

REDEMPTION.

19479

1681. November 23. NASMITH against NASMITH.

No 56.

IN the action of reduction and declarator, pursued at the instance of Sir Michael Nasmith of Posso, against his son James Nasmith, the LORDS found an order of redemption of an apprising, against the said Sir Michael, whereto his son James had right, null, in regard the procurator had no warrant from Sir Michael, the time of using the order; and that the procurator, who compared for the compriser the time of the said order, took instruments that there was no procuratory produced; but this speciality was the reason of the decision,

Fol. Dic. v. 2. p. 322. P. Falconer, No 2. p. 1.

* * Stair's, Hargrave's, and Sir P. Home's reports of this case are No 58. p. 5316, and No 60. p. 5319. *voce* HEIR APPARENT.

1683. January, JOLLY against PATERSON.

No 57.

IN the declarator of redemption of a wadset, at the instance of Mr George Jolly against Robert Paterson cordiner, the LORDS sustained an instrument of consignment, bearing the same to be done by virtue of a procuratory, albeit it did not bear the procuratory was produced, nor that the money was numbered and down-told; seeing it did bear that there was a bag of money produced, wherein, by ocular inspection, there was a sum equivalent to the sum contained in the wadset, which was sufficient.

An instrument of consignment sustained, tho' it did not bear production of the procuratory, it not having been required.

Fol. Dic. v. 2. p. 223. Sir P. Home, MS. v. 1. No 336.

* * Fountainhall reports this case ::

March 13.—MR GEORGE JOLLY against Paterson, reported by Pitmedden. THE LORDS sustain the order of redemption, though the procuratory was not produced, seeing there was none present to require it, and the instrument of premonition bears to have proceeded on a procuratory; and though the instrument of consignment does only bear large sums to have been consigned; which needed not be enumerated, there being none to receive it; and large sums will also comprehend expenses; and though the instrument bore not the enumeration and down-telling of the money, but only that it was there in a bag.

November 30.—THE cause Robert Paterson cordiner in the Cannongate against Mr George Jolly, *et-e contra*, mentioned 13th March 1683, is reported by Pitmedden. Jolly pursues a reduction and count and reckoning against a wadsetter for his intromission more than paid his annualrent. *Alleged by Pa-*

No 57.

terson, That he had a reduction depending of the pursuer Jolly's title, which was an adjudication, viz. that he had adjudged lands for a daughter's debts; on a charge against her to enter heir to her father's lands, whereas he offered to prove she had a brother alive. *Answered*, This objection against the title was competent before his taking of terms, and not now; and he benoved to go on in his reduction as accords, which was not yet enrolled. "THE LORDS refused to take in his reduction *hoc ordine*; and appointed him to count and reckon;" though it was not a proper wadset, which is the case of the 62d act 1661 anent debtors and creditors, but an improper wadset; only, they had declared the back-tack and entered to the possession; which made it of the nature of a proper wadset.

1684.—*January 11.*—THE cause betwixt Mr George Jolly and Paterson, mentioned 30th November 1683, being reported by Pitmedden; 'the LORDS sustained the decret of declarator pronounced by the English Judges *in anno* 1657, the same not having been quarrelled within the year prescribed by the 12th act of Parliament 1661, anent the judicial proceedings before his Majesty's restoration.' It was *alleged*, That the year allowed to question these decreets, by that act anent the English Judges' iniquity, meant only as to the summiary manner of doing it by petition *sine strepitu et figura judicii*, but that the said act of Parliament did not so confirm these decreets, but at any time even after the expiring of the year, their injustice and exorbitancy might be drawn in question, and rectified *per remedium ordinarium* of a reduction; and yet the LORDS repelled this; for in Friezland, where they allow revisions upon iniquity, they terminate it *biennio, ut aliqua sit certitudo*.

1685. *March 6.*—The case between Mr George Jolly and Robert Paterson, mentioned 11th January 1684, being reported again by Pitmedden, the LORDS still adhered to that decret of the English Judges, though it was made appear, that they committed iniquity, seeing it was not quarrelled within a year after the 12th act, Parliament 1661; and though the whole back-tack duties were offered within the days of the charge upon the decret, which was sufficient to purify the *pactum legis commissoriæ*, and take away the irritancy; and that some allegiances had got no special interlocutor. THE LORDS thought, if that were made a nullity, it might lose many of their decreets; and that, in such a case, it was to be presumed, they were repelled; but the LORDS were willing to reduce the decret *ab hoc tempore*; which the pursuer regarded not, seeing he had already, by an order which he had used, power to call them to an account for the superplus mails and duties, more than the annualrent of their wadset sum, ever since the date of the order.

Fountainhall, v. 1. p. 225, 247, 259, & 349.