

her in absence, and that it was null for want of probation, neither the quantities of the husband's goods nor her intromission being proved, and that she was in the case of an executor, and so could only be liable *secundum vires* according to the value of the goods intromitted with belonging to the husband; as also, she had obtained a gift of her husband's escheat, and by her back-bond to the Exchequer, she was preferred to the household plenishing, and to as much of her husband's other goods as will pay the funeral charges, house-rents, servants-fees, and other privileged debts. *Answered*, That the suspender having intromitted as donatar to the bastardy, and the debt being constituted against her by a decret before she had obtained the gift of escheat, and there being thereby *jus quæsitum* to the charger, as a creditor, the suspender could not, *ex post facto*, acquire any supervenient right in prejudice of the creditors; that she, as donatar to her husband's bastardy, was liable to pay her husband's debts *secundum vires hæreditatis*. THE LORDS found that the debt being constituted against the suspender as donatar, she could not ascribe her intromission to any subsequent title of escheat that she had acquired in prejudice of the charger, and therefore ordained her to depone upon the quantity and species of her intromission, and allowed her to have retention as to the privileged debts, such as funeral charges, house-mails, servants-fees, and expenses of both the gifts of bastardy and escheat.

Sir Pat. Home, MS. v. 2. No. 733.

* * P. Falconer's report of this case is No 14. p. 1354, *voce* BASTARDY.

1699. June 16.

HELEN FERRY and Dr BETON of Tarvet *against* PATERSON of Dinmuir.

THOMAS FERRY buys seven acres of land beside Cupar, from Dinmuir's grandfather, and by the disposition he is obliged to infeft Thomas by the superior, which was never done, but the same acres were sold over again to Tarvet, who is infeft, and Helen Ferry, heir to the said Thomas, dispossessed. She afterwards assigns her right to Beton of Tarvet, who pursues Dinmuir on the passive titles, as representing his grandfather who disposed to Ferry, for refunding L. 1000 Scots as the price paid by her father, with the annual rent thereof from the time she was dispossessed. *Alleged*, This pursuit being on the matter for contravention of the warrandice of the first disposition, by granting a second, and the second purchaser having acquired it, he can claim no more than what he paid for it; for the Lords have always restricted these pursuits to what was truly paid for purging the incumbrance, and never extended them to the full value of the right warranted, as is marked by Durie, 1st July 1634, Glendinning *contra* the Laird of Barnbarroch, No 81. p. 9225; 26th January 1669,

No 83.

No 84.

A person granted two dispositions of the same property. The one dispoonee purchased the right of the other. Found to have done *sontanquam si quislibet*, and entitled to insist upon the same for the whole benefit of the other.

No 84.

Boyle *contra* Wilkie, *voce* WARRANDICE, &c. and the defender is willing to refund whatever Tarvet has given to the said Helen for her claim, but he must not seek it *in tota latitudine* of her right. *Answered*, He is not pursuing on the warrandice, but as assignee *et tanquam quilibet*; and as she would make him liable for the whole, as having incurred *crimen stellionatus*, by his grandfather's making double dispositions of the same land, so may he, especially seeing he did not look upon it as an incumbrance that could ever affect or distress his lands; for it was never completed by infeftment, but stood *in nudis finibus dispositionis et personalis juris*, and so could never compete with him who was infeft, though on the posterior disposition. THE LORDS considered that purchasers acquiring in rights affecting their lands, could never extend them beyond the price they cost them; yet, in this case, the said Helen's right could not be looked on as an incumbrance, seeing she could never distress or disturb Tarvet's possession; therefore the LORDS repelled the defence, and found he might crave repetition of the price paid, and its annualrents; whereas, if it had been a probable ground of eviction or distress, the LORDS inclined to think his purchasing it would have restricted him to what he truly paid; otherwise all such pursuits in time coming would be either in the cedent's name, or as assignee to the fuller action of repetition, and would forbear that action of warrandice competent to them as less profitable, which would evacuate that just ground of law restricting them to what they gave for the incumbrance purged; and the double alienations also moved the Lords to decern for the whole.

Fol. Dic. v. 1. p. 601. Fountainball, v. 2. p. 52.

1706. July 24.

JANET CARRUTHERS and JAMES MAXWELL of Barncleugh Her Husband,
against JOHN CARRUTHERS. of Dormount.

No 85.

A wife disposes her estate to her second husband upon his granting back-bond to provide her to a liferent of the whole, and their children to the fee of the half. The husband acquired a former right by his wife to her first husband's father.

SUSANNA MAXWELL, daughter of John Maxwell of Colignaw, having disposed her estate to John Carruthers of Dormount her second husband, upon his granting a back-bond to provide and secure her in the liferent of the whole, and the children to be procreate betwixt them in the fee of the equal half thereof; Janet Carruthers, only child of the marriage, and James Maxwell of Barncleugh, her present husband, pursued Dormount for implement of the back-bond.

Alleged for the defender; That he could not be obliged to implement, in regard the right made to him by his wife was ineffectual, she, with consent of her first husband, having formerly disposed the same lands to John Maxwell elder of Castlemilk, her first husband's father, which excluded the right made by her to the defender, and rendered the same altogether ineffectual, which obliged him to buy in Castlemilk's right.