

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.

No. 11. found that the pursuer might take the same term, to prove his summons, whereby it might have effect if the defender renounced not, and if he renounced, that he might use sentence against him therein *cognitionis causa*.

Act. Craig.

Clerk, Gibson.

*Durie, p. 464.*

No. 12.

Transference of a decree of poinding the ground, to the executor of the obtain-er.

1629. November 27. L. BALMANNO *against* OLIPHANT.

A decret of poinding of the ground for an annualrent, being desired to be transferred in the executor of the obtainer ; in which transferring the heir of him, against whom the sentence of poinding was obtained, and also another heritor of the land, who had acquired the right thereof since that decret, but not from any of the defenders in that sentence, were called in this transferring ; and this heritor alleging, that the transferring could not be sustained against him, seeing he was not a party in the first sentence, and therefore the transferring cannot be against him, which cannot be craved against any but those who were then called ; which allegiance was repelled, and the action of transferring sustained, seeing he was called only for his interest, and nothing concluded personally against him, and that the transferring was craved *activè* the pursuer only.

Act. Mowat.

Clerk, Gibson.

*Durie, p. 471.*

1630. December.

HART *against* CHISHOLM.

No. 13.

Who must be the parties in the transference of a contract assigned ?

Mr. Hart being made assignee by Davidson, who was assignee by Elliot to a contract, for the sum of 700 merks, addebted to the said Elliot by Chisholm, and to all that followed thereon, craving transferring in him as assignee foresaid of the said registrated contract, and of an act of caution, found by the said Chisholm in a suspension of the charges raised by Elliot his creditor, upon the said contract *activè* ; in which action of transferring, the cautioner was only summoned thereunto, and not the principal debtor, who was charged and had suspended ; this action of transferring was sustained, albeit the principal party charged and contracter, and who suspended, was not summoned, but only the cautioner, in respect protestation was admitted against that suspension, whereby the suspension was not standing undiscussed ; for as the principal creditor who was cedent, might after the protestation have charged the cautioner, and miskenned the principal, even so his assignee might seek transferring against the cautioner after protestation, and misken the principal.

Act. Prasens.

Alt. Burnet.

Clerk, Gibson.

*Durie, p. 551.*

No. 14.

1632. Nov. 27. SOMERVIL *against* The APPARENT HEIRS OF LORD SOMERVIL.

A decree-arbitral pronounced between these parties, (by which every one of them is decerned to do something to the other), being registered only at one of