

No. 44.

Pleaded for the pursuers, that as the terms of reversion had no reference to this back-bond, these clauses cannot affect an onerous purchaser of the right of reversion; neither can they affect his author, for Veitch, by assuming full possession on the reverser's death, and letting the lands as proprietor, must be considered as a proper wadsetter, taking his chance of the rents for his interest. It is of no consequence that the wadset was originally an improper one, in consequence of the back-tack to the reverser; for the subsequent assumed possession by the wadsetter, and his letting the lands without any protest, to show that he did not mean thereby to hold the back-tack as voided, clearly converted the wadset into a proper one, so that there can be no claim now for short coming of interest.

The Lords found that the conduct of the wadsetter, in letting the lands for a term of years, not by public roup, and in taking no protest, was virtually passing from the back-tack granted to the original reverser, and that the wadset thereby became improper; and therefore assoilzied both the pursuers from the defender's claims, and decerned in the declarator of redemption. See APPENDIX.

*Fol. Dic. v. 4. p. 397.*

No. 45.

A reverser may insist in a declarator of redemption, notwithstanding an order for redeeming voluntarily has been agreed on.

1786. March 10. NEIL CAMPBELL *against* PATRICK CAMPBELL.

The lands of Balligown had been granted in wadset to James Campbell and his wife; whom failing, to the heir of James Campbell; redeemable at the first term of Candlemas after the decease of the original wadsetters, or at the end of every nine or nineteen years thereafter.

The order of redemption prescribed was,—by premonishing the wadsetter sixty days before the term,—by an offer of the money at a particular parish-church,—or, in case of the wadsetter's not appearing to receive the wadset-sums, by consignment in the hands of certain persons.

An opportunity of recovering the lands having occurred by the death of the original wadsetters, Neil Campbell, the reverser, executed, for this purpose, a summons against Patrick Campbell, who had succeeded to the wadset-right. After reciting the conditions of the bargain, as before stated, it concluded, that the citation of the wadsetter should be held equivalent to premonition; an offer of the wadset-sums at the bar of the Court of Session, to consignment; and that these things being so done, the lands should be declared redeemed, &c.

Pleaded in defence: In the redemption of lands, the method agreed on by the parties should be exactly pursued. Hence it has been understood by all our lawyers, that the voluntary and extrajudicial form of redeeming ought to be tried before resorting to that which is litigious and compulsory; the latter being only calculated to carry into effect, by authority of law, a right which has been before fully perfected, act 1592, C. 136; Craig, Lib. 2. Dieg. 6. p. 164,—168; Spottiswoode, *voce* Redemption; Balfour, p. 445, 447, 453. 458; 15th June 1556, John Sempill against Houston; 15th Februaary 1562, Laird of Kinnaird, (See APPENDIX); Stair, B. 2. Tit. 10. § 16, 19; Bankton, Lib 2. Tit. 10. § 24; Erskine, B. 2. Tit. 8. § 17.

Answered for the pursuer : The forms of redemption prescribed in contracts of wadset were introduced in favour of the reverser, that he might not be under a necessity of following out his rights in courts of law. Appearing to be attended with little expense, they were generally practised for many years ; and it was only where they had proved ineffectual for obtaining restitution that the reverser thought of using judicial measures.

But it has been since found, on account of the many troublesome formalities requisite in that method of procedure, that the remedy by action of declarator is much the surest, as well as the least expensive one. And since, by stipulating an opportunity of voluntary redemption, the reverser cannot be understood to have renounced any right formerly competent to him, nothing surely hinders him from taking, in such a case, the same measures which would have been proper if a special order of redemption had not been mentioned. 18th February 1762, Campbell and Others *contra* Stewarts. (Not reported.)

The production of a missive letter from the defender, whereby he agreed to renounce his security, rendered a determination of the point of law unnecessary. The Judges, however, expressed their opinion, that the proceedings on the part of the pursuer were regular and competent.

“ The Lords repelled the defences, and decerned in the declarator.”

Lord Reporter, *Alva.* Act. *M. Ross.* Alt. *Hume.* Clerk, *Home.*

G.

*Fac. Coll. No. 267. p. 414.*

1790. February 9.

The TRUSTEES of FRASER of LOVAT, *against* ALEXANDER CHISHOLM.

The family of Lovat were superiors of certain lands held by the predecessor of Mr. Chisholm. In the year 1637, the former, on receiving the sum of 8000 merks, sold and disposed to the latter the feu-duties arising out of these lands, which amounted to 663 merks, redeemable upon payment of the first-mentioned sum. This conveyance contained a precept of sasine, and infeftment followed.

At this time the rate of interest authorised by law was 8 *per cent.* so that the feu-duties to be retained exceeded what could have been demanded for the use of the money lent out in the ordinary way. The creditor was also authorised to seek repayment of the sums advanced, if at any time the rate of interest should be increased.

The debtor farther became bound “ to warrant all and hail the foresaid sum of 663 merks, to be yearly uplifted and retained in and by all things, and to be safe and free from all and sundry perils, dangers, accidents, claggs, claims, and inconveniencies whatever, as well named as not named, present, bygone, and to come, against all mortals, as law will, whereby the said annual-rent, or any part thereof, may be evicted, or the grantee debarred from the uptaking and detaining thereof.”

No. 46.

Feu-duties may be the subject of a proper wadset, even where they are due by the wadsetter himself.