

1713. November 19.

JAMES DUNDAS of Briestmill *against* JAMES and JOHN MURRAYS, Grandchildren to the deceased James Murray of Skirling, and Lieutenant-General DOUGLAS.

PATRICK DUNDAS of Briestmill in the year 1659 apprised the lands and estate of Sir James Murray of Skirling, for the sum of 7000 merks owing to him by Sir James, whose son James Murray possessed the estate by virtue of rights acquired by him from some of the preferable creditors, particularly a wadset granted by Sir James Murray in the 1648 to one Livingston merchant in London, for L. 2000 Sterling, and an apprising led in the 1652 upon a bond granted to Thomas Wilson and Barbara Brown his spouse in liferent, and Marion and Jean Wilsons their daughters in fee, for 9000 merks Scots, till about the year 1687, when he sold the lands of Skirling to Lieutenant-General Douglas, and conveyed any rights in his person to the General, who was to pay a price agreed upon, partly to James Murray himself, and partly to his creditors, whose rights were to be conveyed to the General for security of his purchase, and to retain the remainder, viz. 27,000 merks, till several incumbrances were purged, particularly Briestmill's debt. James Dundas now of Briestmill, as heir to Patrick his father, raised a reduction, improbation, and declarator, against John and James Murrays, grandchildren to the said James Murray, wherein Lieutenant-General Douglas's Representatives were called. The production being satisfied, the pursuer passing over the reduction, insisted to have the 27,000 merks of the price of the lands owing by the Lieutenant-General declared to be affected with his apprising, and to have it found and declared, that the debtors in the price ought to make payment thereof to the pursuer, in so far as he is a creditor by virtue of the said apprising.

Answered for the defenders, *1mo*, The pursuer cannot insist in his declaratory conclusion, which is but a consequence of the reduction, till the defender's rights be reduced and improved; *2do*, No infestment having followed upon the pursuer's apprising, he cannot pretend right to the price, unless he had a preferable right to the lands, which he cannot pretend to, since it is offered to be proved, that the Representatives of General Douglas and their authors have been more than 40 years in possession by virtue of infestments and other rights, particularly Livingston's wadset, containing an irritancy in case of not redemption within a certain time, which irritancy was declared, and Wilson's apprising, whereof the legal is run long ago; *3tio*, The pursuer's comprising is prescribed *non utendo*, there being more than 40 years elapsed since the date thereof, and before the commencement of this action.

Replied for the pursuer; It is not necessary for him to reduce and improve any competitor's right, the subject in controversy being the residue of the price of the lands, to be determined by way of multiplepointing, according to the preference of competing rights in this declarator, wherein the debtor and com.

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peting creditors are called; *2do*, This part of the price may be carried by the pursuers comprising without an infeftment, as in effect a right of reversion after more preferable creditors are satisfied. It is no ways relevant that General Douglas and his authors have been 40 years in possession of the lands; because the pursuer doth not quarrel the General's right of property, but only craves to draw his share of that price which he was bound to pay for it; and from the moment that the General gave bond for the remainder of the price, with power to retain it till some particular debts, whereof the pursuer's was one, were satisfied, he could not prescribe positively, by virtue of Livingston's wadset and Wilson's apprising, against those creditors whose interest was saved by the very retention of the price, and giving bond in such terms. Nor could James Murray himself, who sold the lands, prescribe positively in virtue of the said wadset and apprising; because these were only redeemable rights, and extinguished by intromissions. Had there been a declarator of the irritancy of the reversion, (as truly there was none) it could signify nothing; because Livingston the original wadsetter did, after the time it was said to be, accept of the annualrents of his debt, and count for the superplus rent of the lands to James Murray, which was a passing from the declarator; *3tio*, The negative prescription was interrupted by an inhibition in the year 1682, and process founded on the pursuer's apprising, whereon an act was extracted *in anno* 1698.

Duplied for the defender; Neither of these can be sustained as legal acts of interruption; because the inhibition is founded on a depending process, which never came to a conclusion; and the act extracted in the 1698 doth not therein mention the apprising in the production of the writs.

Triplied for the pursuer; The process wherein inhibition was used, though never determined, was still a document taken upon the debt, sufficient to hinder prescription; and though the apprising is not mentioned to have been produced in the extracted act 1698, yet it is libelled upon, which preserves the debt.

THE LORDS sustained Briestmill's title, in order to be heard to affect the remainder of the price in the hands of General Douglas's Heirs; and repelled the defence of positive prescription, founded on 40 years possession by virtue of Livingston's wadset or Wilson's apprising, in respect they found them still to be redeemable rights; and found the pursuer's apprising is not prescribed *non utendo*, in respect of the legal interruptions; and sustained the allegiance, that the sums in Livingston's wadset and Wilson's apprising, are satisfied and paid by intromission with the rents or price of the lands, relevant to prefer the pursuers upon the remainder of the price.

Fol. Dic. v. 2. p. 127. Forbes, MS. p. 2.

* * A similar decision was pronounced in a case respecting the vicennial prescription of holograph writs, 15th January 1714, Edmonston against Edmonston, No 188. p. 10990.,