

No 3.

To which of the parties does the consigned money belong?

1739. *June 26.*TUACH *against* M'KENZIE.

WHERE money is consigned by a reverser, it is considered to be the absolute property of neither reverser nor wadsetter, till the event of the declarator, but belongs conditionally to the one or the other, as the declarator shall proceed or not. Upon which principle it was found, that an arrestment of money consigned by a creditor of the consigner, did not so affect the consigned money, as to preclude the reverser from proceeding in his declarator of redemption.

A consideration of equity also here concurs, that it often happens that consigned money is not the property of the consigner, but is advanced by a friend in order to prevent the expiry of a reversion; and it would be very hard if that money could be run away with by the reverser's personal creditor arresting, so as to prevent the effect of his proceeding in his declarator of redemption.

Kilkerran, (CONSIGNATION.) No 2. p. 147.

No 4.

1780. *February 11.*CAMPBELL *against* SINCLAIR.

A PURCHASER of an heritable subject having called all the creditors of the seller in a multiplepinding, was desirous of consigning the price, which, till certain incumbrances were purged, and disputes among the creditors adjusted, he could not safely pay. THE LORDS found, That if he did consign, it behoved him to make a total consignment, and not a partial one. *See APPENDIX.*

Fol. Dic. v. 3. p. 164.

1794. *June 21.*The TRUSTEE for the Creditors of Robert Rae, *against* ALEXANDER GORDON.

No 5.

Consignation in the hands of a clerk of court may be proved by witnesses.

IN an action at the instance of the Trustee for the Creditors of Robert Rae, before the Stewart of Kirkcudbright, against John Milligan, he was ordered to consign L. 46 : 14 : 3 in the hands of the clerk of court.

It being afterwards disputed, how far this order had been obeyed, Milligan contended, That he had consigned L. 41 with the depute stewart-clerk, but had retained the rest on account of a debt due to him by Robert Rae.

The depute stewart-clerk had by this time died bankrupt, but the principal stewart-clerk was made a party to the action, and Milligan offered to prove by witnesses, that the consignment had taken place. A proof before answer was accordingly allowed, from which the Stewart, satisfied that Milligan's averment was true, found him liable only for the balance which he had retained in his own possession.

The Trustee then brought an action against the principal Stewart-Clerk, for recovery of the money consigned with his depute, and the Stewart having found him liable, he presented a bill of advocation, which, having been refused by the Lord Ordinary, he, in a reclaiming petition,

Pleaded ; 1st, Consignation is a judicial act which can be proved only by the records of court. Dic. *voce* PROOF, p. 211.

2dly, At any rate, in this case, as relating to a payment of money, parole proof was incompetent, in so far as the sum claimed exceeded L. 100 Scots.

Answered ; 1st, The order to consign is a judicial act, but the consignation itself is a private transaction between the party who makes it and the clerk of court.

Parole evidence is in many cases rejected, because in them writing is commonly adhibited, and because it was in the power of the party to obtain written evidence. But when money is consigned, no receipt is ever given by the clerk. It is, indeed, generally marked in the diet-book, or on one of the steps of process. The custody of both is, however, entrusted to the clerk of court, who therefore must be answerable for the omission. If he should lose any material paper of a process, it would be competent to prove, by parole evidence, that it had been lodged, and for the same reason, the proof taken in this case, was competent.

Consignation is, in fact, the depositions of a certain subject for certain purposes ; and, it is a settled point, that depositions, whatever be the nature of the subject deposited, may be proved *prout de jure* ; Dict. p. 226.

2dly, The object of this action is not to establish a payment of money, but a claim of damages on account of malversation in office.

THE COURT, upon advising the petition, with answers, were clear that the Stewart's interlocutor was right, both on the competency of the proof, and merits of the question, and therefore unanimously ' adhered.'

Lord Ordinary, *Dreghorn.* Act. *Da. Williamson.* Alt. *Alex. Fergusson,*
Clerk, *Sinclair.*

D. D.

Fac. Col. No 126. p. 283.

Upon whom lies the hazard of consigned money ? See PERICULUM.

Consignation in order to redemption. See REDEMPTION.

See *Wolmet against Ker, No 10. p. 2557.*

See APPENDIX.