

REDEMPTION.

13483

Gray, *voce* WADSET; and 27th July 1665, Hamilton against Tenants, *IBIDEM*; yet Derric has a case, where a right was sustained, notwithstanding of a redemption, 5th March 1630, Campbell and Orr against Salmond, *See* APPENDIX, in the case of a gratuitous disposition to a daughter, redeemable on a 40 shilling piece.

No 60.

*Fol. Dic. v. 2. p. 325. Fountainhall, v. 1. p. 808.*

1702. December 17. OGILVIE against STORMONTS.

No 61.

CONSIGNATION the day after the term fixed in the heritable bond, found ineffectual, though the term fell upon a Sunday; for the Lords thought, that the consignation should rather be the day before than the day after.

An heritable bond being taken to a man in life-rent, and to his son in fee, containing a clause of reversion upon premonition, &c. and empowering not only the heir but the life-renter to require; an order of redemption and consignation of the money found null, because premonition was only made to the heir, requiring him to acquaint the life-renter.

*Fol. Dic. v. 2. p. 324.*

\* \* This case is No 28. p. 8264, *voce* LIFE-RENTER.

1711. November 13.

WILLIAM DOUGLAS of Dornock against WILLIAM CARRUTHERS of Nutholme.

No 62.

WILLIAM DOUGLAS of Dornock, who acquired the reversion of a wadset of the lands of Nutholme, granted by Maxwell of Castlebank to William Carruthers, raised a reduction and improbation of William Carruthers's right, and, while his title to the reversion was lying in the hands of William Carruthers's lawyers, given out to be seen in that process, used an order of redemption against Carruthers; and thereafter used a new order, wherein he produced his right to the reversion. When Dornock came to insist in a declarator of redemption, the defender *alleged*, That no declarator could proceed upon the first order, because Dornock was a singular successor to the reversion, and his title not produced either in the instrument of requisition or consignation.

An order of redemption, made by a singular successor to the reversion, without producing his title at the using of the order, not sustained, although the papers were at the time in the hands of the wadsetter's lawyers, in another process before the Lords.

*Replied* for the pursuer, *imo*, No law requires the user of an order of redemption to produce his title, which the wadsetter should not controvert, more than a tacksmān or vassal can controvert their superior or constituent's right; February 19. 1674, Lord Berthwick against Pringle, No 51. p. 13473.; for in

No. 62. orders of redemption, the instrument needs only to bear production of the right of reversion, when it is doubtful or controverted, Stair, Instit. Tit. Wadsets, § 17. that wadsetters may not be disquieted by mere pretenders; and not where the right of reversion is in the wadsetter's own hand at the time of using the order; February 19. 1662, the Children of Wolmet against Ker, No 41. 13463. ; February 17. 1663, Montgomery against the Heirs of Halyburton, No 42. p. 13463. ; February 19. 1635, L. Earlstoun against L. Grimmet, No 36. p. 13461. Now the production of the pursuer's right to Nutholme's lawyers, (who were able to advise the validity and import thereof,) was more favourable to him, than if it had been produced at the time of the order, whereof the procedure would not have allowed him so long time to consult it. Besides, how soon the defender's lawyers returned to the pursuer his papers, he renewed the order of redemption, and exhibited them.

*Duplied* for the defender; Writs in the hands of his lawyers in another process, are not to be considered as in his own hands, for he might know nothing thereof; yea, though the papers had been in the defender's own hand, the pursuer, to complete the order, ought to have required production of them, as my Lord Stair observes, seeing the formalities of an order of redemption are to be exactly performed, and orders have been annulled even for not produced a procuratory, or not designing the party's dwelling-house, which are less material defects than the not producing of his title.

THE LORDS sustained the order of redemption to take effect only from the time that the pursuer's title was produced.

