

1679. *January 16.*The LAIRD of LAMBERTON *against* The LADY PLENDERGAIST.

UMQUHILE ALEXANDER HOME of Plendergaist gave a reversion of certain appraised lands to Lamberton his good-brother, from whom he had the right of appraising, in these terms, 'That failing of heirs-male of his own body and his brothers, he obliged his heirs of line to resign the lands in favour of Lamberton, and the heirs between Lamberton and his sister.' This Lamberton, as heir betwixt them, having used an order of redemption, and consigned the sum of L. 8000, on which the lands were redeemable, pursues a declarator against Plendergaist's heirs of line, both the brothers having died without heirs-male. Compearance was made for the Lady Plendergaist, who produced her infeftment in these lands, and alleges that the bond granted by Plendergaist was only a substitution whereby Plendergaist preferred Lamberton to his own heirs-female; for it bears only 'an obligation on the heirs-female to denude, failing heirs-male, which are the terms of the substitution;' so that Lamberton being their heir of tailzie, he cannot quarrel Plendergaist's deed for so just a cause, as providing a jointure to his wife, though it might import an obligation not to do any fraudulent or gratuitous deed to vacuate this bond.—The pursuer *answered*, That he opposes the bond, which is no ways a substitution, but a positive obligation to denude upon payment of L. 8000; and though it be conditional, yet it is an effectual obligation, and a true reversion registered, which by the act of Parliament anent reversions is a real right, affecting the ground against singular successors, though for the most onerous causes; and therefore the Lady's infeftment being posterior to this reversion registered, it cannot impede the redemption and declarator, but can only affect the sums consigned, as coming in place of the land redeemed, whereby the decret will bear, that the sums are to be employed for the Lady's liferent use.—It was *replied*, That this bond, bearing 'love and favour,' can be interpreted no further than a destination of succession, otherwise Plendergaist should have bound up himself and his heirs-male for ever that they could never sell or burden this land; for tho' his brother or he had had heirs-male to three generations, they might have failed thereafter, and thereby be incapacitated to dispoise; *2do*, This bond can be no reversion, which is *pactum de retrovendendo*, and which indeed is made real by statute; but it can only be in the case that a party infeft dispoise his lands on reversion, but here Lamberton was never infeft.—It was *duplicated*, That this reversion did certainly hinder Plendergaist or his brother to dispoise; and tho' it were extended also to hinder their heirs-male to dispoise, there is no inconsistency; but it is like the Lords would have so interpreted the clause if there had been heirs-male; for the clause 'which failing,' in substitutions, is by our custom understood whenever they shall fail, though once heirs did exist, contrary to the interpretation of the Roman law, which by once existence of the

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Objected against a registered reversion, that not being *pactum de retrovendendo*, which is the true nature of a reversion, but granted to a third party, who had no right to the lands, it could not be good against singular successors. This objection repelled.

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institute, did wholly evacuate the substitution, 'but failing heirs,' when it is not in a substitution, but in a condition, is only meant of the immediate heirs-male; so that if either of the brothers had had an heir-male at their death, the reversion did expire. As to the second, neither law nor statute makes distinction, whether a reversion was granted to him who was formerly infest, albeit that being the ordinary case of reversions, it is thence called *pactum de retrovendendo*, yet there are many reversions granted to other parties than the grantor's authors, which being registrated, are as secure and real rights as the others.

THE LORDS sustained the declarator, and repelled the defence for the Lady, and found this not to be a substitution, but a conditional reservation, and registrated, and the condition purified, so that no infestment subsequent to the reversion could exclude the redemption, but ordained the money consigned to be employed for the Lady's liferent use. See SUBSTITUTE and CONDITIONAL INSTITUTE.

*Fol. Dic. v. 2. p. 63. Stair, v. 2. p. 673.*

\*.\* Fountainhall reports this case:

IN the action between Renton of Lamberton and the Lady Plendergaist, the LORDS 'found Lamberton's right more than a bond of tailzie, and that it imported a reversion, and that the Lady behoved to liferent the wadset money.'

*Fountainhall, v. 1. p. 34.*

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An improper wadsetter became cautioner for the reversion to a third party, and obtained from the reverser a declaration, that the wadset should not be redeemed until he were also relieved of this engagement. In a competition between the wadsetter and another creditor, it was found this was only a personal obligation, and not a proper eik to the reversion.

1708. February 18. SIR JAMES DALRYMPLE against SIR JOHN INGLIS.

THE Lord President of the Session, as purchaser of the estate of North Berwick, pursues Sir John Inglis of Cramond in a declarator and reduction of Sir John's rights affecting that estate, and particularly insisted against an eik granted by Sir William Dick to Mr John Inglis, then of Cramond, in July 1651, acknowledging he had engaged for him to Mr James Whitehead of Park for L. 10,000 Scots, and that he had a wadset upon his lands for L. 20,000 formerly due, therefore declares there shall be no lawful redemption by re-paying the said L. 20,000, unless Cramond be likewise freed and liberated of the said L. 10,000 due to Whitehead; against which the President *contended*, That it was no real right, but a mere personal declaration, wanting all the essential requisites to a formal eik; for, *1mo*, It does not bear these material words, 'and hereby adds and eiks the foresaid sum to the reversion;' *2do*, It is not added to a proper wadset, but to a wadset affected with a back-tack, and yet bears nothing anent augmenting the back-tack duty; *3tio*, It bears no obligation to pay, but only that the lands shall not be redeemable till it be paid; which is no more than what all wadsets bear, that there shall be no legal nor valid redemption, till the back-tack duties, termly failzies and penalties be paid; and yet no law-