

1672. November 29. DUKE of Buccleuch *against* LAIRD of THIRLSTON.

THE deceased Mary, Countess of Buccleuch, having right to a right of reversion of lands wadsetted to Thirlston, did thereupon use an order *in anno* 1655; and now this Duchess, as heir to her and the Duke, pursues a declarator of redemption. The defender *alleged*, *1mo*, No declarator, because the instrument of premonition does not bear that the reversion was shown. *2do*, The consignation was only simulate, and the sum was immediately taken up, and therefore there ought to be no declarator, or at least it can only take effect from the sentence, and the wadsetter must enjoy the profits of the land *medio tempore*. It was *replied*, That the reversion was shown at the consignation, and that it was in Thirlston's own hand, being then tutor to the Countess. To the *second*, That it does not infer simulation, that the sums were lifted by the consigner, in respect the sums were at her peril, if the consignatar had proved insolvent.

THE LORDS repelled the defence, and declared; the pursuer always before extract, producing the principal sum and whole annualrents since the consignation, and found the wadsetter accountable for the duties since that time.

*Fol. Dic. v. 2. p. 324. Stair, v. 2. p. 123.*

\* \* \* Gosford reports this case :

1672. November 28.—IN a declarator of redemption of the lands of Tranlawhill, pursued at the instance of the Duke and Duchess against Sir Francis Scot, for payment of the duties of the lands since the using of the order, which was *in anno* 1655, it was *alleged* for the defender, Absolvitor, because, by the instrument of premonition it is clear, that the Duchess's right to the reversion was not then produced. *2do*, It was offered to be proved, that the consignation was simulate in so far as the money consigned immediately after the consignation was taken up again, and therefore, at most, he can be liable only from the time that it is now offered to be paid and made out, and so ought to be free of all bygone duties. It was *replied* to the *first*, That the defender's father, against whom the order was used, was one of the Duchess's tutors, and so could not but know her right, and not having controverted the same, there was no necessity to produce in this case, albeit orders of redemption are *stricti juris*, and wadsetters being premonished, ought to see it clearly instructed, that the users of the order not being the granters of the wadset have the right of the reversion settled in their persons. It was *replied* to the *second*, That the money being truly once consigned, the taking up thereof did not take away the order, it being re-produced with the whole annualrents thereof since the consignation.

THE LORDS did repel both the defences in respect of the replies, and decreed the defender to make payment of the whole bygone duties of the

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Found in conformity to  
Jardine against Johnston, No 46.  
p. 13466.

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lands, in respect that the principal sum, with the whole annualrents, were re-funded.

*Gosford, MS. p. 280.*

\* \* \* A similar decision was pronounced, 19th February 1674, *Borthwick* against Pringle, No 51. p. 13473.

1673. February 7. Dame ELIZABETH BURNET *against* FRAZER.

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A tack of lands was let, bearing a reversion upon payment of a certain sum. The tacksman assigned to his wife for her life-ent use. The sum was paid for redemption, and a translation taken from the original tacksman. The tack found evacuated *in toto*.

BURNET of Leys having granted a tack of certain lands to James Burnet his son, bearing a reversion upon payment of 10,000 merks, Tilliewhillie obtains assignation to the tack, and thereby possesses, and his Lady having renounced her life-ent lands at his desire, he gave her a translation to the tack, during her life, and now she, and Kinnever her second husband, pursue for mails and duties. Compearance is made for Sir Alexander Frazer, who craves preference, because the lands contained in the tack being wadsetted to Burnet of Leys by the Earl of Marischal, Sir Alexander hath acquired the right of reversion from the Earl of Marischal, and the property of the land, and for clearing the incumbrance of this tack, he made payment to Tilliewhillie, as assignee, of the whole sum of 10,000 merks, and took a translation from him, so that this being in effect a redemption, he was not obliged to know the translation made by the husband to the wife, being a latent deed betwixt them; for if he had used an order, and paid the wadsetter, his payment being *bona fide*, he could never be distressed by any latent right which he neither did, nor could know. *2do*, Although he had taken translation without any right of reversion, yet being for an onerous cause, he ought to be preferred to an anterior translation by the husband to his wife, which is latent and fraudulent, neither intimated nor clad with possession, nor so much as registered; and albeit the narrative thereof bear it to be in remuneration, yet such writs betwixt husband and wife prove not; unless they be otherwise instructed. *3tio*, It cannot be denied, that Tilliewhillie, who made double translations, was *in pessimo dolo*; and if need be, it is offered to be proved, that the Lady was *particeps fraudis*, because that she knew that her husband was receiving a great sum for a translation, whereas she had a private translation; and she not only concealed her right, but herself received a part of the sums, and wrote a letter to cause her husband get payment of some by-gones of the tack before the translation. It was *answered* to the *first*, That albeit Sir Alexander had right to the reversion from the Earl of Marischal, yet thereby he could not redeem this tack, but only Burnet of Leys to whom the reversion was granted. And to the *second*, The Lady's right by translation being valid and wanting no solemnity in law, it cannot be evacuated by any posterior deed of the husband; for albeit sasines must be registered, no law requires tacks to be registered; and as to possession, the