

1715. June 21.

SIR GEORGE INNES of Coxtoun, and JAMES WISEMAN, his Assignee, against
JAMES CHALMERS.

There being an apprising of the lands of Linkwood led *in anno* 1671, for 6000 merks principal, which is now by progress in the person of the said James Chalmers, there was a contract entered into betwixt his authors and common debtor *in anno* 1672, restricting the apprising to the accumulated sum of 8,000, and declaring it purgeable for 6000 if paid at Whitsunday thereafter: As also, *in anno* 1685, there is another contract, restricting also the accumulated sum again to 8000 merks, and assigning a locality of certain lands for payment of the annual-rent of the sums appraised for. The right of reversion being competent to Sir George Innes and his assignee, as coming in place of Gibson of Linkwood the debtor, there was an order of redemption used at the assignee's instance, and now in a process of declarator of redemption, this point came to be advised, viz. How far a contract, relative to the apprising entered into within the legal, and assigning a locality as said is, should not only be good against the contractor and his heirs, but even against James Chalmers as singular successor? And,

It was alleged for James Chalmers, That however such contracts or back bonds might affect apprisings, while within the legal, and not completed by infestment; it was against the nature of heritable rights, that these should be clogged with back-bonds, which were latent, and being in no register, could not be known by purchasers; and that infestment had followed upon this apprising after the legal had expired, after which the effect of any back-bond behoved to cease, as was found 21st July 1636, King, No. 22. p. 10186. and 10th March 1629, Shaw, No. 30. p. 10198. And this is Viscount Stair's opinion, B. 3. Tit. 1. § 21. where he says, "That because apprisings within the legal may be taken away in the same manner as personal rights; therefore adjudications, discharges, and back-bonds by those who have right to the apprising are effectual, and if thereupon the matter be made litigious before expiring of the legal or inhibition used thereupon, they will be effectual against singular successors, even after the legal is expired; but after expiring of the legal, infestments upon apprisings are in the same manner as upon irredeemable dispositions; for they are the foundation of the rights of most lands in the kingdom; and if personal rights should make them insecure after expiring of the legal, it would be of great inconveniency." And this also is conform to a decision, 21st November 1673, Brown against Gairns, No. 41. p. 10209. where the Lords found a back-bond affected the apprising before infestment;—As also, to another decision 6th July 1661, Telfer against Maxton, No. 18. p. 5633. where the Lords repelled an allegiance upon a bond relating to an apprising, as not affecting singular successors. And besides all this, the great inconveniencies, if such latent bonds or contracts should affect singular successors, are too obvious to be mentioned.

No. 37.

Effect of latent and unregistered back-bonds.

No. 37.

