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Sir John also *pleaded* compensation on a bill of Kinminity's, bearing annual-rent from the date, to the term of payment.

THE LORD ORDINARY, 16th July 1745, " preferred the Lady Kinminity to the tack-duties, which fell under her husband's disposition, and repelled the ground of compensation."

*Pleaded* in a reclaiming bill; That the right being personal in Garty, the personal conveyance was effectual, and carried the profits, anterior to the time when the subsequent conveyance was made real by infestment.

*Answered*; That it is infestment which determines the property of lands, and the rents must follow the subject; and granting, if a question had occurred before infestment, the first right must have been preferred, this would have been owing to their being both considered as assignation to mails and duties, where the first diligence would be preferred.

THE LORDS adhered.

Act. *Ferguson.*

Alt. *Lockhart.*

Clerk, *Murray.*

*D. Falconer, No 221. p. 305.*

1749. December 14.

The INSURANCE COMPANY OF EDINBURGH *against* The ROYAL BANK.

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By the articles of an insurance Company, the area of a burnt house falls to the Company, if not built within three years after the proprietor receives the insured sum. This article was found not to effect onerous purchasers.

CERTAIN considerable proprietors of houses in Edinburgh, entered into a contract, for mutually insuring each other against losses by fire, by raising a fund for that purpose, by the contribution of certain sums, proportioned to the estimated value of the subjects insured, or by paying certain annuities for a determined number of years; the profits, if any arose, after making up what losses should happen, being to be divided amongst the Society, in manner agreed on by the articles; by the 12th of which it was provided, " That the area or ground right, with the ruins, if rebuilt within the space of three years, should be allowed by the Society to the proprietors *gratis*; and if not rebuilt within the space of three years from the adjustment, and payment of the damage, should belong to the Society, if there were no legal impediment hindering him to build within the said three years."

The contractors obtained a seal of cause from the Magistrates, incorporating them, and many other landlords acceded to the Society, which was done by subscribing their books, and paying the premium, or granting bond in due form, for paying the annuities in lieu thereof; which bonds were, by act of Parliament, declared to be real upon the house insured; and the method upon alienations, was for the purchasers to subscribe, and grant bond if any annuity remained due.

Sir James Dalrymple of Hales, and Mrs Margaret Cathcart, insured their several properties, in that tenement, at the back of the cross, called Carbieston's land, which was consumed by fire; and at the meeting of the Society, 7th De-

ember 1741, the loss declared to have been total; in consequence whereof, payment was made of the full estimated value, to wit, to Sir James 16th December 1741, and to Mrs Cathcart, 23d April 1742.

William Adams architect made a purchase of these houses in September 1743; the disposition from Sir James, containing a clause, providing, that in case he failed to build within three years, whereby the area should be evicted, the disponent should not be liable in warrandice; and he conveyed his right to Allan Whitefoord, for the use of the Royal Bank.

Mr Adams had also purchased an adjoining house, which, according to the plan he had formed for the Bank, was necessary; and 6th April 1744, obtained warrant from the Dean of Guild, whereupon he began to remove the rubbish of that other house; and 10th April 1745, obtained jedge and warrant for building; but application was made 1st May, by Elizabeth Hamilton, for stopping him, as having taken into his plan the space of a cellar belonging to her, part of the additional purchase, and there the design stopt.

The Society raised a declarator against Sir James Dalrymple, Mrs Cathcart, Mr Adams, Mr Whitefoord, and the Royal Bank, that the areas belonged to them, for failure of building, at least that they should be adjudged to them, the article implying an obligation to convey; and the Bank took infestment in the subjects.

*Answered*; Sir James Dalrymple and Mrs Cathcart, never came under any legal obligation, consequently there can be none incumbent on their successors, in respect their names appear, with numbers of others wrote in a book, to which the articles are indeed prefixed, validly executed by the first contractors, but the subsequent names are added of different dates, without witnesses, and as they do not subscribe together, they are not *co-testes*.

*Replied*; The parties were bound by their accession to the Society, and their names might have been wrote in the books by any body, they have subscribed the bonds for their annuities, validly executed, referring to the articles, have made payment upon them, and have received the estimated value of their houses.

*Answers, 2dly*, The article pursued on, proceeds on an erroneous supposal, that the area belonged to the Society, whereas it was still the proprietor's; no more was insured than what was combustible, which the area was not; and the proprietor having right to it, had no need of this article, to give him what was his before.

*Replied*; It is understood, that houses are insured at their full value, according to which, the Society pays; which implies an obligation on the proprietor to make over the area to them; and this is supposed by the article, whereby the company conditionally pass from their right, and allow it to the former proprietor.

*Answered, 3dly*, The forfeiture is not incurred of this right, granted to the proprietor, if it is to be called a grant; it cannot be imagined the not

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finishing a building should infer a forfeiture ; and here preparations were made and the work begun, by removing the rubbish, and obtaining the jedge and warrant before lapse of the time. The work also was stopt by a lawful impediment, within a month of the lapse, which ought to be taken into consideration, as this forfeiture is a penal irritancy, and purgeable ; neither ought it to be objected, that both the beginning to work, and the impediment regarded the house taken in as an addition to the plan ; since not to allow of such additions, would be to make it impossible to mend any absurdities in the old buildings, to the prejudice of the beauty and regularity of the place.

*Replied ;* There is no penalty in the case, the Society pays for the house, but on condition gives the area to the former owner, which not being complied with, it has right to claim it ; if it has been usual to estimate houses below the value, the owner has judged it to be for his advantage to pay a lower annuity ; besides, there is this difference betwixt insurance in this Company, and in any other, that here the insurers and insured are the same, and the conditions cannot be unequal or penal, where the persons at contracting, have an equal chance of loss and gain ; the claim is not made, because the house was not finished, but not begun to be built, nor the ground so much as cleared ; for neither the working on another house, nor impediment given thereto, can be considered ; and this does not hinder the improvement of the plan of a building by a neighbouring purchase, providing it can be made with a clear title.

*Answered, 4thly,* There can be no claim against the Bank, as the real right was in the original owners, which they have conveyed, and the purchasers are infest.

*Replied ;* The owners had the right in them, subject to a conditional obligation to denude ; the articles of the Insurance Company were notorious, and no person could *bona fide* accept of a right to defeat them ; especially, the purchaser could not insist against them, with regard to the purchase from Sir James Dalrymple, who excepted from his warrandice, any eviction that might happen upon them. Mr Adams disposed his right while it remained personal, consequently the purchaser from him was liable to the same objections he was, and could not mend himself by taking infestment, after the matter was made litigious.

THE LORDS found, that the Royal Bank had in them the real right to the area, and were not bound to denude in favour of the pursuers, and remitted the cause to be further heard, how far Sir James Dalrymple, and Magdalen Cathcart, the proprietors when the houses were burnt, were liable to the pursuers in damages.

Reporter, *Easdale.* Act. *R. Craigie.* Alt. *W. Grant.* Clerk, *Kirkpatrick.*

*D. Falconer, v. 2. No 110. p. 125.*