No 8.

1624. *March* 9. L. Touch *against* E. Hume.

In an action betwixt L. Touch and E. Hume, being a cause of special declarator, which being accessory to a general one, the Lords found, that there needed no continuation in special declarators, in respect of a privilege contained in the summons, viz. because it was accessory to the general declarator, albeit the special declarator was pursued for payment of certain particulars, consisting *in facto*, which of its own nature required continuation, and for the which, if the rebel's self had intented pursuit, the summons behoved to have been continued, and that it was alleged, that the general declarator put only the donatar in the rebel's place, which was repelled, as said is, in respect of the preceding general declarator, which put the donatar in a better case than the rebel, and in respect of the privilege.

Act. *Stuart & Craig.* Alt. *Hope.* Clerk, *Gibson.*

Durie, p. 119.

No 9.
An heritable bond, on which infeftment has not followed, does not fall under single escheat.

1626. *July* 1. Haliburton *against* Stuart.

One Haliburton being assigned by Sir George Hume of Manderstoun, who was donatar to the L. of Coldingknow's escheat and liferent, in and to a part of the said escheat and liferent, so far as concerned an obligation, granted to the L. of Coldingknows, by Francis Stuart, son the late Earl Bothwel, upon a sum of money, which was an heritable bond, bearing, 'the debtor to be obliged 'to infeft the creditor in an annualrent, in case of failzie to pay the principal 'sum, at the terms appointed by the bond,' it being controverted in this cause, how far this escheat, or liferent should extend to, anent this sum and the profits thereof; the Lords found, that the principal sum (the same being owing, as said is, by an heritable bond,) fell not under the said escheat, neither simple nor liferent; but found, that all the by-run annuals owing preceding the date of the gift, fell under the rebel's simple escheat; and sicklike, that the annuals addebted, in time to come, after the gift fell, since the expiring of year and day after the rebellion, under the liferent escheat; and found, that the same pertained to the King's donatar, and not to the debtor, granter of the bond, who was obliged to give the infeftment of the annualrent, seeing the said bond bore not to grant that infeftment of the annualrent, 'to be holden of the annailziar's self,' but being granted indefinite, without mention of any superior, of whom the same annualrent should be holden; it was presumed for the King, that he behoved to be superior, of whom the said annualrent should be holden, and so to belong to his donatar. And this was found, albeit no infeftment

followed upon the bond; and so, albeit there was no holding, and albeit that it was alleged, that there could be no liferent escheat where there was no holding, as was clear by the 32d act, 4th Parl. James V. *anno* 1535, which requires an holding before there can be any liferent escheat; which allegeance was repelled, and the annualrent since the expiring of year and day, was found to come under the said liferent escheat, as said is, and to pertain to the King; and this was found, albeit the bond bore only these words: 'To infeft the creditor in an 'annualrent correspondent to ten for ilk hundred of the principal sum;' and bore not 'to infeft him in an annualrent out of his lands, nor of what superior 'to be holden.' In this process, it came under the LORDS' consideration, to advise how the said annualrent in time to come, could fall under the said liferent escheat; wherein this difficulty offered itself, that seeing the debtor, who was obliged *ut supra* by an heritable bond, might nevertheless pay the principal sum to the creditor-rebel, whereby the bond, and the clause for the annualrent would become extinct, that therefore the donatar could no further bruik the liferent of that annualrent, which was loosed by the paying of the principal sum thereupon; and it being questioned, if the donatar should have the use and benefit of the principal sum, so long as the rebel lived, or if the liferent escheat, concerning the annual of that sum, expired by the said payment of the principal sum; the which doubt also offered in the case of wadsets, where the receiver of infeftment of land, under reversion, is year and day rebel, and that the land be redeemed, and the sum paid or consigned, if the donatar to his liferent after redemption, can have any right to the profit of that principal sum, which may appear, should succeed in the place of the profits of the lands wadset; to the which profits, so long as the wadset stood, the donatar to the wadsetter had good right. This point was not determined, viz. If the donatar should have the profit of the money, in any of the two cases foresaid; albeit most part of the LORDS seemed to be of the opinion, that after payment of the principal sum in an heritable bond, or after redemption in a wadset, the donatar to the liferent could pretend no right to the profit of the sums thereafter; which opinion may be also controverted, albeit the same may be probably disputed, for where there is not a standing and extant right of liferent, there can be no liferent sought; and, where any thing which is lawfully constitute by right of liferent, if the same perish, the liferenter's, or his donatar's right thereof *perit cum interitu rei ipsius;* or if the sum therein, or the land wherein the liferent is constitute, be otherways exhausted or evicted, so also in this case: But it may be thought, that the principal sum being paid or redeemed, as in other cases controverted, if the party remain still rebel at the horn, the payment will pertain to the King and his donatar, by virtue of the simple escheat, and may so be of new gifted: Again, others think, that albeit the debtor cannot be staid to pay the sum, yet the profit of the money must ever pertain to the donatar of the creditor's liferent, so long as the creditor lives; for they put the donatar in the same case, as any to whom the creditor, if he had not been rebel, had

