

No 48. some of the debts were assigned to the appriser, after the date of the charge, as to which the LORDS found the apprising null.

THE LORDS sustained the defence, and found no process; and had respect to the said decision of reduction of the apprising, which they found to be, as is related; though it was alleged, that after so long time, an appriser was not obliged to produce the letters of apprising, or charge to enter heir, or executions; yet, seeing *de facto* these were produced, and deduced in the apprising, and mentioning the dates as aforesaid, the same was reduced *pro tanto*; but there was no debate reported, whether it should stand *pro reliquo*, or how far it should extend, seeing the appriser, as to the rest, offered to prove it satisfied by intromission.

Stair, 1. 2. p. 405.

* * * Newbyth reports this case :

IN a pursuit, Abercrombie against Anderson, for payment of a debt, to which Abercrombie was assignee, the LORDS would not sustain process at the pursuer's instance, upon the assignation to the debt, in respect the assignation was posterior to the date of the summons; albeit there was compearance made for the cedent, who concurred; and found that they would not in any time coming sustain process whereof the summons was of a prior date to the ground thereof.

Newbyth, MS. p. 84.

1672. January 19. Lord LOVAT and KINTAIL against Lord M'DONALD.

No 49.
Found the
reverse of
Kinghorn
against Ar-
buthnot, No
28. p. 13265.

THE Lord Lovat's grandfather having disposed certain lands in wadset to the Lord M'Donald's predecessor, and he having used an order before Whitsunday last, is now pursuing a declarator of redemption. The defender *alleged*, Absolvitor, because the order of redemption was not orderly made, in so far as the Lord Lovat did neither, by the requisition nor consignation, instruct that he was heir to his goodsire, to whom the reversion was granted, either immediately or mediately, as being served heir to his father, who was served heir to his goodsire; for it is not at all instructed, that his father was heir served to his goodsire; and albeit Lovat hath since the order, and since the term of Whitsunday, served heir to his goodsire, yet that cannot supply the order, because the defender was not obliged to receive the money, or quit his possession to any party, unless there had been a formal title in his person at that time. It was *answered*, That the defender had no further interest but his money, and was no further to inquire into the pursuer's progress, who was commonly known to succeed to his goodsire in all his estate, especially seeing that before declarator he was served; and it is very ordinary to sustain removing, at the instance of one heir, though not infest the time of the warning, if infest thereafter, before in-

tenting of the removing. It was *replied*, That there is no consequence from removing, which is merely possessory, and where the heir-apparent continues his predecessor's possession, and is ordinarily acknowledged by the tenant, to this declarator, which is a petitory judgment; and even in removings, though the heir be not infeft the time of the warning, if the tenant thereafter come to know that he is infeft before the term, and so may provide himself, in that case, the removing might be sustained; but if the heir be not acknowledged by mails and duties, or infeft before the term, the party warned is not obliged to quit his possession and infeftment after the term, though before the removing; and so will not be a good title to remove.

THE LORDS sustained the defence, and assoilzied from the declarator.

Fol. Dic. v. 2. p. 304. Stair, v. 2. p. 49.

* * * Gosford reports this case :

IN a declarator of redemption, at the instance of the Lord Lovat against M'Donald, of some lands wadset by Lovat's grandfather, it was *alleged* for the defender, That the order could not be declared, because the Lord Lovat, user thereof, had no right to the reversion, neither the time of the requisition nor consignment, being only apparent heir. To which it was *replied*, That the time of the using of the order, the Lord Lovat was infeft in the lands wadset, as heir to his father, and before intenting of the declarator was served and retoured general heir to his grandfather, granter of the wadset; which ought to be drawn back to the time of the using of the order, as is constantly sustained in removings, where the apparent heirs, after warning, are retoured and infeft before summons of removing. THE LORDS did, notwithstanding, sustain the defence, seeing Lovat could not instruct by infeftment that his father, to whom he was retoured special heir, was heir by progress to his father, who gave the wadset; and that there was a great difference betwixt the sustaining of removings, where the warning was at the instance of apparent heir, and declarators of redemption; seeing removings are against tenants, who have no right at all, and can pretend no prejudice, getting timeous warning; and even as in that case, if the heritor who uses the warning be not infeft before the term, the removing will not be sustained; and an apparent heir using an order of redemption, which is to take away an heritable right from the wadsetter, and is in possession, who cannot be obliged to renounce but to one who hath the right of reversion in his person, and one who neither was served nor retoured heir before the term of consignment.

Gosford, MS. p. 232.