

1671. June 16. LORD LOVAT *against* LORD M'DONALD.

No 47.
Procuratory,
not called for,
may be pro-
duced before
extract.

THE LORD LOVAT pursues the Lord M'Donald to count for the superplus of a wadset, from the date of his instrument of requisition *in anno* 1663, whereupon he had raised a summons *in anno* 1667. It was *alleged*, That the instrument was at the defender's dwelling-house, when he was out of the country, and bore no production of the procuratory, and only an offer of a bond, with a clause of infestment in all Lovat's land, and did not bear an offer of caution. It was *answered*, that the act did not require requisition by instrument, but *quævis insinuatio sufficit*, and the instrument bore delivery of a copy to the defender's Lady in his house, there being no procuratory, for the pursuer offered now to produce the same, and a surety by infestment was sufficient, the act of Parliament mentioning no caution.

THE LORDS found, That the requisition behoved to be by letters of supplement at the cross of Edinburgh, and pier of Leith, seeing the defender was out of the country; but sustained the same as to the procuratory, it being now produced, and sustained the offer of surety, and ordained it to be produced, reserving the objections and answers of either party thereanent.

Fol. Dic. v. 2. p. 323. Stair, v. 1. p. 734.

* * * Gosford's report of this case is No 50. p. 3715, *voce* EXECUTION.

* * * A similar case is reported by Stair, 28th June 1671, Home *against* Lord Justice Clerk, No 67. p. 5688, *voce* HOMOLOGATION.

1671. December 8. FORREST *against* BROWNLEE.

No 48.
Found in con-
formity to
Jardine *a-*
gainst John-
ston, No 46.
p. 13466.

MASTER JOHN FORREST, as assignee to the reversion of some tenements in Edinburgh, and having used an order of redemption, pursues declarator. It was *alleged* for the defender, That he was not accountable for the rents since the order, because it was but simulate, by producing the bags without telling of the money, and that it was taken up again by the consigner, and the general clause for all other debts was not fulfilled. It was *answered*, That the pursuer having used the order, and presenting the money, was obliged to do no further, seeing the defender compared not to demand either compt or payment, nor did instruct any further due by the clause, and the consignation being upon the peril of the consigner, he might very lawfully take up the sum for its preservation, seeing he produced the same at the bar in the process.

THE LORDS found the pursuer only liable for the annualrent of the money, since he took it up; and found that he had right to the rent of the lands since the order.

Fol. Dic. v. 2. p. 234. Stair, v. 2. p. 19.