pay, was simply obliged, and was not subject in any heritable condition or obligation, nor holden thereby to pay annual, but when the payment was made either to the party to whom he was bound, or to his creditor artester, or any other. So the LORDS found it was affected with the same condition, and ought to be employed upon land for the parties' warrandice; and thereafter found, that this arrester, for his debt due to him, had right to the sum as Sir Thomas had, and might seek the same, but that he ought to employ it upon land for warrandice to Sir William, conform to the destination and condition of his bond. No 8.

Act. *Lermonth & Cunningham.* Alt. *Stuart & Nicolson.* Clerk, *Gibson.*
Fol. Dic. v. 4. p. 253. Durie, p. 203.

1642. *February* 16. VEITCH *against* TENANTS and POSSESSORS.

No 9
A Lady kenned to her terce of lands, in which her husband was, infeft, redeemable, was found to continue to have right, although the sums had been charged for by her husband, but no redemption nor renunciation had followed. But she was afterwards disappointed in consequence of a renunciation by the tutors of the husband's heir.

KATHARINE VEITCH being served heir and kenned to a terce of some lands, wherein her umquhile husband died infeft redeemable, pursues for the duties of the said lands, intromitted with by Veitch of Dawick, divers years since the death of her husband. And the defenders *alleging*, that before the pursuer's husband's decease, the sums whereupon the lands were redeemable, were charged for to be paid in the defunct's lifetime, so that the sums were thereby moveable, which makes the terce of the lands to cease; this allegeance was repelled, because no redemption followed, nor renunciation, nor other deed upon that charge, and the defunct died infeft, and undenuded. And the defender *duplying*, that after the defunct's decease, his son and his tutors renounced that right of wadset; and the pursuer *answering*, that that renunciation done by his tutors, ought not to be respected, not being done by the father in his lifetime, who made the money moveable; the LORDS found the renunciation made by the tutors and minor relevant to elide this pursuit, to exclude the tercer, seeing the wadset was redeemable, and the renunciation made was sustained, being dependent upon a preceding necessary ground of reversion, albeit there was no declarator of redemption; but because the pursuer alleged collusion done betwixt the tutors to her prejudice, the matter was ordained to be further heard.

Clerk, *Gibson.*
Fol. Dic. v. 2. p. 353. Durie, p. 894.

No 10.
Consignation by the debtor being ambulatory, as it was in his

1673. *January* 21. NICOL *against* LAWRIE.

THERE being a sum due to unquhile Henry Pirie by bond, containing a provision for infeftment in certain lands, and a reversion upon the premonition by

No 10.
power to uplift before declarator, the sums, not being the property of the creditor, were not arrestable.

the debtors, conform to which the debtor did premonish, and did consign the sum according to the reversion; and their being two heirs-portioners to Pirie the creditor, Lawrie and Nicol, Lawrie, in the absence of Nicol, was served sole heir, and did confirm as executor to Peers, and gave up in inventory the consigned sum, and obtained decreet against the consignatar, and recovered payment twenty years ago. Now Nicol pursues Lawrie to refund his half of the sums, which sums did belong to them two, as heirs-portioners, and were not moveable, and did not belong to Lawrie as executor. The defender Lawrie alleged absolvitor, because the debtor having premonished, his premonishing should work the same effect, as the requisition of the creditor, which unquestionably makes the sum moveable; but much more, where there is not only a premonition, but the sums consigned; which consignation makes the property of the sums consigned to be transmitted from the debtor consigner to the creditor, in whose favours the consignation is made; so that the sum of money being the creditor's, is unquestionably moveable, and belongs to the executor. It was *answered* for the pursuer, That consignation of sums for redemption of wadsets, or heretable rights, according to law, and the constant custom of the kingdom, it hath always been in the power of the debtor-consigner, that he might at his pleasure uplift the consigned sums, and pass from the order before declarator of redemption; so that the naked consignation being so ambulatory, doth not put the sums in the property of the creditor, but they do remain in the property of the debtor till declarator; and therefore the right of property of the wadset, or annualrent, remains in the creditor, and belongs to his heir, and not to his executor. And it is a general ground in law, that no man's right can be altered without his own consent or authority of law; so that till declarator, the right remains heritable; and albeit the requisition of the creditor, without any further, so long as it stands, and is not past from, makes heritable sums moveable, *ex facto creditoris*, who may and doth show his mind to make use of the personal obligation, and pass from the real right; yet there is no reason that it should be in the power of the debtor by any fact of his, without consent of the creditor, to alter his sums from heritable to moveable; and so not only to make them fall to executors, but the third to the relict, and the whole to the fisk; which hath been confirmed both by the judgment of our famous lawyers, as *Craig De reversionibus mortuo vadio*, where he shews that before declarator, sums consigned do not become moveable; and there is a decision observed by Durie, upon June 21. 1626, in the case of Murray of Philiphaugh, No 8. p. 14093., where a consignation having been made for redemption of a wadset, and thereupon the redeemer having entered in possession of the wadset-lands, a creditor of the wadsetters having arrested the consigned sums, as belonging to the creditor of the wadsetter, and pursuing to make forthcoming, the LORDS found, That the consignation made not the sum moveable before declarator, but that the consigner might pass from his order, and lift his sum be-

fore declarator, albeit the debtor and creditor were father and good-son, and seemed to act by collusion, in prejudice of a creditor arrester, which is a case far stronger then this in question. No 10.

