and 30th April 1733.*

* The journals do not instruct what other interlocutors were added when the appeal was allowed to be amended.

Pleaded for the Appellants:—1. The wadset for 8000 merks was a *bona fide* incumbrance upon the estate, before the respondent's marriage contract; and as the same was purchased by Sir Adam Gordon, he ought to stand in the place of the incumbrancer, against whom she could not have recovered one penny of the rents till redemption; and although this incumbrance was deducted out of the price of the lands, that is no reason why Sir Adam Gordon should not have the benefit of it, to protect his possession when purchased in with his own money.

2. The contract in 1715, whereby the respondent released her liferent in Ardoch, and accepted of a new allocation for six chalders over Newhall, was a contract for love and favour from a mother to her son, and was intended to relieve him of his warrandice to the purchaser, and therefore ought not to be construed as a mere excambion; and it would be extremely hard to permit her now to depart from it, and have her relief against the purchaser, who, resting on the faith of it, has lost the benefit of her son's warrandice, he having since died insolvent.

3. Supposing the sequestration of the lands of Newhall from the respondent to be a foundation for relief against those of Ardoch, yet such relief ought not to exceed what she restricted herself to by the foresaid agreement; and therefore there was no ground for decreeing to her the customs, carriages, and services, or an allowance for a house.

4. The heirs of the respondent's brother ought to have been made parties to the action, because payments may have been made, or other satisfaction given to the respondent for her jointure, which cannot be instructed but by them; and because the

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purchaser would be entitled, in the event of the present claim being sustained, to recover damages from them under the claim of warrandice.

Pleaded for the Respondent:—1. The wadset, in terms of the minute of sale, was paid off with part of the price covenanted to be given for the lands, which was the money of the seller, and a release and renunciation of the wadset was taken, as well to the seller as to the purchaser, according to the provision in the minute; which shows that an extinction, and not a conveyance, was intended, as well as executed. Therefore, neither Sir Adam, nor any deriving right from him, can found upon this wadset, to exclude the respondent's jointure.

2. The respondent never renounced her infeftment in the lands of Ardoch, nor received any other in lieu thereof. The agreement amounts to no more than a restriction of her demand to six chalders, and a personal obligation on her to be contented with a jointure to that extent, out of the lands of Newhall, and a personal obligation on her son to secure her in that payment; and if an actual excambion had been made, she would have been entitled by law, upon the eviction of Newhall, to return to her jointure lands.

Judgment, Feb. 6, 1736.

After hearing counsel, "it is ordered and adjudged that the appeal be dismissed, and that "the several interlocutors, or parts thereof, as are "therein complained of, be, and are hereby affirmed; and it is further ordered, that the said appellants do pay, or cause to be paid, to the said "respondent, the sum of forty pounds, for her "costs, in respect of the said appeal."

For Appellants, *R. Dundas, A. Hume Campbell.*
For Respondent, *Dun. Forbes, W. Murray.*