Answered for Coxtoun and his assignee, That the contract 1685, having plainly qualified and turned the apprising into a redeemable right, and no infeftment having been upon this apprising before the date of this contract, it is to be remembered, that the arguments for the other side, do chiefly relate to voluntary conveyances, as to which the above position is freely owned: But the case was still otherwise in apprisings within the legal, which were looked upon as *pignora judicialia*, and which did not denude the debtor: So that no man was ever secure by acquiring of such, but was still subjected to the hazard of all deeds within the legal. Thus they are extinguished by any payment, intromission, compensation, &c. all which will meet singular successors. Nay, it is known, that creditors do daily for conveniency assign, in order to leading adjudications, and rest secure upon back-bonds; which would be very insecure, if the assignee, being infest and transferring the right to strangers, should evacuate the force of the back-bonds. So that such a back-bond being granted within the legal, though it should afterwards expire, yet the apprising stands still affected, in regard perfectly qualified and impressed, while it was of the nature as to receive that impress. As to the authorities adduced. *1mo*, The two decisions first quoted, do plainly concern voluntary conveyances, *2do*, The Lord Stair's assertion is misapplied, for all that he says there, is, That assignations to incomplete, real rights, as apprisings, dispositions of lands before infestment, &c. are affected with the assignée's back-bond, if the competition come in before infestment: He is not there determining the point, how far apprisings within the legal may be affected with back-bonds, but how far assignations to incomplete real rights (where dispositions are brought in as well as apprisings) are affected, &c. But he is not there treating of the nature of apprisings within the legal, which he is *ex professo* treating in another place, viz. B. 3. T. 2. § 39. where he says, Apprisings are excluded and qualified by the back-bonds and obligations of the appriser; and this was so found 23d July 1666, Earl of Southesk against Marquis of Huntly, No. 40. p. 4712. where an apprising was found taken away by a back-bond, even in prejudice of a singular successor. As also, 6th July 1676, Gordon against Skein and Crawford, No. 1. p. 7167. where it is *in terminis* decided, that back-bonds do affect even as to singular successors, though *extra corpus juris*. And as to the other two decisions cited for the other side, in the first it does not appear that the bond there in question had a reference to the apprising, but was an extrinsic bond of communication. And as to the other, it is there found, that the back-bond was sufficient to affect the apprising, being before infestment; but still that does not exclude likewise the other position, That also within the legal it affects it, whether infestment follow or not. Lastly, here Chalmers (as appears by his disposition) only acquired right to the apprising, with all hazards that did attend it, and paid only 8000 merks, which is the very sum to which the apprising was restricted, and the disposition bears only warrandice from fact and deed; so that he was not buying the lands of Linkwood, but only the apprising, as a security for his money.

The Lords in respect the contract 1672, restricted the comprising to a lesser sum; and in regard that the contract 1685 wadsets part of the comprised lands, redeemable for the sums in the comprising, and possession conform, both contracts being within the legal; and that the defender's purchase of the comprising was for the sum in the wadset, and not for a sum equivalent to the comprised lands; they repelled the defences, and found the comprising still redeemable.

Act. *Sir Walter Pringle.*

Alt. *Oliveston.*

Clerk. *Mackenzie.*

Bruce, p. 127.

No. 37.

1741. *December.* SINCLAIR *against* MURRAY.

Where one had acquired the reversion of a wadset, in so far as concerned a certain part of the lands, it was found that such partial purchaser could not redeem the wadset in part.

Kilkerran, No. 1. p. 592.

No. 38.

1747. *December 3.* GRAYS *against* BROWN.

David Gray, 14th March, 1672, wadset to Archibald Brown, flesher in Tra-nent, a tenement lying there, for 650 merks Scots, redeemable at any term of Lammas or Candlemas after Lammas then next to come, for payment of the principal, annual-rents and expenses; and the wadsetter, in the same deed, granted to the reverser a back-tack for 39 merks, the then interest of the wadset sum, with this provision, "That in case the said Archibald Brown and his foresaids should failzie in thankful payment of the said back-tack duty above written, and suffer two terms payment thereof to run in the third unsatisfied; that then, and in that case, that present back-tack should be extinct, void and null of itself, in such manner and form as if the same had never been made, given, or granted; and the said David Gray and his foresaids should have full ingress, access, and regress in and to the same lands, setting, raising, using, and disposing thereupon, without any declarator or further process of law, notwithstanding of any act or practick in the contrary; neither yet should the back-tack duty aforesaid be any ways restricted to any less than was above-mentioned, nor be affected with any public burden; and in case of declarator of nullity of the back-tack, should that present wadset be any ways restricted, nor be obliged to account with the said Archibald Brown or his foresaids; neither should the said David or his foresaids be obliged to grant any excrescence to them, or their assignees or creditors, during the not-redemption of the said lands, notwithstanding of any acts of Parliament, law or practick to the contrary; all benefit whereof, the said Archibald Brown and his foresaids had renounced, and thereby did renounce for ever."

No. 39.

A wadset was granted and a back-tack let thereof, stipulating, that if the duty was not paid, the wadsetter should enter on the possession, and declarator of failure of payment was obtained. The wadset-ter having taken possession, it was found that thenceforth the wadset was a proper one.