No 45.

pressly provided, that the order and consignation should be at London, and which was only done because the said James was residenter there, and for his conveniency allenarly, but having made over his right in favour of Sir Robert Murray, and the right thereof being now in the person of the defenders, Scotsmen residenters in Edinburgh, the order and consignation made at Edinburgh is sufficient. To which it was *duplied*, That all reversions being *stricti juris* ought to be fulfilled *in omnibus punctis*, so that the defenders are not obliged to debate upon the conveniency or inconveniency thereof; and if the money had been paid and consigned at London, which the pursuer might easily have done, the defenders might have made profit thereof, by returning the same to Scotland upon exchange. THE LORDS repelled the defence and duply, and sustained the order, notwithstanding the same, with the consignation, was made at Edinburgh, and not at London; reserving to themselves what consideration the defender should have for exchange.

Newbyth, MS. p. 91.

1670. *February* 24. JARDINE of Applegirth *against* JOHNSTON of Lockerby.

No 46.

The reverser may retain the money, if the wadsetter appear not.

APPLEGIRTH having apprised Lockerby's estate, and pursuing on the apprising, Lockerby *alleged*, That the apprising was satisfied, at least he offered presently what was defective in this account. Lockerby alleged upon a wadset right, whereof an order was used; whereupon the question arose, and was reported by the auditor, whether after order used for redemption of a proper wadset, the sums consigned, being immediately taken up by the redeemer, and the wadsetter remaining four or five years in possession thereafter, and declarator of redemption being obtained upon production of the sums consigned, with the annualrent from the consignation, whether the wadsetter had right to the mails and duties, and might refuse his annualrent, or if he behoved to accept of his annualrent and count for the mails and duties. It was *alleged* for the wadsetter, That the consignation was but simulate, and the money remained not in the consignatar's hand, so that he did justly retain the possession, and so was not accountable for the duties.

THE LORDS found the wadsetter accountable for the duties, seeing he had no objection against the legality or verity of the order, so that it was his fault that he kept not the day of consignation, and received his money conform to the premonition; and that the user of the order did no wrong to take up the money out of the consignatar's hand, seeing consignations are upon peril of the consigner, he making the same forthcoming at the time of declarator, with annualrent since the consignation.

Fol. Dic. v. 2. p. 324. Stair, v. 1. p. 675.

*** Gosford reports this case: No 46.

In a removing pursued at Applegirth's instance against Lockerby, depending upon a comprising which was near expired, and the pursuer offering to purge the same after compt and reckoning, with his intromission, the Lords declared, that the legal should not expire during the dependence, and did appoint an auditor to the compt and reckoning, wherein several articles were controverted; *1mo*, The pursuer craved allowance of 14 pecks of multure, as part of the tack-duty of some lands set by the pursuer to the defender's predecessor; against which it was *alleged*, *1mo*, That multures being a duty payable by insuckers for grinding of their corns, it could not be here craved, because it was offered to be proved, that the pursuer had caused his miller refuse to grind, and beat the servants who came with corns to the mill. It was *replied*, That the said multures being payable yearly by a tack, as a constant duty, were dry multures, and payable whether corn were ground or not. The Lords notwishstanding, found, That in so far as Lockerby was damnified in going to another mill, and paid more than the dues to which insuckers were liable; therefore, he should have allowance of the foresaid tack-duty. *2do*, The pursuer craved allowance of 350 merks, payable as a grassum by the said tack, with the yearly annualrents thereof, since that the defender married the heir of the tacksman, which was many years ago. To which it was *answered*, That the defender of late had obtained a decreet for sums of money due the time of the entry, when the grassum was due. The Lords did sustain the compensation, albeit it was not liquid by a decreet, but of late, and that to be drawn back to the time that the money was due, for cutting off the annualrent of money that was due for the grassum; but did not decide, that grassums of their own nature did bear annualrent, which is disputable, it being only a part of tack-duty. Yet it is thought in reason, annualrent will be due, seeing if the grassum were paid, the granter might employ the same upon annualrent, and it is no reason that the tacksman should bruik his sub-tack yearly, and make use of the grassum. *3tio*, There being a discharge produced by the defender of all tack-duties preceding 1636, granted by the Laird of Hempsfield, as tutor to Applegirth, it was *alleged*, That the discharge bearing only the receipts of one years duty, that could not prejudge the pupil to seek all preceding years. The Lords notwithstanding did sustain the discharge to liberate from all preceding years, not only because Hempsfield was donatar to Applegirth's ward, and so might discharge the same for nothing, but even as tutor, having granted a discharge of the terms foresaid, which was never quarrelled by the space of 30 years. They thought, that it did liberate the defender, whose predecessor did only receive the same; and that the pupil and his heirs had only action against the tutor and his pupils.

Gosford, MS. p. 109.