It was *replied*, That the consignation makes the sums consigned to be in the property of the creditors, and so moveable, even before declarator, because a declarator *nihil novi juris tribuit, sed jus constitutum declarat;* and so in declarators of redemption, the order is declared to have been sufficient *ab initio*, and that thereby the wadset-right was evacuated, and the consigned sums belonged to the creditor from the date of the consignation, and that the debtor had right to the mails and duties from that time; and without question after consignation the creditor may safely lift his sum, and pursue the consignatar to deliver the same to him *jure dominii*, and not by any obligation upon the consignatar; and in that case the debtor consigner could not lift the sums, and pass from the order; and albeit in conventional reversions where the peril of the sums consigned is ordinarily the consigner's, the consigner doth frequently uplift the sums, and may pass from the order; yet in legal reversions, as of apprisings, or the like, where the peril is the creditors, and so he must be *dominus*, *nam unumquodque perit suo domino*, and there the consigner cannot lift the sums consigned, not being his own; so that if the creditor oppose, or any deriving right from him, as an assignee, arrester, or executor, the sums consigned remain moveable, and cannot be lifted by the consigner; and as to the decision, it is but one single decision, and is inconsistent with the nature of the right, and therein both the debtor, consigner, and creditor wadsetter did concur. But here the debtor craves not to take up the sums, but the executor hath actually uplifted the same from the consignatar; and as to the inconveniency, *incommodum non solvit argumentum;* but whatsoever inconvenience follows upon the nature of a right, is unavoidable, and in the most part they may be evited; for if the creditor please, as he ought to take his sums when they are offered, or at the very time of consignation, he may immediately re-employ them as he pleases, and so they will neither fall to the fisk, nor to the relict; neither can it be said, that the condition of the creditors' sum is altered without his own fact or consent, because he hath consented to the clause of reversion and premonition.

THE LORDS found, That consignation of sums, although ordinarily done, yet was ambulatory, and in the power of the consigner, that he might pass from his consignation, and uplift the sums before declarator, or before the creditor had acknowledged the consignation; till which they found the sums not to be in the property of the creditor, or to belong to his executor, or to be arrestable, and so would neither belong to the fisk, relict, nor arrester; but that the creditor, or his assignee, owning the consignation, or pursuing for the sums, did by his own consent and fact alter the condition of the security, and hinder the consigner to uplift; but they found, that after his death, his executor confirming the sums consigned, as in this case, could not alter the condition of the security, but that the right be-

No 10. longed to the heir; and albeit there was no infeftment followed upon this right, and so it was *alleged* they needed no declarator, but that it was in the same case as an heritable bond, which becomes extinct by offer and lawful consignation, for albeit such bonds where no order is required may become so extinct, *et ex natura rei* the inconveniency cannot be shunned, yet that is not to be drawn in consequence to rights requiring an order; for if the debtor in these cases could alter the condition of the debt, without the authority of a Judge by declarator; then by collusion all redeemable rights by a consignation of the debtor might become moveable, and disposable upon death-bed, or befall to the relict or fisk.

Fol. Dic. v. 2. p. 354. Stair, v. 2. p. 152.

*** Gosford reports this case:

IN a pursuit at Nicol's instance, as one of the heirs-portioners to Pirie against Lawrie as representing another heir-portioner, who uplifted the sum of L. 2400 merks lent upon the wadset of a tenement of land belonging to Mr William Rutherford, and which did equally belong to the pursuer and defender, and therefore craved payment of the half thereof; it was *alleged* for the defender, That the pursuer, as heir, could have no right to any part of the said sum, because it was made moveable, in so far as the debtor who had granted the wadset, had used an order of redemption by premonition and consignation of the sums of money, against the creditor whom the pursuer represents, by which the money became his in place of the lands wadset, and being a moveable sum did belong to his executors, and not to his heir. It was *replied*, That a premonition and consignation used by the debtor, did not take away the wadsetter's right and infeftment, these being no deeds of his; so that unless there had been a declarator of redemption obtained, his right still remained, and was in the power of the consigner to uplift the sums of money consigned by him until his obtaining of a declarator; and it were of a dangerous consequence that a wadsetter, without his own deed, should have his whole estate, which he destinates to be heritable, to be made moveable, and so might fall to the fisk or his executor. THE LORDS did repel the defence, and found, That the consignation of money lent upon a wadset did not make it moveable *quoad* the creditor, unless there had been a decreet obtained declaring the order of redemption, or that he himself had uplifted the sums consigned, which was his own deed, and without which it were against all law and reason, that the destination and security made to apparent heirs, should be limited by collusion or deeds of others; likeas by a practique in Durie, anno 1626, No 8. p. 14093, it was expressly found, that a

sum consigned upon requisition was not arrestable at the instance of a creditor of the wadsetter. No 10.

Gosford, MS. p. 300.

*** A similar decison 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.

No 11.
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 requisiton 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

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 consignation, 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 rhe 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 ubsist till payment were made, notwithstanding of personal diligence; but it cannot subsist after the defender's consignation, 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