

sum consigned upon requisition was not arrestable at the instance of a creditor of the wadsetter.

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Gosford, MS. p. 300.

*** A similar decision was pronounced, 8th February 1681, Dunbar *contra* M'Kenzie, No 120: p. 55688., *voce* HERITABLE and MOVEABLE.

1710. July 25. WILLIAM ROSS of Aldy *against* CHARLES ROSS of Ey.

CHARLES ROSS having granted to William Ross a proper wadset of the lands of Littleallan, whereupon he was infeft and got possession, and some years thereafter set them in tack to the granter of the wadset; after expiring whereof he he used requisition, and thereupon charged the reverser to pay the sum in the wadset. He the reverser made offer of the money under form of instrument, and consigned it; but William Ross chusing rather to retain the wadset than to accept of the money, pursued Charles Ross to remove from the lands of Littleallan.

Alleged for the defender; He could not be decerned to remove, in respect that upon the wadsetter's requisition and charge he had offered and consigned his money, which consignment, being equivalent to payment, extinguished the wadset right.

Replied for the pursuer; The requisition and charge could not hinder him to prosecute his removing, since he past from his requisition; as a reverser premonishing the wadsetter to take his money may, after consigning the same, take it up again before declarator of redemption, or the wadsetter's acceptance; especially considering, That it is provided in the contract of wadset that no personal diligence should prejudice or loose the real right; and the reverser hath used no premonition, nor raised a declarator of redemption.

Duplied for the defender; The clause in the wadset, That using personal diligence should not loose the real security, imports only, That the real right should subsist till payment were made, notwithstanding of personal diligence; but it cannot subsist after the defender's consignment, which is equivalent to payment. Nor needed the defender to use any premonition, when he was distressed and charged by the pursuer, who cannot now pass from his requisition and diligence, when *res non est integra*. There is a great difference between a reverser's premonishing the wadsetter to take his money, and thereafter passing from the requisition, and a wadsetter's resiling after his using premonition, and charging for payment; for a wadsetter hath no prejudice by the reverser's passing from his requisition; whereas it were highly prejudicial to the reverser, if after he hath raised money to satisfy the wadsetter's requisition and charge, he should

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The granter of a wadset, upon the wadsetter's requisition and charge for payment of the money, offered and consigned it, by way of instrument. The Lords refused to allow the wadsetter afterwards to pass from his requisition and charge, and recur to his right of wadset, although the reverser had used no order of redemption by premonition and declarator against him.

But afterwards the wadsetter was permitted to pass from the charge, and recur to his right of wadset, by insisting in a process of removing against the granter, although he consigned the money in the clerk's hands, after the removing was

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judicially called, without prejudice to the reverser to use an order of redemption.

be forced to keep it dead in his hand, and suffer the wadsetter to enjoy the rents of his estate.

THE LORDS sustained the defence, That Charles Ross could not be decerned to remove after his consignation, of the sums in the wadset, upon the pursuer's requisition and charge.

1710. *November 10.*—IN the process of removing, at the instance of William Ross, as proper wadsetter of the lands of Littleallan, against Charles Ross granter of the wadset, the LORDS, July 25. 1710, found, That Charles Ross having, upon William Ross's requisition and charge for payment of the sum in the wadset made offer and consignation thereof under form of instrument, William Ross could not thereafter pass from his requisition and charge, and insist in the removing, albeit Charles Ross had used no order of redemption ;

William Ross reclaimed, and *represented*, That there being no offer of payment, nor consignation, before he insisted in his removing, he is not obliged to accept of the money until lawful premonition be made to him, in the terms of the contract. Whereupon the LORDS found, That the pursuer might pass from his charge, and insist in the removing, reserving to Charles Ross to use an order of redemption as accords, in the terms of the contract of wadset ;—albeit it was *alleged* for him, That though an infestment of wadset extinct by the wadsetter's premonition or requisition revives by his passing from the order, yet a charge of horning used upon the requisition cannot be so past from, Stair, Instit. Lib. 2. Tit. 10. § 22 ;—in respect it was *answered* for William Ross, That a requisition and charge have the same effect, Stair, Lib. 2. Tit. 1. § 4. ; Spottiswood, Tit. Assignation, Donaldson against Donaldson, see APPENDIX ; and the citation by Charles Ross out of Stair's Institutions must be understood where the wadsetter hath not given sufficient evidence of his passing from the charge, by making use of his infestments.

Fol. Dic. v. 2. p. 354. Forbes, p. 434. 440.

NO 12. 1739. *January 19.* ARBUTHNOT *against* LOCKWOOD and GIBBON.

A REAL creditor upon a bankrupt estate, having agreed with the debtor to accept of a certain sum in place of his whole claims, and the debtor having consigned the sum upon the creditor's refusal to implement the bargain, and thereupon having obtained interlocutor in his favour, declaring the creditor's claims upon the estate to be sopite and extinguished ; there ensued a competition upon the consigned sum among several parties to whom the said creditor was due sums of money, and who had arrested, some before and others after the said interlocutor. It was *objected* against the prior creditors, That the money belonged to the consigner before the interlocutor. The LORDS, notwithstanding