

1673. *July.* SIR ALEXANDER HAMILTON of Hags, *against* FAIRLY.

SIR ALEXANDER HAMILTON of Hags, having sold some woods to one Black for 10,000 merks, one Fairly becomes cautioner in the contract for the price. Black, the principal, turning bankrupt, Hags charges Fairly, the cautioner, for 1218 merks, which, by an account fitted between him and Black, appeared to be yet owing. He suspends on this reason, that Hags, the charger, finding Black falling, he had taken a disposition of his own woods back again from Black, and by virtue thereof had intromitted with much more than that remainder of the price now charged for.

ANSWERED,—He had indeed got a disposition of some of them, and had intromitted, but it was in payment and satisfaction of some other sums Black was owing him beside this, and for relief of cautionaries he stood engaged in for him far above the value of any intromission he had by that disposition. And that he had deponed in thir terms before the Sheriff of Lanerk; being pursued by this Fairly, suspender, to grant him a discharge of this cautionry, because the said price (as he pretended) was all now paid: and so it is *res hactenus judicata*.

REPLIED,—That whatever was between Hags and Black, Black, the principal, could never invert the possession he had acquired for himself and his cautioners, by assigning it back to Hags; but Hags his intromission therewith must ever, in law, be ascribed and interpreted in payment of the price of these woods, for liberating the cautioners; and Hags can never be allowed to attribute the said intromission to any other cause of debt; and the subject matter out of which the price was to be paid returning to his own hand, the same, in all law and reason, must ever be, *primo loco*, liable and affected with that debt; the woods being that which naturally was to afford the price, and therefore could be misapplied to no other use till that was first satisfied, especially by the creditor retrocessed to his own place by a collusion betwixt him and the principal, to the evident defraud and prejudice of the cautioner.

The Lords inclined to sustain the reason of suspension; yet, before answer, ordained Hags to produce the said disposition, if he had it; and if not, then to depone upon the tenor of it, and if one of the causes thereof was not for satisfying what remained of the price of the woods.

*Advocates' MS. No. 415, folio 224.*

1673. *July.*

LORD FORBES *against* ———

MY Lord Forbes pursues a reduction, *ex capite inhibitionis*, of an eke to a wadset; ALLEGED, he cannot quarrel the said eke, because the pursuer, as superior, has granted a confirmation of the said wadset, since the eke; *et quod semel approbâsti non licet amplius reprobare*.

ANSWERED,—These are *penitus disparata*, to confirm a wadset, and crave to reduce an eke. *2do*, It is an absolute inconsequence to argue from any person's deed, as superior, to their other actings; for as superior they refuse none, yea may be forced