*Fal. Dic. v. 2. p. 323. Forbes, p. 538.*

\* \* \* Fountainhall reports this case :

WILLIAM CARRUTHERS of Nutholme having acquired a wadset of a three merk-land of the barony of Castlemilk, and William Douglas of Dornock having purchased in the reversion, he uses an order, and pursues a declarator of redemption. *Alleged*, You cannot declare, because, when you used the order, you did not produce your title and right to the reversion, which is a sasine on a charter from the Duke of Queensberry, superior, on an adjudication against Castlemilk's heir; and so your order is defective and null; and I am not bound to renounce you, a singular successor, who neither in the premonition, nor in the instrument of consignation, produced your rights. *Answered*, I need not produce them, for they were in your own hands at the time, having been given out in process of reduction and improbation at my instance against you, and were not returned the time of using the order; and as soon as I got them, I renewed the offer and exhibited my right; so *exceptione doli* you are excluded from quarrelling my title, being in your advocate's and agent's hands, which, in construction of law, is all one, as being in your own;

and at the time of the order you did not object to this, nor call for production of it; and our decisions have sustained orders more lame and defective than this. Thus, on the 19th February 1674, Lord Borthwick *contra* Pringle, No 51. p. 13473 an order was sustained at an assignee's instance, though he did not produce nor show his assignation till he raised the declarator, and only restricted the effect of it to the date of its production; and so in Durie, 21st February 1635, Earlstoun *contra* Grimmet, No 36. p. 13461.: And Stair observes, title Wadsets, that where the reversion was in the wadsetter's own hands, and craved to be exhibited, the premonition was good without it; and cites the case of Lord Yester *contra* Scot, No 15. p. 13445. out of Hope, to confirm it; and to shew how uniform the analogy of our law is in these cases, he tells a premonition was not found null, though the procuratory was not produced, seeing it was not called for, nor questioned. See the like, 19th February 1662, Children of Wolmet *contra* Ker, No 41. p. 13463.; and 17th February 1663, Montgomery *contra* Halyburton, No 42. p. 13463. And here to cast Dornoch's order of redemption, were an infinite prejudice to him, for it is so conceived, (contrary to the usual tenor of other reversions) that he has only the liberty of redeeming once in the five years; so that if his premonition be not sustained, the creditor, Nutholme, will have the benefit of a lucrative wadset for five years longer. *Replied, Esto* they had been in my lawyer's or agent's hands the time of the order, yet, unless that had been known to me, it can never sustain the offer, I living at a great distance from Edinburgh, and their knowledge or oath cannot prejudge me; and there is nothing in our law where formal solemnities are so nicely required, as in orders of redemption, Craig and our other lawyers making them to be *strictissimi juris*, so that if the very dwelling-house of the wadsetter was not designed, the order was found null; and if so, how can Dornoch expect his order, labouring under more substantial and material defects, can be sustained? And the least he should have done, if his title was in Nutholme's doer's hands, was to have required him, by way of instrument, to have exhibited and produced it, as appears by the case of Scot and Yester cited; and his neglecting this, shews it was his own proper default that he wanted it, and so *non debet lucrari ex sua culpa*; and he had a manifest prejudice by the offer, casting money in his hand, not knowing where to re-employ it, which put him to a dilemma of losing both the rent of the lands and the annualrent of his money; and the truth is, he was not averse to the redemption, but was not in a capacity to renounce, not being infeft, and the pursuer, his superior, had not yet given him a precept of *clare constat* to complete his right. THE LORDS sustained the order of redemption, notwithstanding the nullity objected, seeing it was not denied the writs were in the defender's agent's hands, but so as only to take effect from the date of producing them; and superseded his entry to the wadset lands till Whitsunday next, that Nutholme may perfect his right, and seek out a hand:

No 63. for his money *medio tempore*. This case cannot occur so oft now, because, by the present stile of wadsets, or infeftments of annualrents, the reversion is ingrossed in the body of the right, so that when the reverser, or his singular successor, use an order, they can refer to the writ in their own hands. Of old there used to be a letter of reversion apart, and likewise a regress, but that form is much in desuetude.

*Fountainhall, v. 2. p. 671.*

Premonition, or requisition, against parties, out of the country; see EXECUTION.

In a declarator of redemption, who must be cited? see CITATION.

Wadsetter, upon redemption, bound only to renounce what right he has from the reverser; see MUTUAL CONTRACT.

See APPENDIX.