

S E C T. XXI.

Effect of Decree, and of Consignation.

1628. *January 18.* NASMITH *against* RUTHVENS.

IN a suspension betwixt Nasmith and Ruthvens, wherein Henry Nasmith having obtained sentence against Alexander Crichton, as executor to umquhile the Laird of Ruthven before the Commissary of Dunkeld, for payment of a sum contained in the L. Ruthven's bond, and having arrested for satisfying of that decret; in the hands of the relict of the said umquhile Laird of Ruthven, and in the hands of the now La. Ruthven, certain goods and gear; this arrestment and decret foresaid, obtained by him, is transferred before this same Judge, viz. the Commissary of Dunkeld, in the person of James Nasmith, as brother and heir to Henry *active*; and the said relict, and now Laird of Ruthven are decerned to make the arrested goods furthcoming, being referred to their oaths; and they holden as confest; which decret being suspended by them, the LORDS found, that the Commissary of Dunkeld might be Judge to an action of transferring of his own decret; and sicklike found, that he might be Judge to actions pursued at the instance of heirs of any defunct, albeit he might not be Judge to actions where the defenders were pursued as heirs to defuncts; for the pursuit of any pursuing as heir, hindered not the Commissary to proceed in any action, where the matter drawn in controversy, and where the nature of the action was proper to such consistorial jurisdictions; and here the obligation, which was the ground of the pursuit, made to Henry, was heritable, and therefore the decret thereupon was transferred in his heir, who had the right thereto, seeing it would not belong to Henry's executors, except for bygone annualrents owing before his decease; and therefore the letters were found orderly proceeded, notwithstanding of the reasons of suspension, containing the two arguments above written. This last part was altered upon the 23d February 1628, where the sum was found to pertain to Henry's executors, and not to his heirs, as is there observed, and consequently the decret obtained at the instance of the heir of Henry was null. *See* JURISDICTION.

No 119.

Decree and arrestment upon an heritable obligation, found to render it moveable.

1628. *February 23.*—IN a suspension of Nasmith against Ruthvens and Hugh Ross, umquhile Henry Nasmith heir to his father John Nasmith chirurgion, obtained decret before the Commissaries of Dunkeld, against the executors of the Laird of Ruthven, for payment of a sum owing by the Laird of Ruthven to the said John, by an heritable bond; and upon this sentence, by virtue of the Commissary's precept, he arrests in the Lady Ruthven's hands some particular moveables pertaining to the defunct's executors; and thereafter Henry, user of

No 119. the arrestment, dies, after which, James Nasmith, heir to his brother Henry, pursues before the Commissary, and upon a process by a sentence, obtains this decret recovered by Henry, and the arrestment foresaid used by him, transferred in him as heir to Henry; and in the same sentence, the relict, in whose hands the arrestment was made, is decerned to make the arrested goods forthcoming, for satisfaction of the sums contained in that sentence transferred. THE LORDS found this decret of transferring, and making arrested goods forthcoming, null, because they were both obtained upon one process, and contained in one sentence, which ought to have been done by two several pursuits and two decreets, and not to have been joined in one, and so could not be sustained, being so confounded; for if confusion of diets be a cause to annul proceedings of inferior judges, far more the confusion of sentences; and also the LORDS found, that albeit the obligation was heritable, whereupon decret was obtained by Henry as heir, yet being decerned at his instance, by his decease the sums therein contained, (sentence being recovered thereupon, and arrestment executed at his instance before his decease), were made and became to be moveable, and so did pertain to Henry's executors, and not to his heirs, and therefore the decret obtained by his heir was found null. See JURISDICTION.—PROCESS.

Act. Nicolson.

Alt. Stuart.

Clerk, Gibson.

Fol. Dic. v. 1. p. 373. Durie, p. 328. & 350.

1681. February 8. DUNBAR against M'KENZIE.

No 120.

The sum of a wadset found to belong to the heir of the wadsetter, he not having accepted of the sum during his life, although consigned.

THE Laird of Dunbeath having right by a wadset to the lands of Rarighies, whereof umquhile Mr Thomas M'Kenzie had a right of reversion, and did thereon use an order of redemption, and consigned the sum of 10,000 merks in the hands of Hugh Hamilton Bailie of Edinburgh, which he again uplifted himself; Dunbar of Hemprigs being executor to Dunbeath, and having confirmed the said sum, obtained decret against Mr Thomas M'Kenzie in anno 1650 for payment of the sum; and now John Dunbar of Hemprigs, as executor to his father, pursues Mr John M'Kenzie, as representing his father, for payment of the sum; who *alleged* absolvitor, because there having no declarator of redemption followed upon the consignation, and Dunbeath never having accepted the consignation, nor insisted for uplifting of the sum, but continued to possess the wadset lands till his death, the sum of the wadset could not become moveable and fall to Dunbeath's executor, without his own deed, or the sentence of the Lords, or a decret of declarator; and it could not be in the power of the debtor or reverser, to make Dunbeath's sums, which he had made heritable to descend to his heir, become moveable, to fall to his executor; and therefore though the defender were insisting in a declarator of redemption up-