

1715. June 8. ISOBEL ANDERSON *against* CORBET of Hardgray.

HARDGRAY having become cautioner for Captain Anderson in his father's testament as executor; he, for Hardgray's relief, disposes to him, among other things, the lands of Partick, but took his back-bond, in anno 1692, declaring, That the disposition was granted to the effect, that Hardgray might sell the lands, and apply the price for his own relief, and payment of other creditors, and the balance to the Captain's wife, children, &c. The Captain thereafter, with consent of Hardgray, sells the lands to Provost Gibson, and Hardgray became cautioner in the warrandice of the disposition, which, with Gibson's bond for the price, was depositate in a third person's hands, upon these terms, not to be delivered up till Hardgray was relieved of all his former engagements for the Captain. From thence till 1702, Hardgray did not intromit with the rents of the lands, but suffered them to remain in the tenants' hands. But Isabel Anderson, the Captain's heir, having thereafter insisted in a count and reckoning against him upon his foresaid back-bond, charges him, among other things, with the said ten years rent of the lands of Partick, for which he *contended* he was not liable;—because,

Imo, Since the Captain's disposition was only a further security, by the nature of the thing, he ought not to be liable for diligence, except in so far as he had debarred the disponent or any of his creditors from possession, which he had not done. *2do*, Though, by the back-bond, he was obliged to do diligence, yet that obligation must only be to do diligence for the purposes mentioned in the back-bond, which was not to uplift the rents, but to do what he could to sell the lands, and dispose on the price, &c. And that this was solely the party's view, appears, in that very soon thereafter there was a bargain made with Provost Gibson for them, though that sale proved ineffectual by the Captain's own fault in not relieving Hardgray.

Answered for the pursuer; *imo*, That by the back-bond, Hardgray declares, That the right was granted, that he might sell and dispose upon the lands, uplift sums, &c. and do diligence for effectuating payment, so that the debts due to himself and other creditors might be satisfied: So that having bound himself to diligence, he must be liable for these ten years rent, unless he could say, that after ultimate diligence he was debarred. *2do*, He being, by the back-bond, bound to sell these lands to the best advantage for payment of debts, and pay in the superplus to the disponent, he can never be in *bona fide* to allow ten years rent to perish. *3tio*, As to the selling to Provost Gibson, and depositing the disposition, *answered*, That Hardgray having been trustee for the Captain, in his whole estate, for securing of creditors, &c. *perinde est*, whether Hardgray granted the disposition, or the Captain, with his consent? For still Hardgray in whose person the right stood, must be reputed the disponent, since the Captain had no right either to the lands or price, except in the terms of Hardgray's back-bond; so that the sale was still Hardgray's deed, and not the Captain's.

No 18.

Found that a person getting a disposition to lands in trust, in order to sell them, and pay himself of what was due to him by the granter; and, not intromitting with the rents of these lands for many years, was not liable for the rents, unless it were instructed, that he entered to possession.

No 18. Besides, that so long as the papers were deposited, they were in effect as not granted, nor could give any right to Provost Gibson, either to possess or intro- mit with the rents, and therefore could not debar Hardgray from either ; so that he must still be liable for the rents ; this method being far from performing the obligation that lay upon him by his back-bond, viz. to do all possible diligence to sell the lands for payment of debts, &c.

Replied for the defender, That a deposited disposition, and no disposition, greatly differ, at least as to the pursuer ; for, where mutual writs are deposited, not to be recalled at the option of the granters, but put in a third party's hand, till certain articles be performed, they are *quodam modo* delivered, and the *deposi- tar* is considered as a common *sequestrator* for them both ; and, upon performance of the terms of depositions, the writs are as if *retro* delivered of the date ; and thus during the depositions, the subjects are understood sequestrate ; and here, had the Captain implemented the terms of the depositions, the rents would have *retro* belonged to the Provost, and the annualrents of the price to the Cap- tain. Nay, the present particular case is much stronger, for the defender hav- ing consented to a sale of the lands, and the terms of depositions being pres- table by the Captain himself, he cannot be admitted to plead his own fault, to subject the defender to diligence ; for if he had relieved the defender, the price had come for clearing the defender's engagements, and the disposition would have been effectually delivered, nor was there any obligation upon the defender after the subject was disposed by the Captain's own consent, to do further di- ligence thereanent.

THE LORDS found Hardgray not liable for the rents, unless it were instructed that he had entered to the possession.

Act. *Elphinston.*

Alt. *Sir John Fergusson.*

Clerk, *Sir James Justice.*

Fol. Dic. v. I. p. 238. Bruce, No 93. p. III.

S E C T. III.

Diligence Prestable by Annualrents.

1662. February 15. LADY MUSWALL, Elder, *against* LADY MUSWALL, Younger.

No 19.

IN a contention betwixt the Ladies Muswall, elder and younger, upon two annualrents out of one barony,