

1625. July 29. The EARL of WINTON *against* TENANTS.

IN a removing, at the instance of the Earl of Winton, as donatar to the L. of Touch's ward, against certain tenants,—the Lords found the gift of ward, which was the title of this pursuit, was dated before the warning, but was not sealed while after the warning, and could not be a ground or title whereupon warning might be used; and that the sealing thereof could not be drawn back to the time of the date thereof, seeing it was not a perfected gift before it was sealed; therefore found no process upon that warning, as wanting a warrant to make the same.

*Act.* Craig. *Alt.* ———. Gibson, *Clerk.* *Nam jus superveniens actori, lite pendente, regulariter ei non prodest.* *Socin. Reg.* 269. *Vid.* 20th November 1624, L. Lagg; and the cases there cited.

Page 184.

1625. July 29. TOURIS *against* DOWGLAS.

IN an action betwixt Touris and Dowglas, a decret was desired to be transferred; and this nullity being proponed against the same, by the defender, *viz.* that it was given without probation, in respect that the pursuer referred his summons to the defender's oath, who, being summoned by the pursuer to compare to depone, and he compearing to give his oath, the pursuer produced horning, and so debarred him to depone, whereupon the sentence was pronounced; and so, in effect, wanted probation, by the pursuer's choosing of that manner of probation, and then not suffering him to depone; which could not be the ground of a lawful sentence, specially where the process and action was deduced before an inferior judge, *viz.* the commissaries of Edinburgh. Which allegiance was repelled, and the decret found lawful, and sustained as good; for the debarring by horning was alike as if, for non-compearance, he had become *contumax*, and as sentence in that respect had been pronounced against him.

*Act.* ———. *Alt.* Mowat. Hay, *Clerk.* *Vid.* 15th July 1624, Dickson; which appears to be contrary to this decision.

Page 184.

1626. March 8. The LAIRD of CAPRINGTOUN *against* BARTILMEO.

IN a suspension betwixt the Laird of Capringtoun and Bartilmeo, wherein L. Capringtoun, being charged to pay Rebekah Bartilmeo for herself, and also as heir served and retoured to Masie Bartilmeo her sister, the sum of 600 merks, which, by contract, he was obliged to pay to them two, and their heirs, equally betwixt them; and so the one sister being dead, and the other being heir to her, charged for the whole sum;—the Lords suspended the charges executed for that half pertaining to the deceased sister, notwithstanding that the charger was heir to her; because the Lords found, that that contract concerning the

sum pertaining to her who was dead, could not be so summarily executed, and that sum charged for at the instance of her heir, except the contract had been first transferred in her person, as heir. And so the charge was not sustained, except the right of the contract had been lawfully and formerly established in her person by a preceding sentence.

*Act.* Cunninghame. *Alt.* ———. Hay, *Clerk.* *Vid.* 5th July 1625, L. Drumlanrig.

Page 189.

1626. *March 8.* HECTOR MONRO *against* DR KINCAID.

IN a suspension, at the instance of Hector Monro *against* Dr Kincaid, who having acquired the right of certain sums, which the said Hector was obliged to pay by an heritable bond, *viz.* the annual-rent thereof to Margaret Vaus and Mr Adam King her spouse, liferenters of the sums, during their lifetime, and, after her decease, to Margaret Mawer, fiar thereof, and, in case of her decease unmarried, to the other two sisters named in the said bond,—in the which obligation it is specially set down, that, notwithstanding of the heritable clause therein contained, the said Margaret Vaus, and her said spouse, might charge for the payment of the principal sum conjunctly, they being both in life, and, after the decease of the said Mr Adam and his spouse, that the said Margaret Mawer might charge for the same; and the right of this bond and sums being disposed to the Doctor by the said Margaret Vaus, liferenter, (her husband being dead,) and by the said Margaret Mawer, fiar;—the charges, at his instance, as assignee, were suspended upon these reasons, *viz.* in respect of the tenor of the bond, which provided that the liferenters conjunctly, they being both in life, might charge for the same, and, after both their deceases, the fiar might charge; and seeing Mr Adam King, husband to Margaret Vaus, liferenter, was dead, the relict could not charge, herself, for the principal sums, seeing the bond provided that the charges for the same should be executed by them both conjunctly, being both on life, and so the one being dead, as she could not, no more could her assignee charge therefore: And sicklike the bond provides, that the fiar should not charge while after both the liferenters' decease; so that Margaret Vaus yet living, the fiar nor the assignee could not seek the same: and, further, that the fiar, or her assignee, could not seek the principal sum, in respect of the tenor of the bond providing the sum to be paid to her, and failing of her by decease unmarried, to her two sisters; and so, she being yet unmarried, she could not assign nor dispose the same in prejudice of her other sisters:—The Lords, notwithstanding of both these reasons, sustained the charges for the principal sum, at the instance of the assignee, seeing they declared that that clause anent the not charging for the principal sum, during the life of the liferenters, was introduced in favours of the liferenter and fiar, and not set down in their prejudice, or in favours of the debtor; and, therefore, seeing both liferenter and fiar had made an assignation, the assignee having both their rights, might charge therefore, seeing the bond provided not that the fiar might not charge while the liferenter's decease, but bore *that she might charge after both*