No 9.

No 9. disponed his liferent right of these sums, so that they think, if the sum be secured, to be made furthcoming after the liferenter's decease, to his heirs, executors or assignees, the donatar has the use thereof, during the rebel's lifetime; but it was found by the LORDS, that as long as the sum of the heritable bond remained unpaid by the debtor, or that the wadset remained unredeemed, that the donatar to the liferent had good right to the profit of the sum addebted by the bond, and to the profit of the lands wadset, so long as the same remained unredeemed, the creditor being on life, who was rebel; and it was so found in the foresaid process.

Act. *Craig.* Alt. ——. Clerk, *Hay.*

Fol. Dic. v. 1. *p.* 253. *Durie, p.* 207.

1628. *March* 8. DOUGLAS *against* L. WEDDERBURN.

No 10. Found in conformity with No 6. p. 3616. The sub-vassal's liferent escheat first falling, makes a part of the casualty of the vassal's single escheat, but falling after the vassal's liferent-escheat, makes a part of the casualty of liferent-escheat.

IN a declarator of L. Wedderburn's liferent escheat of certain lands holden by him of John Stuart, having right to the benefice of Coldinghame, and thereby fallen in his hands as superior, and which was pursued against Wedderburn by William Douglas donatar to John Stuart's liferent escheat, and who had obtained declarator upon John Stuart's liferent, it being contraverted by the L. Wedderburn compearing, and *alleging* that his liferent, which had fallen since John Stuart his superior's liferent fell, and since it was gifted and declared at William Douglas's instance, and which was not then extant, to be comprehended within that gift of John Stuart's liferent, then granted and disponed, and so which he *alleged* could not pertain to the pursuer, whose gift of the superior's liferent could not extend to a casuality, falling forth to the superior thereafter, and which casuality, he *alleged*, could not be disponed by any gift of the superior's liferent escheat, but was proper only to be disponed by a new gift of the superior's simple escheat, as a provenient casuality, which could no otherwise be gifted but by a simple escheat, and could noways pertain to the donatar of his liferent. This allegeance was repelled, and this casuality of the sub-vassal's liferent was found, might be comprehended under the gift of the superior's liferent escheat, albeit the time of the gift it was not then extant; for the King having disponed John Stuart's liferent, and all which should befal to him, as that gift did extend to any feu, or other duties paid to him for these lands, whereof Wedderburn's liferent sasine fell, so behoved it to extend to a greater profit, which might befal to him thereafter, out of the same lands, by his vassal's fault; for that casuality of the sub-vassal's liferent was not a new purchase by the superior, whose liferent was acquired by the donatar, without any inherent casuality of the superiority, whereto the gift did extend, as effectually as if the superior had disponed to the donatar before his rebellion his liferent of all these lands whereof he was superior, *quo casu* as that disposition would