

S E C T. V.

Obligation to relieve and purge from Incumbrances.

No 22. 1626. *July 20.* LD CLUNIE and STIRLING *against* OGILVIE.

A BUYER of land being allowed to retain part of the price till an incumbrance should be purged; and that having become imprestible, and the seller seeking annualrent for the retained money, because the buyer was also in possession of the lands, and offering likewise caution to warrant him against the said incumbrance; the LORDS found, in so far as the yearly profits of the land did exceed the annualrent of the sums paid, that the defender should pay back the same to the pursuer; but, as to the rest of the profits, refused to sustain action, because the said renunciation was not obtained.

Fol. Dic. v. 2. p. 359. Durie.

*** This case is No 81. p. 543., *voce* ANNUALRENT.

No 23. 1662. *February 4.* LD of ELPHINGSTON *against* MURRAY.

A CHARGE for the price of lands was suspended upon this medium, That by the disposition, the charger was obliged to relieve the suspender of all inhibitions, several of which were condescended upon. The charger *answered, Non relevat*, unless there was a distress, seeing the disposition bears not to purge, but only to relieve. The LORDS considering, that the charger *vergebat ad inopiam*, found the reasons relevant till caution should be found to warrant the suspender from these inhibitions.

Fol. Dic. v. 2. p. 359. Stair.

*** This case is No 42. p. 3392., *voce* DEBTOR and CREDITOR.

No 24. 1706. *July 2.* JAMES SMITH of Cammo *against* HUGH SOMMERVELL, Writer.

No 24.
Where one
stipulated to
retain a part

THE Lord Pollock reported James Smith of Cammo against Hugh Sommervell, writer. Cammo having bought the lands of Arthurstane from Murray,

and finding two inhibitions unpurged, he retains 1000 merks of the price in his hands, but gives bond for it to Hugh Sommervell, with this quality, bearing it was a part of the price, and that he should have retention of it for five years, that these inhibitions might be purged *medio tempore*. The five years being elapsed, and he charged to pay, suspended, and on this reason, that Sommervell was but Arthurstane's trustee, so whatever defence would meet the one must also militate against the other. But so it is, if the bond had been in Arthurstane's name, the obligation to purge the land of incumbrances, and the compensation he has upon his debts, would have been relevant; and *eodem modo* they must be received against Hugh Somervell. THE LORDS were all clear on this, on supposition that the bond was taken in Somervell's name for Arthurstane's behoof: But this being denied, it was *alleged*, whether trustee or not, I cannot pay till these incumbrances be purged, natural equity affecting the price for clearing and disburdening the lands, these being *correlata* and inherent *ex natura rei*. And though five years was limited and a competent time in which it might have been done, yet they being *de facto* still unpurged, it is against all reason to draw the price out of his hands, and leave him under the lash and hazard of these inhibitions, when he has paid a full adequate price, and got no ease, abatement, or deduction on that account. *Answered*, There is no doubt but the price should be applied to purge the lands, and that quality *inest de jure*, though not expressly provided for; but it is such a privilege as may be renounced, as here Cammo has done, by restricting his retention of the sum to five years, which are now elapsed. And though the inhibitors have not quarrelled him within that time, yet he has taken his hazard, and taken himself to the disponent's warrantice, and might by a reduction and declarator have forced them to insist, and so has now no pretence of retention of this sum. THE LORDS by plurality, found, though the bond bore it to be a part of the price, and mentioned the incumbrances, yet the limitation of the time was an implicit renunciation of his privilege of retention, and so repelled Cammo's reason of suspension.

Fal. Dic. v. 2. p. 359. Fountainhall, v. 2. p. 339-

* * * Forbes reports this case :

JAMES SMITH of Cammo having granted bond to Hugh Somervell, Writer to the Signet, for 1000 merks, narrating the same to be the remainder of the price of some lands bought by the granter from John Murray of Arthurstane; and declaring, that in case two inhibitions affecting the said purchase were not purged before the term of payment in the bond, Cammo should have retention of the 1000 merks for the space of five years after the date thereof, at least so long as these incumbrances should continue unpurged, to the effect *alienarly*; that he might have deduction of any expenses he might be put to in defence of actions of eviction upon them within the five years; Cammo being charged upon the said bond at the instance of Hugh Somervell, he suspended upon this ground,

No 24.
of the price for five years, on account of subsisting inhibitions, it was found he could not withhold the money beyond five years, altho' the inhibitions continued unpurged.

No 24. That the bond being granted for a part of the price of land, he ought to have retention thereof till the inhibitions therein mentioned be purged, which is not yet done.

Answered for the charger ; The bond is granted to him a third party, qualified only with retention for five years for payment of expenses allenarly ; which five years being elapsed, and no expense laid out, the money is now simply payable without objection.

Replied for the suspender ; The sum in the bond, being the price of land, is, according to the disposition of law, still retainable till incumbrances be purged ; although the five years be elapsed, which was the conventional term for retention *quoad* expenses, and necessary to be qualified by express paction, because law allows no expense of a process of eviction, if eviction do not actually follow : So that the legal retention remains, though the conventional took no effect, and is expired. Since the limitation of a cause to a time does not hinder its taking effect thereafter ; *cum per debitorem stetit*, that performance was not made sooner ; December 2. 1628, *Zair contra Remsay*, (See APPENDIX.) And as “ Nemo præsumitur suum jactare ;” so “ Novatio Juris alicui competentis nunquam præsumitur.” *2do*, There are two notable decisions, December 22. 1674, Marquiss of Douglass *contra* Somervels, No 180. p. 11502. ; and February 1. 1676, *Veach contra* Pallat and Ker, No 28. p. 5646. in the first whereof the LORDS found, that a right to a son might be reduced upon a debt due by the father to him who granted that right, upon the act of Parliament 1621 ; since at the time of granting the right to the son, he might not have known fully the father's circumstances ;—and in the second decision, the granting of a right by a debtor to two of his creditors jointly, and their acceptance thereof, did not so homologate, as to hinder one of these creditors to reduce against the other.

Duplied for the charger ; The charger was not the seller of the land, and therefore noways concerned in the legal retention, but has a *jus quæsitum* by the bond upon the conditions therein, which are purified by elapsing of the five years without expense in defending against inhibitions. *Nec per eum stetit*, that the inhibitions were not purged ; but the suspender has himself to blame, who did not see to it within the time. *2do*, The bond charged on is the suspender's own deed, granted on conditions agreed to by himself, which are now purified ; so that he is not in the case of the cited decisions, and is most unreasonable to contradict his own deed.

THE LORDS found, That by the quality of the bond the suspender could not retain the 1000 merks, the five years being elapsed ; and therefore found the letters orderly proceeded.

Forbes, p. 115.