

- No. 28. requisition or redemption, which supposes the pursuer for the superplus duty to be always liable in case of requisition. It was replied for the Earl, That the defenders ought at least to be liable since the date of the offer of security, in respect there was no objection against the caution then offered, and the pursuer being a singular successor in the reversion, ought not to be liable in the requisition. The Lords found the defenders liable since the date of the offer of caution, in case the Earl, either upon requisition or premonition, should redeem from the said wadsetters within five years after the date of the interlocutor; but in case he did not redeem within the space foresaid, then they were obliged to allow him the superplus duty when redeemed.

P. Falconer, No. 63. p. 41.

* * * The following is the same case.

1683, February, & 1685, March.

EARL MARSHAL *against* WADSETTERS.

No. 29.

Import of the clause in the act of Parliament allowing offer of caution.

The late Earl Marshal having, in the year 1661, offered caution, and required his proper wadsetters to restrict, this Earl of Marshal, as having right to the property and reversion, raised a process to have the wadsetters declared liable for the superplus.

Alleged for the defenders: The clause in the act of Parliament allowing the offer of caution during the not-requisition, imports, That the craver of the benefit of restriction should be liable to the requisition; and this pursuer not being liable thereto, for that he is a singular successor, cannot crave the benefit of the restriction, unless he subject himself to the requisition.

The Lords found the defender's allegiance relevant.—This decision seems to be irregular, the clause in the act importing no more but the condition of the wadset the time of the requisition, viz. that it were not loosed; for in the case of requisition there was no place for restriction, the party's mind being then to receive his money, and not to let it lie in wadset. Thereafter, March, 1683, the Lords allowed the Earl to be liable for the requisition after five years, from the date of the interlocutor; then it was stopped; and in March, 1685, upon a debate in presence, the Lords found just the contrary.

Harcarse, No. 1027. p. 292.

1685. March. SIR GEORGE LOCKHART *against* LAIRD of WALSTOUN.

No. 30.

It being alleged against a declarator of redemption of a wadset, That there was a posterior infestment of annual-rent for other sums, and the bond bore a provision, That the annual-rent should not be redeemable until the whole sums due

by the granter any other manner of way were also paid, so that the wadset could not be redeemed till the sums for which the annual-rent was granted were also paid,

No. 30.

The Lords finding the wadset not burdened with the provision, and the rights being *separata jura*, they declared as to the wadset, the sum therein not being by way of eik to the annual-rent, nor registered as eiks ought to be.

Harcarse, No. 1028. p. 292.

1686. *November 24.* LADY DRYBURGH *against* CREDITORS.

No. 31.

The Lady Dryburgh having voluntarily restricted her jointure of sixteen to twelve chalders of victual, in favours of her son, and the heirs-male of his body, secluding heirs-female, with this provision, That if payment was not made at the terms appointed, she should return to the sixteen chalders, and the restriction be void, the terms of payment not being observed, she pursued for the whole sixteen chalders.

Effect of a voluntary restriction.

Alleged for the creditors of the son, who was dead: That they were content to purge bygones, and to pay in time coming.

Answered: This being a voluntary restriction, and no failzie, or *pactum commissorium* in wadsets, was not purgeable now, as had been several times decided.

Replied: The clause not being taxative and personal to the son, was appraisable by his creditors.

The Lords allowed the creditors to purge between and Candlemas; and they did not consider if there was an onerous cause for the restriction or not, as was done in the Lady Dean's restriction.—This decision seems contrary to some former decisions.

Harcarse, No. 1030. p. 293.

1688. *June 16.* RAMSAY *against* CLAPPERTON of Wylliecleugh.

No. 32.

One Ramsay, in England, having right to the reversion of a lucrative proper wadset in the person of Clapperton of Wylliecleugh, required him to take caution, and quit the possession; and insisted in a count and reckoning for the superplus above the annual-rent.

Offer of caution.

Alleged for the defender: The offer was not sufficient; because, *1mo*, It was made by a notary for strangers who were minors, and no procuratory mentioned in the instrument or shewn; *2do*, The offer was but general, without naming any person, so that it could not be considered, if the caution was sufficient.

Answered: The act of Parliament requires no instrument, or that the party should be present, or send a procuratory; and if that had been questioned, a procuratory