

1628. *March 21.*The LAIRD of LINHOUSE *against* the RELICT of ROBERT KINCAID.

No. 8.

Transference
of arrestment.

Robert Kincaid being addebted in certain sums to the Laird of Linhouse, there is arrested by the Laird of Linhouse, in the Treasurer of Edinburgh's hands, the sum of £.1200 owing by the town to Margaret Harriot, Robert Kincaid's spouse, and therefore belonging to him *jure mariti*. After the arrestment Robert dieth, and Linhouse intents summons against the Provost, &c. of Edinburgh, to make the arrested sum forthcoming, wherein was called the relict of Robert and his only daughter. Alledged by the relict, no process upon the summons now after Robert's death, till first the contract were transferred in some to represent Robert. Replied, That ought to be repelled, in respect he had convened the relict and the only child for their interest, who are the persons who in law should represent him; and further, Mr. Alexander Lockhart who was decerned executor dative to the defunct, concurs to the pursuit; likeas also he should concur to the giving of the town of Edinburgh a sufficient discharge; and therefore seeing all parties are put *in tuto*, and none having interest prejudged, the pursuer should not be put to multiply sentences unnecessarily. Next the exception is not competent to the relict, unless she would allege some right to the sum arrested. The Lords found the exception relevant.

*Spottiswood, p. 341.*1628. *July 17.* LORD YESTER *against* JOHN BANNATINE.

No. 9.

No necessity
to call the re-
bel in trans-
ference of a
process rela-
tive to his es-
cheat.

John Murray and John Bannatine (for my Lord Yester's behoof) both donatars to the Laird of Drumelzier's escheat, contested who should be preferred: Shortly after John Murray died, and my Lord Yester sought to have an act of interlocutor given in his favours against John Murray while he lived, transferred in his son David Murray. Alledged, all parties having interest were not called, viz. the Laird Drumelzier, for whose escheat they were striving. Answered, He needed not in this case, where he was only seeking one to represent the defunct, but after he had established the judgment so, then he behoved to call the rebel before he got process. The other contended, That this being a part of the process, and a special act therein, the rebel who was most concerned in the business, should have been called thereto. The Lords found there was no necessity to call the rebel in the transferring.

Spottiswood, p. 341.

* * Durie reports this case:

In a transferring of a declarator of the L. Drumelzier's liferent, at the instance of one Bannatine donatar thereto, wherein litiscontestation being made by the

compearance of a contrary donatar, who was admitted for his interest; and a reply proponed and admitted, for eliding of an exception proponed by him; which donatar dying since litiſcontestation, this process was desired to be transferred in one representing the said donatar; to the which transferring the Lords found no necessity to summon the principal party defender in that declarator, seeing he was living, and so needed not to be summoned; albeit it was alleged, that the process wherein he was principal party, could not be moved nor meddled in by any judicial deed, except he were cited thereto; this action being for procedure, in a process wherein he was party principal, wherein nothing could be done, except he had been egally cited, this being a diet in the same process; which allegiance was repelled, and the transferring sustained without necessity to cite him, seeing he would be summoned after the transferring by a wakening.

Act. Stuart.

Alt. Scot.

Clerk, Hay.

Durie, p. 390.

No. 9.

1628. December 2. WILLIAM ROBERTSON against JOHN JAMISON.

William Robertson, cessioner and assignee constitute to one Traquair, convened John Jamison to hear and see a contract made between the defender's father and the pursuer's cedent (whereby the defender's father was obliged to deliver to the other 100 stone of butter, for which the cedent should pay him £.3 the Stone, whereof he advanced £.80 at making of the contract) transferred in him *passive*. Alleged, The contract could not be transferred, because it was null in law, being only subscribed by one notary and three witnesses. Replied, That ought to be repelled in respect he declared, that he craved transferring only to the effect, that he might have repetition of his £.80 advanced, by reason of which restriction his action should be sustained. Duplied, The contract once being null *in toto*, could not be sustained in part. The Lords in respect of the reply sustained the action.

Spottiswood, p. 342.

No. 10.

Transference of an action at the instance of an assignee.

1629. July 17. EXECUTORS OF DOUGLAS against L. EDNEM.

Umquhile William Douglas, as donatar to the escheat and liferent of John Stuart, having obtained general declarator thereon, after his decease, his executors pursue the intromitters with the teinds of Ednem, for payment thereof, for certain years preceeding the donatar's decease, as pertaining to the said John Stuart. This action of special declarator, for the said by-past years, was sustained at the instance of the executors; and no necessity found that they should first transfer the general declarator in them as executors, neither were they holden to produce John Stuart's title and right to the teinds as the title of this pursuit; but it was found enough to prove the same *cum processu*; and the defender being convened, as lawfully charged to enter heir to his father, who was intromitter, and he offering to renounce, and a term being assigned to him to produce his renunciation, it was

No. 11.

Action of special declarator at the instance of the representative of a donatar sustained without transference, the donatar having obtained general donatar.