thay wer the time of the away-taking; quia notarius non potest testificari, nisi de his, quæ percipit sensu corporeo; et valor rei percipitur judicio intellectus. No 366.

Balfour, (OF PROBATIOUN BE WRIT.) *No* 32. *p.* 368.

1611. *December* 1. ANSTRUTHER *against* THOMSON.

No 367.

IN an action pursued by Roger Anstruther against William Thomson of Wigton, the LORDS refused process, upon an instrument subscribed by two notaries, bearing that the said William Thomson confessed that he sold and disponed to the said Roger his tack of certain lands holden of Lochinvar.

Fol. Dic. v. 2. *p.* 243. *Kerse, MS. fol.* 255.

*** Haddington reports this case:

1611. *November* 29.—IN an action betwixt Anstruther and Watson, in Tungland, founded upon an instrument of two notaries, containing the effect and substance of a contract between the said parties, the LORDS would not sustain the said instrument, because albeit two notaries might lawfully subscribe a contract for a party, that could not write himself, being required by him, yet they might not, by an instrument, bind him. Thereafter the pursuer offered to prove the verity of the tenor of the instrument, which was not of great consequence, by the defender's oath: The LORDS found it relevant.

Haddington, MS. No 2321.

1629. *December* 19. LAWRIE *against* MILLER.

No 368.
An instrument of consignation subscribed by a notary does not prove against the depositary, unless he sign it.

A PURSUIT made by the assignee, constituted to the order of redemption by the father, against Graham of Panholls, the cedent, user of the order of redemption, and also the party from whom the lands should have been redeemed, and the depositar, in whose hands the money was consigned, whereupon the lands were redeemable; after all their deceases the assignee pursues the heir of the depositar, for delivery of the money to him; in the which action no other party being called, the LORDS sustained the pursuit, and found no necessity to call the heir or executor of the person against whom the order was used, albeit the money was consigned to his use, in respect the pursuer passed from that order, and renounced all right which he had to the land, and all right of reversion *simpliciter*, and was content that the party should bruik the land irredeemably, and pursued only for delivery of the consigned money.

Clerk, *Gibson*.

No 368.

1630. *January* 14.—MENTION being made hereof, 19th December 1629, the LORDS found, that an instrument of consignation, bearing money to be consigned for using an order of redemption, subscribed as use is, by the notary, and not by the depositar, was not sufficient to prove against the depositar's self, if he were living and pursued, and so not against his heirs, to make him answerable for the money contained in that instrument; for albeit it was alleged that the instrument of a notary ought to have faith in those acts, which he does *in officio* as notary, and which is proper to his calling, as this act of consignation, and taking instruments thereupon, is, and which requires no other solemnity nor perfection thereto, nor no subscription, either to the lawfulness, or to the verity thereof, but only the notary's own; yet it was not found good to burden the depositar without his own subscription, or some other lawful deed done by the depositar's self; for the instrument, albeit it was not enough to burden the depositar with the sum, yet it was good and lawful to prosecute redemption thereon, and to shew that the alleged consigner had prosecuted the order of redemption; and the same was respected as an act done by the notary in his office *hoc modo*, and to that effect, and was done to make the depositar liable for the money, which is not the scope thereof, for, after the instrument, it is usual to the redeemer to take up the money again; neither was it sustained as an adminicle, to prove, by the witnesses inserted in the instrument, that the money was consigned, as the party offered to do for supply of the instrument, which was not admitted, albeit the same was only 100 pounds; for the pursuit was 30 years intented after the consigning.

Fol. Dic. v. 2. p. 243. Durie, p. 477. & 479.

*** Spottiswood reports this case:

ANDREW LAWRIE having wadset four acres near Stirling, to Graham of Panholls, redeemable upon the sum of 100 merks, afterwards useth the order, and consigneth the 100 merks in James Miller's hands, one of the bailies of Stirling for the time. After this the parties transact, and Lawrie dischargeth the reversion; and a long time being past, he pursueth the heirs of James Miller for the 100 merks consigned in their father's hands, which he verified by production of the infeftment of consignation. THE LORDS would not sustain the action, upon that instrument, to lay the debt upon the defunct's heirs, except the pursuer could verify it some other way.

After having offered to prove, by witnesses, the real delivery of the said sum in Miller's hands, yet the LORDS thought it not sufficient, in respect it is the ordinary custom that men will really consign money, in order of redemption, and will soon after take it up again, if the party refuse it; so that it were hard, by proving once delivery, to bind it on him in whose hands it was consigned for ever after.

Spottiswood, (REDEMPTION.) *p.* 264.