

No 15.

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.*

No 16.

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-

yer ever pretended that these were real ; *4to*, It is so far from bearing a clause consenting to the registration in the register of sasines and reversions, in which record they have put it, that it bears only a warrant to insert in the books o Council and Session, in which register they did not put it ; so it is plain, they never looked upon it as a formal or valid eik ; and therefore any intromissions Cramond had with the rents of North Berwick, must go to extinguish the L. 20,000 in the principal wadset, and can never be ascribed to the said eik, which is no better than a personal bond, and could never be the title of his intromission with the mails and duties.—*Answered* for Cramond, That he opposed his eik, which had all the materials required by law ; for though it wanted these words of adding and eiking, and a further back-tack duty, yet it materially and virtually contains them all ; for he who declares that there shall be no redemption used till this sum be paid as well as the sum in the principal wadset, says as much on the matter as if he incorporated it into the wadset, added and eiked it thereto, and declared it a part thereof. And as to the clause of registration, it is confessed that, in executive writs, where executorials are to pass on a charge of six days, there must be a formal explicit consent ; but in registration appointed merely for publication and intimation, such as that of reversions and eiks, there is no need of the party's consent, the law supplies it. And as to my father's intromissions, they cannot be ascribed and imputed to the principal sum in my wadset, but are already applied by an interlocutor of the Lords, in the act *anno* 1685, to the sum in the eik ; and which is both consonant and agreeable to the principles and analogy of law, where indefinite payment is made to a creditor having two sums owing him, the one due by caution, and the other without it, the application is made to the sum wanting caution, as the presumed will of the party to preserve his sum, which he has unquestionably secured entire, and rather to pay the less secured debt, which by a contrary application might come to be altogether lost, as was found 13th February 1680, M'Rieth *contra* Campbell, No 3. p. 6801.—*Replied*, The said interlocutor was obtained when Stewart of Coltness, the other competior, was forced to flee, and was forfeited, and therefore not to be regarded ; but by a contract of communication betwixt Cramond and them in 1654, it appears no stress was laid upon this eik ; for, in deducing his rights, it is not so much as mentioned.—THE LORDS found it was not such an eik as to be a valid title for possession, and that Cramond's intromissions could not be imputed to it, but they behoved to extinguish the sum in the wadset, and therefore reduced it, as only being a personal right, which could not affect the lands ; as also reduced the said act in 1685, in so far as it found the intromissions imputable to the eik, as well as to the wadset.

*Fol. Dic. v. 2. p. 63. Fountainhall, v. 2. p. 432.*

No-16.

\* \* \* Forbes reports this case :

SIR WILLIAM DICK and his sons having granted a wadset of their lands of North-Berwick to Mr John Inglis of Cramond, and John Joussie of Westpans, equally, redeemable for L. 20,000, containing a back-tack for payment of the annualrent thereof, and a clause that no redemption should be held till the whole back-tack duties, termly failzies, and all other sums, wherein these wadsetters should be creditors to Sir William, were satisfied, together with the principal sum ; Sir William also granted a declaration apart thereafter, in July 1651, bearing, ' That Cramond, Joussie, and others therein mentioned, were engaged to Mr James Whitehead of Park for the sum of L. 10,000, borrowed and applied for Sir William's use and behoof ;' and declaring, ' That the wadset right should not be redeemable, upon repayment of the foresaid L. 20,000, annualrents, and expenses thereof, unless they were freed of their engagement for the L. 10,000, annualrent, and expenses.' This declaration bears only a clause of registration in the books of Council and Session, that letters and executorials may pass thereon ; but is registered in the record of sasines and reversions. Cramond and Joussie, in August 1652, obtained, upon the wadset and declaration, a decret of mails and duties in absence, and thereby possessed the wadset lands. Sir Hugh Dalrymple, Lord President, who purchased these lands, as the highest offerer at a public roup, insists now against Sir John Inglis, in a declarator of extinction of the wadset, by his and his predecessor's intromission with the rents of the wadset lands.

*Alleged* for Sir John Inglis ; That his and his author's intromissions must be ascribed in payment of the principal sum and annualrents in the eik to the reversion, as well as to the sums in the principal wadset.

*Replied* for the President ; What Sir John Inglis pretends to be an eik, is but a declaration, bearing registration for execution, which cannot become an eik by the creditors thinking fit to record it in the register of sasines and reversions, without any special consent, paction, or design on the debtor's part to make it real ; which did not in the least alter the nature of the obligation, more than registering a personal bond in the register of sasines could make a real right ; and is of no more effect than the usual clause in the wadset itself, that expenses, termly failzies, and all other sums, shall be paid before redemption, which was never pretended to afford any title to mails and duties, or an additional back-tack duty to the wadset. An eik to an improper wadset, or to an annualrent, signifies nothing, unless the back-tack be declared void, conform to the irritant clause in the wadset ; or it contain a new back-tack duty ; or unless the infetment of annualrent contain a new annualrent. For what imports it, that the granter of an annualrent, or an improper wadset, obliges himself that there shall be no redemption till an additional sum be paid ? It is a matter of indifferency to a debtor, whether the annualrent or wadset right

be redeemed or not. If this pretended eik had the real effect to stop redemption, the President would chuse rather not to redeem, but still to lie subject to the back-tack duties. And though custom hath introduced eiks to proper wadsets, which generally are more valuable than the sums therein contained, an eik to the reversion of an annualrent, or an improper wadset, was never sustained to have any real or legal effect.

*Duplied* for Sir John Inglis ; Eiks adjected to reversions, and duly registered, have the same effect as if contained in the principal wadset ; and the infetment unredeemed is a real burden upon the ground, and a title of mails and duties for payment of sums in the eik, as well as those contained in the principal wadset. Albeit the eik doth not bear an obligation for an additional back-tack duty, or an assignation to mails and duties, yet the making the said eik to the reversion was a virtual addition to the back-tack duty, as being an addition to the principal sum in the wadset ; and the disposition and infetment, upon the principal wadset right, became a title for payment of the sums contained in the eik, as well as those in the wadset itself. *2dly*, The question here not being about the recovery of payment by virtue of the decret of mails and duties upon the eik, as well as the wadset, but concerning the application of indefinite payments already recovered, and intromissions had by Cramond, the creditor (now that the debtor is insolvent) must have his election, and be allowed to apply the payments in satisfaction of a debt that is least secured, and in greatest hazard, February 13th 1680, M'Rieth against Campbell, No 3. p. 6801. *3dly*, There is no consent of parties requisite for registering eiks in the register of reversions, because that is for publication only ; and consent is only needful to the registering of writs, in order to execution and diligence. *4thly*, There is a great difference betwixt an eik to an improper wadset, which is a right of property, and an eik to an infetment of annualrent, which is only a servitude on the property, and so not a proper subject to bear the burden of an additional eik ; nor doth there appear any sufficient ground of difference in this case betwixt a proper and improper wadset, both being rights of property, while unsatisfied or unredeemed, though not extinguishable the same way.

*Triplid* for the President ; The allegiance that an additional back-tack duty doth naturally result from such an eik, is made *invita juris prudentia*, without authority or example ; and, where was it ever pretended, that a party obtaining a decret in absence upon several titles, some good, some bad, the intromission should be equally ascribed to all ? Intromission is always imputable to a preferable right, at least to a valid right.

THE LORDS found, that the declaration produced is not such a valid eik as to be a title of Cramond's intromission, to which his possession might be ascribed, as well as if the eik had been added to the principal wadset.