1756. *March* 2.

ALEXANDER, DUKE of GORDON, *against* DONALD M'PHERSON.

No. 41.
In an order of redemption the wadsetter is not bound to accept of Bank notes instead of current coin. A process for redeeming land is competent without necessity of a previous order of redemption.

Gordon sold to M'Pherson the lands of Kinguissie, redeemable by payment, "on a Whitsunday's eve, of 4,000 merks Scots hail and together, in one sum of current gold and silver having passage for the time."

The Duke of Gordon, in right of the reverser, did, on the eve of Whitsunday 1755, execute an order of redemption against M'Pherson; and he not appearing, consigned the sum stipulated in notes of the Bank of Scotland: The Duke then insisted in a declarator of redemption.

M'Pherson objected: That the order of redemption was null; for that it was proved by the instrument of consignation, that Bank notes had been consigned, whereas the clause of reversion required gold and silver; and he pleaded, that an order of redemption must be observed in the specific form required; that when the clause of reversion mentions one species of money, no other can be obtruded, 15th May, 1547, Ogilvie, No. 3. p. 13441. Balfour, Tit. REVERSIONS, p. 456. Spottiswood, p. 261. This rule has been so strictly observed, that even when the species covenanted was not to be had, payment could not be made in another, without the authority of Parliament, 37th act, 6th Parl. Q. Mary. Since then in reversions one species of money cannot be legally tendered in lieu of another, *a fortiori*, bank-notes cannot be legally tendered in lieu of money. The notes of the Bank of Scotland are nothing more than the notes of a trading company: The credit indeed of that Company is entire, but it is liable to various accidents; has been impaired by civil commotions; and may be destroyed by any public calamity; payment therefore made in such notes cannot be deemed equivalent to payment in gold and silver. A consignation in bills at sight accepted by the wealthiest merchants in Scotland, would not in the present case have been held a proper consignation, much less can bank-notes; for that such bills may be instantly discounted, the payment of bank-notes may be postponed for six months; the former are subjected to diligence by horning, the latter are not, 11th July, 1728, Royal Bank against the Old Bank, No. 1. p. 875.

Answered for the Duke of Gordon: Our ancient decisions required redemptions to be made in the precise form prescribed by the letters of reversion, even when such form was of no moment to the wadsetter. The equity of modern practice has mitigated this rigour. Thus, anciently, in redemptions, the actual production of a procuratory was required; but now, it is sufficient that a procuratory do exist, and be produced on demand. In like manner, a consignation of a discharge of a debt arising from the contract of wadset, is held as equivalent to a consignation in money, 2d January, 1667, Hodge against Hodge, No. 44. p. 13464.

While the value of our coin was perpetually fluctuating, there was an essential difference to the wadsetter between payment in one species and payment in an-

No. 41. other. On this principle the decisions quoted for M'Pherson proceeded; but now that the value of our coin is fixed, there is no such difference.

The accepted bills of merchants are in no sort equivalent to bank-notes; the credit of the Bank is greatly superior to the credit of any private merchants; and were the whole proprietors of Bank stock to become bankrupt, their stock would be transferred to their creditors, but the credit of the Bank itself would not be impaired.

Further, Bank notes have been held equivalent to money, 21st January, 1737, Crawfurd against Stewart, No. 3. p. 6193.; where the consignation of bank notes, by one attempting to poind the goods of the tenant, was found sufficient to satisfy the hypothec claimed by the master.

Bank notes may be used in consignations, even although it should be granted that they cannot be obtruded as legal payment. The purpose of a consignation is to afford evidence that the reverser is ready to pay, and that the wadsetter is *in mora*. After the form of consignation has been completed, the reverser may take up his money; nor need he pay it again, until he either obtain a renunciation from the wadsetter, or a declarator of redemption against him. On the other hand, the wadsetter is not bound to renounce his wadset-right, until legal payment be made to him. Had he, in this case, appeared, and refused to accept bank notes, the sum would have been paid down in gold and silver; he cannot, by not having appeared, receive an advantage, which he would not have received had he appeared.

But, *separatim*, the order of redemption, however informal, must be sustained, to the effect of enabling the reverser to redeem at Whitsunday 1756, in terms of the wadset; for that he now insists in a declarator of redemption against the wadsetter. This is analogous to the practice in warnings. An action of removing, brought on an informal warning, is sustained to the effect of decreeing the tenant to remove at the next term, without any further warning; as in that case an action of removing is considered as a warning equivalent to that required by the statute; so, in this case, a declarator of redemption ought to be considered as equivalent to the form of redemption required by paction.

"The Lords sustained the order of redemption and consignation, to this effect, that the pursuer may redeem the lands by payment or consignation, upon the term of Whitsunday 1756, of 4,000 merks in one sum of current gold and silver, having passage for the time; and, upon the pursuer's making such payment or consignation, found the lands redeemed from and after the said term."

Act. *Johnstone, Ferguson.* Alt. *Sir D. Dalrymple.* Reporter, *Auchinleck.*

Fac. Coll. No. 194. *p.* 287.

*** This case is reported by Lord Kames:

No. 41.

A wadset right contained *in gremio* the following clause of redemption: "Redeemable always the said land by the said John Gordon and his foresaids, from the said Malcolm M'Pherson and his foresaids, by payment making to them of the sum of 4,000 merks Scots, hail and together in one sum of current gold or silver, having passage for the time, upon a Whitsunday evening, &c." The Duke of Gordon having right by progress to the reversion, used an order of redemption, consigned the money because the wadsetter did not appear to receive the same, and raised a declarator of redemption. The defender objected to the formality of the order, as being disconform to the clause of redemption in the following particular: That gold or silver was not offered or consigned, but only bank notes, at least bank notes in part, of which the defender was not bound to accept had he been present. And, to verify the allegation, the instrument of consignation was appealed to, bearing, "That the procurator did number and tell down, in bank money and bank notes of the bank of Scotland, and part in silver, having all passage for the time, the said sum of 4,000 merks."

The order of redemption was undoubtedly informal, not only as different from the order of redemption agreed upon in the contract, but at common law, even suppose nothing had been stipulated about the species of money. A bank note or bill is not current money. A creditor is not bound to accept of it in payment of a bond or a bill, far less can it be imposed upon a creditor in an order of redemption. But as there are many minute formalities required in an order of redemption, and as the slightest mistake or defect enervates the whole, it was thought hard to reduce the reverser to the necessity of renewing the order, and of renewing it perhaps more than once, which might protract a redemption, and weary out the reverser with expense, examples of which were frequent. Why not an interlocutor in this very process, finding, that there is no necessity to renew the order of redemption, but that the lands may be redeemed at the next Whitsunday, upon re-payment or consignation of the wadset sum? What led the Court to be of that opinion, were the following considerations: As in every contract of wadset the wadsetter is taken bound to receive the wadset sum at the term covenanted, there can be no doubt but that he may be compelled by a process to perform his engagement, without necessity of any previous order of redemption. The only use of that order, is to subject the wadsetter to damages if he prove refractory. But if the reverser be satisfied with having his land restored to him, without making the wadsetter liable for damage or expense, he can have no occasion for the previous order.

The single difficulty was, Whether such a conclusion could be grafted upon the present process. This difficulty was surmounted upon reflecting, that forms in judicial proceedings were invented to expedite justice, not to retard or disappoint it; and that the defender, by making such an objection, could have no view but

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 consignation."

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 consignation, 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 consignation, 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