

No. 41. to catch at an unjust advantage, by obtaining the redemption to be delayed for another year.

It was also considered, that the same thing in effect is done every day in processes of removing. Even where a warning is informal, the landlord is not put to the necessity of a new warning and a new process of removing. It is seldom that such an objection is further sustained, than to delay the removing till next term.

The judgment was in the following words: "Sustain the order of redemption of the wadset right in question, so as to declare the lands redeemed at Whitsunday next. And remit to the Lord Ordinary to proceed accordingly, and to settle the terms of payment or consignment."

This interlocutor is not properly worded. It was the unanimous opinion of the Court, that the order of redemption being informal, could not be sustained to any effect. But that as, without any order, a process of declarator is competent, concluding that the wadsetter should be decerned to receive his money at Whitsunday next; and that, upon payment or consignment, it should be found that the lands are redeemed; there can be no good reason why these conclusions may not be grafted on the present process, when it saves expense to the parties. The interlocutor, therefore, ought to have been in some such terms as the following: Find, That the defender is bound to receive the wadset sum at Whitsunday next; and that, upon payment or consignment, the land shall be held as redeemed. This is indeed but a hypothetical interlocutor, and it cannot be otherwise. But to purify the same, all that is further necessary is, after consigning the money at Whitsunday, to apply to the Court, or to the Ordinary, if the cause is remitted to him, mentioning, that the money is consigned according to the order of Court; and therefore, that the Lords should find that the land is actually redeemed.

Sel. Dec. No. 106. p. 150.

1757. *March 9.*

HUGH MACLEOD of Genies, *against* HUGH FRASER of Lovat and His CREDITORS.

No. 42.

A proper wadsetter being dispossessed, his claim for the rents is only personal, and not real against the lands.

John Macinreoch obtained, in the year 1630, a wadset of part of the lands of Assint, redeemable after nineteen years.

Kenneth Mackenzie, second son of Lord Seaforth, came to have right to the estate of Assint, in virtue of certain adjudications and apprisings; and in the year 1676, the wadsetter was forcibly turned out of possession of the wadset lands, and Kenneth Mackenzie immediately entered to the possession.

In the year 1730, the heir of the wadsetter obtained a decree of preference, as to the mails and duties, against the reverser Kenneth Mackenzie; in consequence of which she recovered the possession of the wadset lands in the year 1736, and then brought an action for the rents and profits of the lands during the period she

and her predecessors had been forcibly excluded, viz: from the year 1676 to the year 1736, and conveyed her right to Hugh Malceod.

The creditors of Kenneth Mackenzie brought a ranking and sale of the estate of Assint. In this process Hugh Macleod insisted to be ranked as a preferable creditor, not only as to the property of the wadset lands, subject to redemption, but also for the rents and profits from the year 1676 to 1736.

It was admitted by the creditors: That the claim for the rents and profits was well founded, as a personal debt, against Kenneth Mackenzie, the proprietor of Assint; but they denied that it was a preferable debt affecting the wadset lands, in a competition with them.

For Hugh Macleod it was argued, That though the claim for the bygone rents of the wadset lands is a personal debt, yet he ought to be found entitled to retention of the wadset lands, supposing an order of redemption used, until payment of these bygones. It was a breach of the contract of wadset, upon the part of Kenneth Mackenzie, to dispossess the wadsetter of the lands; and, of consequence, the wadsetter would have been entitled against him, the reverser, to retain the possession after an order of redemption, till the rents from which he was excluded were fully repaid. This defence must be equally good against the creditors of Assint, since their diligences can only carry the right of reversion, and they cannot be in a better case than the reverser.

If this wadset had been improper, the lands could not have been redeemed but upon payment of the interest of the wadset sum during the years of exclusion, as well as the principal; and the rents, in the case of a proper wadset, must be considered in the same light with the annual-rents in the case of an improper wadset; and therefore must be equally secured to the wadsetter by a right of retaining the lands.

Answered: The claim of a proper wadsetter dispossessed of the lands, is good against the person who dispossessed him, and received the rents, whether that violence was committed by the reverser or by a third party; but in both cases it is only a personal claim; because, by the nature of a proper wadset right, the rents are taken in place of the interest of the money, and the wadsetter runs all risks, and has a remedy at law for keeping and recovering possession of the rents. The case of an improper wadsetter is different; the rents are not taken in place of the interest of the money; for the reverser is bound to uphold them; and therefore the interest of the money is a real debt against the estate, unless in so far as paid or extinguished by the rents received.

“ The Lords adhered to the Lord Ordinary’s interlocutor, finding Hugh Macleod preferable as to the property and possession of the wadset lands till redemption, subject to redemption in terms of the wadset right; but finding, that the intrusions had by the common debtor and his author, the reverser of the wadset right, with the rents and profits, while the wadsetter was kept out of possession, were not really secured, nor could affect or burden the clause of reversion in the

No. 42. wadset right; and therefore, that Hugh Macleod could only be ranked *ultimo loco* for these rents and profits."

Act. Lockhart.

W. J.

Fac. Coll. No. 22. p. 37.

1775. November 17. THOMAS BUCHANAN against JOHN ADAM.

No. 43.
Whether
proper or
improper?

The defender having, in virtue of a wadset and right of annual-rent transmitted to him from the original wadsetter, been long in possession of a small pendicle of land belonging to the pursuer, this action was brought in order to have it found and declared, that the said wadset was extinguished, and the debt satisfied by intromissions, and that the defender might be decerned to remove from the lands.

The question turned chiefly upon the nature of the wadset right, which is somewhat anomalous, the same debt having been secured partly by a wadset, and partly by a right of annual-rent, at a time when the interest of money was at ten *per cent.*

In the year 1615, John Lennox, then of Barnshogle, borrowed from James Adam, the sum of 400 merks; for security of which, he disposed to the said James Adam, "That part and portion of his said lands of Barnshogle, commonly called Taillabout, then possessed by the said James Adam," redeemable by the said John Lennox: "Likeas, the said William Lennox grants him to have sold and disposed, &c. to the said James Adam, and his foresaids, heritably, all and hail an annual-rent of 20 merks money, to be uplifted forth of all and hail the said John Lennox, his forty shilling-land of Barnshogle, with the pertinents, beginning the first payment thereof at the feast and term of Whitsunday next to come, *in anno* 1615 years, and so forth, to continue ay and while the lawful redemption thereof under-written." So that the creditor, in the *first* place, got a wadset of the little pendicle of Taillabout, a part of the lands of Barnshogle; and, *2dly*, got also a right of annual-rent over the whole lands of Barnshogle for five *per cent.* of his money.

The said James Adam thereby obliges himself to grant a sufficient letter of regress and reversion in due and competent form, with all the other usual clauses of a wadset and right of annual-rent; and there are several clauses which it was said seemed to point more at an improper than a proper wadset, such as the warrandice given by the reverser from all life-rents, annual-rents, feu-duties, &c. and other perils, dangers, and impediments whatever, bygone, present, and to come; and a *proviso*, that the redemption should not take place, unless the bygone annuals of the said annual-rent should be first paid.

Argued on the part of the pursuer: That, whatever may have been originally intended, it is clear these double securities could not subsist after the reduction of interest, to any other effect or purpose than for enabling the creditor to recover