

possession and the violent profits. The defender *alleged*, the case is not here so, unless it were *alleged* the tenants were cast out; but the defender may defend the right to the mails and duties upon a better right than the pursuer. The pursuer *answered*, That he declared, he craved only re-possession to the ordinary profits. THE LORDS ordained the parties to dispute their rights to the mails and duties, and possession, as in a double pointing, and as if the duties were yet in the tenants hands. The defender *alleged* further, that she hath right to the mails and duties, because she offered her to prove, that the pursuer's father-in-law granted a back-bond, obliging himself and his heirs, to re-dispense these lands to umquhile Robert Lord Kirkcudbright, from whom the said lands were appraised, to which appraising the defender hath right, and thereby has right to the back-bond, and that the defender's wife represents her father as heir, or at least as lucrative successor after the back-bond; and so as he might thereupon have debarred the grant of the back-bond, so might the pursuer as representing him. The pursuer *alleged*, 1st, *Non relevat*, because the said back-bond is but a personal obligation, and the defender had thereupon no real right but only to the superiority; because, by discharge of the feuduty produced, he acknowledged the pursuer to be proprietor. 2dly, If any such backbond was (no way granting the same,) he offered him to prove that it was conditional, so soon as the said umquhile Robert Lord Kirkcudbright should require: *Ita est*, he has never required. The defender *alleged*, he had done the equivalent, because in a double pointing formerly pursued by the tenants, he had craved preference; and the pursuer *alleged*, upon the condition of requisition in the back-bond, and also that by the back-bond the granter and his wife's liferent was preserved; whereupon the defender was excluded.

THE LORDS found the allegiance of the said double pointing was not equivalent to the requisition; and therefore found the replies relevant, and assigned a day to the defender to produce the back-bond, and to the pursuer to prove the quality thereof; and so found the reply not to acknowledge the defence, but reserve it to either party to allege *contra producenda*, and found the personal obligation sufficient to debar the pursuer, albeit the defender had no other real right, seeing thereby she was obliged to grant a real right to the defender.

*Stair, v. 1. p. 72.*

1664. June 25.

CAUHAME against ADAMSON.

THOMAS CAUHAME having appraised a tenement in Dunbar, from Joseph Johnston, pursues James Adamson to remove therefrom; who *alleged* absolvitor, because this appraiser could be in no better case than Johnston, from whom he appraised, whose right is affected with this provision, that he should pay L. 6000

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to any person his author pleased to nominate; *Ita est*, he hath assigned the right to the defender, so that it is a real burden affecting the land, even against this singular successor, and included in his author's infestment. The pursuer *answered*, That albeit it be in the infestment, yet it is no part of the infestment or real right, but expressly an obligation to pay without any clause irritant, or without declaring that the disponder's infestment should stand valid, as to the right of that sum:

The which the LORDS found relevant, and repelled the defence, but superceded execution, until some time that the defender might use any means he could for making this sum to affect the land.

*Fol. Dic. v. 2. p. 66. Stair, v. 1. p. 207.*

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Lands were disposed with a provision in the disposition and infestment, that a sum of money should be paid by the receiver of the disposition to the disponder or any he should name, and in case it should not be paid, the right should be void. It was found that the clause and provision were effectual against singular successors.

1666. November 7.

CUMING against JOHNSTON.

SOME lands in Dunbar being disposed by one Adamson in favours of Johnston, with a provision contained in the disposition and infestment, that a sum of money should be paid by the receiver of the disposition to him, or any he should name; and in case it should not be paid, the right should be void; and the said lands being thereafter appraised, it was found against the complainer, that the said clause and provision were real; and that the person named, and having right to the sum and benefit of the said clause, though before declarator he could not pursue a removing, yet he has good interest to pursue for the mails and duties for payment of the said sum; and being *in possessorio*, to retain the mails and duties for payment of the said sum *pro tanto*; and that the said provision, and such like, are effectual against singular successors. It was *urged* by some, That all that could be done upon that clause was, that a reduction of the right might be pursued thereupon; but it was *answered*, that it being *actum*, that the lands should be burdened with that sum, and if nothing more had been exprest, but that it is provided that the said sum should be paid, the said provision being real, would have furnished the said action and exception, for payment of the said sum out of the mails and duties; and therefore, the subjoining the resolute clause, being *ad majorem cautelam*, could not be prejudicial nor retorted in prejudice of the disponder nor his assignee. This question was hinted at but not decided in the said debate, viz. If the declarator should be pursued upon the said clause for annulling the right, if it should operate in favours of the assignee, the lands not being disposed to him but in case of contravening, being to appertain to the disponder and his heirs, in case the right should be rescinded? It is thought, that the provision being assigned, the whole benefit and consequence of the same are disposed; and consequently the assignee, in the case foresaid of annulling the right, may pursue the heirs of