

' THE LORDS preferred the disponees to the superplus of the debt, after payment of Lord Cassilis. And, on a reclaiming petition from the arresters and answers, adhered.'

No 56.

For the disponees, *Lockhart, &c.* For the arresters, *Fergusson, &c.* Clerk, *Home*.  
*J. Dalrymple.* *Fac. Col. No 157. p. 235.*

1758. February 15.

MAJOR WILLIAM CUNINGHAM of Enterkine *against* WILLIAM WEMYSS,  
 Writer in Edinburgh.

ROBERT LUDGATE in Coldingham, in 1745, disposed certain subjects, lying in the town of Coldingham, to Robert Robertson and others, his creditors, jointly, their heirs and assignees, under this provision, ' That the said lands shall be redeemable at any term betwixt and the term of Martinmas 1753 inclusive, upon premonition of sixty days, and payment making to them of a certain sum of money.'

No 57.  
 Wadset sum  
 consigned, after  
 an order of  
 redemption  
 used, but before  
 decret of  
 declarator,  
 found not  
 arrestable.

In March 1751, Lieutenant-Colonel John Cuningham purchased this wadset-right from the said Robertson, &c. for a certain sum of money; and, of that date, they executed a conveyance of the subject in his favour, redeemable in terms of the disposition to them.

William Ludgate, son and heir to the said Robert Ludgate, the original reverfer, at the term of Martinmas 1753, duly used an order of redemption; and having taken a proper instrument against Colonel Cuningham for not receiving the money in terms of the clause of redemption, consigned the wadset-sum in the hands of one Matthew Craig.

Major William Cuningham being creditor to the said Colonel John Cuningham, arrested the consigned sum in the hands of the said Matthew Craig; and William Wemyss, writer in Edinburgh, another creditor of Colonel Cuningham's, used arrestment in the hands of the said Matthew Craig, and likewise in the hands of William Ludgate the consigner.

Major Cuningham being advised, that the above-mentioned arrestments would be ineffectual, as the sum still remained heritable, no declarator of redemption having been obtained, although a summons of declarator had been raised in January 1755, procured from Colonel Cuningham, in February 1755, a disposition to the wadset lands; and a competition having thereupon ensued upon a multiple-pointhing raised by Craig, Major Cuningham contended, That the sum consigned not being moveable, could not be arrested; and that, therefore, he was preferable in virtue of his foresaid disposition from the Colonel; and offered to accept of the wadset-sum without the trouble of a declarator.

Pleaded for Mr Wemyss, the preferable arrester, A wadset-right is a mutual contract, by which the granter conveys an heritable subject, with this condition adjoined, That when he uses the order stipulated, he shall again return to his

No 57. right of property in the subject, and the wadsetter shall have right to the redemption-money. It is true, after offer of payment, or consignation made by the reverser, he may depart from the order of redemption, and thereby it becomes ineffectual; but if he proceed in his declarator, he is understood to have been reinstated in his right of property, from the instant he used the order agreed on; and the decret of court is only declaratory of that right. Thus Lord Stair, lib. 2. tit. 10. § 19. says, 'It is the order that constitutes the redemption; and the declarator but finds and declares it to be orderly proceeded, and decerns the wadsetter to denude himself conform thereto; and therefore, though the reversion be personal, excluding assignees, if that person once use the order, he may assign it, and dispone the lands as redeemed, and the assignee, at any time after his death, will have interest to declare.' And Sir George Mackenzie, in his title, *Of redeemable rights*, lays it down as a rule, 'That, after an order of redemption is used, it may be assigned;' which shews plainly, that the consigned money is affectable by arrestment; which is confirmed by the opinions of Dirleton and Stuart, in express words, under the heads, *Arrestment of conditional debts* and *Wadsets*: Stuart's words in particular being, 'So soon as the order is used for redeeming, it may be arrested; and the first arrester will be preferred.'

*Answered* for Major Cuninghame, When a wadset, or sale under reversion, is constituted, the same remains, in the person of the wadsetter, an heritable right, until he accepts of the redemption-money, or until a declarator of redemption; and, in like manner, the redemption-money, which comes in place of the wadset-lands, is also heritable *quoad* the wadsetter, until he require or accept of the sum, or until decret of declarator be obtained. The using the order of redemption, and consignation of the sum, by the reverser, can have no effect to change the nature of the right *quoad* the wadsetter. That can only be done by the wadsetter himself, or the interposition of a judge. It is only the declarator of redemption that makes the redeemed lands belong to the reverser, and makes the sum consigned moveable, and to descend to the wadsetter's executors. As therefore the sum in question is not moveable, no decret of declarator having been obtained, it follows of course, that is not arrestable. Stair, lib. 3. tit. 1. § 37 says, 'An arrestment being laid upon sums consigned for a redemption, was not found effectual till declarator of redemption pass, which only makes the sum moveable.' See also Craig, lib. 2. tit. 6.; Macdowal, lib. 3. tit. 1. § 35.; Decisions, 21st June 1626, Murray, (Durie, p. 203. *voce* RIGHT IN SECURITY.); 22d February 1666, Lockhart, (No 38. p. 701.); 21st January 1673, Nicol, (Stair, v. 2. p. 152. *voce* RIGHT IN SECURITY.); 8th February 1681, Dunbar. (Stair, v. 2. p. 856. *voce* HERITABLE AND MOVEABLE.)

THE LORDS found the sum not arrestable, and therefore preferred Major Cuninghame upon his disposition.

A& Wal. Stewart.

Alt. Garden.

G. Cockburn.

Fol. Dic. v. 3. p. 40. Fac. Col. No 102. p. 181.