On the 5th February 1771, the Lords "found the arresting creditors preferable;" adhering to Lord Kennet's interlocutor.

For Reid,—R. M'Queen. *Alt.* G. Ogilvie.

1771. *February* 6; and 1772, *Dec.* 8. JOHN BOYD *against* JAMES STEELE.

SALE—IRRITANCY.

An alienation of land, qualified with a Back-bond, Whether to be held a fair sale, or right in security?

[*Faculty Collection, V.* 260; *Dictionary,* 7,221.]

PITFOUR. In the case of *Lord Balcarras* and *Scott of Scotstarvet*, the lands were found redeemable where the purchaser had no power to require his money, although it was pleaded that it was hard to keep him bound while the seller remained free. In that case also, 40 years were allowed for redemption; and yet the order of redemption was not used for many years after the lapse of that period. The present subject of controversy is not a sale, but a right in security. It is, indeed, declared that this shall be held as an absolute sale; but that is *protestatio contraria facto.* It is of no moment whether there is evidence of premonition or not; for there was no occasion for a premonition.

MONBODDO. If there were no circumstances in the case of *Balcarras* but those mentioned by Lord Pitfour, it proves too much, and therefore proves nothing. I think that *here* the reversion is barred both by the Roman law and ours. *Pacta legis commissoriæ* are unlawful *in pignoribus*; because an usurious stipulation for the pledge is generally more valuable than the sum advanced upon it. But *here* there is a sale, and probably for an adequate price. The premonition, supposing evidence of it, is nothing to the purpose; for redemption was the thing required.

COALSTON. Supposing the lands to have been sold for an adequate price, I have a doubt. The objection of *pactum legis commissoriæ* takes not place in sales. *Here* there was a sale. The provision as to paying annualrents, &c. in the event of a redemption, is no more than a paction *ut res sit inempta.* What strengthens my opinion is, that here there was no creditor who could demand his money.

KAIMES. I see the cloven foot: A severe creditor taking the advantage of a needy debtor. This is no more but a security, however expressed.

AUCHINLECK. We are always to consider *quid vere agitur*, not *quid simulate concipitur.* There was no occasion to give the creditor a power of demanding his money; for his interest must have prevented him from ever making the demand.

GARDENSTON. If this is not a sale under reversion, I do not know what definition to give of such a contract. If you find it to be a right in security, you will prevent a good-natured thing, which is often done. A man buys an estate, but allows the seller a term of years to redeem. If he can find money, there is nothing unreasonable in the provision of making up the annualrents: for the purchaser, as is often the case, might chance not to draw his interest out of the subject sold.

PITFOUR. I have always considered that the cardinal difference between a right in security, and a sale under reversion, consists in this,—Whether does the purchaser run the risk of the rents or not? The purchaser is *dominus terræ;* the wadsetter is not. A bargain of risk is implied in the very nature of a sale. How can *he* be any thing else but a creditor who has the interest of his money secured at any rate? How can we believe a fictitious narrative, contrary to the *res gesta.*

MONBODDO. The purchaser was *dominus terræ* till redemption was used: upon redemption *res erat inempta,* and every thing returned to its original condition.

KAIMES. Even in a real sale under redemption matters return to be as at the *time* of the reversion. *Here,* if a real sale, the interim rents must have gone to the purchaser; and the risk must have been his in the interim.

BARJARG. The question, whether, from the circumstances of the case, *here* is a sale under reversion, or a wadset? I am satisfied that this was nothing else than a security for money.

KENNET. Many wadsets were granted of old, without the power of calling for the money, because those wadsets were lucrative, and, at the same time, it might distress the wadsetter to have such a demand made on him. That circumstance did not weigh with the Court in the case of *Balcarras: pacta legis commissoriæ* are not absolutely reprobated in our law. But there ought to be a declarator for closing the chequer. In a sale under reversion, the chequer is closed of course when the term elapses. From the circumstances of this case, I think it was *actum et tractatum* that there should be a security only, not a sale.

PRESIDENT. The question comes to this,—Is there here a *pignus* or a *sale?* The power of requisition to the reverser is not essential. When there is a sale, the price is extinguished; but here just the contrary. I do not value a clause thrown in contrary to law.

On the 6th February 1771, "The Lords found the lands redeemable; adhering to Lord Stonefield's interlocutor. *8th December* 1772, altered upon advising proof, which showed a *fair* sale for a just price."