

1672. February 6. MR JAMES LOWES *against* SIR ANDREW DICK.

IN an action for mails and duties of the lands of Craighouse, wherein the said Mr James Lowes was infeft as heir to his father, who had a wadset of the said lands, affected with a back-tack, against Sir Andrew Dick, who was heritor and in possession; compearance was made for Sir John Lesly, as donatar to the life-rent escheat of Sir Andrew;—and thereupon ALLEGED, That he had been seven years in possession, and ought to have the benefit of a possessory judgment until his right was reduced.

It was REPLIED, That the pursuer, during some of these years, had gotten payment of his back-tack duty; and, albeit it was by interposed persons, to whom he gave assignations, yet he offered to prove that it was by Sir Andrew's means, and to his behoof, who was heritor.

The Lords did sustain the reply, and found payment so made was equivalent as if it had been done by Sir Andrew himself.

Page 240.

1672. February 16. The EARL of NITHSDALE *against* The TENANTS of DUNCAN.

IN a removing, at the Earl's instance, against the tenants, it was ALLEGED, That the Earl, by himself or his servants, at his direction, had invaded five of the defenders, who were commissioned by the rest to execute a summons of improbation, raised at their instance against the said Earl; and therefore, by an Act of the 8th Parliament, and by another of the 14th Parliament of King James VI. ratifying the same, making it a perpetual law, whereas the first was temporary, the Earl did lose all the interest that he had in these lands, and the defenders were secured from all real action at his instance hereafter.

It was REPLIED, That the defence was only competent to those who were actually invaded; and, even as to those, order and direction is not relevant by the Act of Parliament, and, if it were, it is not probable but *scripto vel juramento*.

It was DUPLIED, That the Act of Parliament, bearing all invaders, art and part, or who gives red and counsel to be liable, it is sufficient to allege that the Earl gave order and direction, or that *ratum habuit*, by imprisoning one of those who were wounded; and the Act of Parliament ordaining, that such a crime should be summarily tried before the justice or other judges competent, where order and direction is probable by witness, that same manner of probation ought to be sustained here, otherwise the Act of Parliament might be elided; seeing it cannot be supposed that the giver of such an order would put it in writ, to be a ground of a dittay against himself; and the penalty being no less than the forfeiture of interest, it ought not to be referred to his own oath, who is committer of the crime.

The Lords did sustain the action, being founded upon order and direction; but, as to the manner of probation, they assigned a term to both parties before answer, for leading of witnesses, and to the defender for proving the direction and rathabition, and to the pursuer for proving that he was absent the time