

DECISIONS

OF THE

LORDS OF COUNCIL AND SESSION,

REPORTED BY

SIR JOHN BAIRD OF NEWBYTH.

1664. . *November 25.* AGNES FRAZER and her Husband SIMON M'KENZIE
against THOMAS M'KENZIE.

By contract of marriage betwixt Kenneth M'Kenzie and Mr John M'Kenzie, his father, on the one part, and Agnes Frazer and Hugh Frazer of Culbockie, on the other part,—her father, the said Mr John, was obliged to infest the said Kenneth and the said Agnes, the longest liver of them two, in liferent, in the lands of Arcanduth and others, and to warrant the lands, teinds, and others, to be worth six chalders of victual, with customs, carriages, and services, used and wont, by and attour the feu-duties and other impositions mentioned in the contract, except so much of rental as shall fall through the said Agnes her default. The said Kenneth being deceased *in anno* 1641, immediately thereafter, Mr John, his father, offered, by an instrument, to the said Agnes, to find tenants to pay her the six chalders victual, and relieve her of the feu-duties and other impositions, and to find a sufficient gentleman, of the name of M'Kenzie, cautioner; which the said Agnes refused. The said Agnes and her present husband, Simon M'Kenzie of Loslin, alleging the said lands to have been inlacking of the

rent twenty bolls of victual since the year 1641; convening Mr Thomas M'Kenzie, as representing his father, to make payment thereof: the Lords found the defender should make up to the pursuer the six chalders of victual since the date of the summons, and not before; and found, That, in time coming, the defender should be obliged to give sufficient tenants to take the conjunct fee-lands at the rate, and therefore could be cautioner himself for other payment.

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1664. November 16. SARAH and ELIZABETH KIRKTOUNE *against* The LAIRD of HUNTHILL.

SARAH and Elizabeth Kirktoune having recovered a decret against the Laird of Hunthill, as being tutor nominated to them by their mother's testament, and having comprised his estate, and intented removing thereupon; there was a reduction, intented by Hunthill, of the foresaid decret; wherein the grounds of the confirmed testament were called for, *viz.* the nomination, and the act whereon the tutors had accepted. The Lords inclined that the testament, *ante omnia*, should be produced; and thought it might be of dangerous consequence if the assertion of a clerk should bind a tutory, and consequently an intromission and a necessity of counting; but it was waved in regard of the consequence, and the parties desired to agree.

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1664. November 17. JOHN STIRLING *against* NICOL EDGAR.

UMQUHILE Mary Home did assign the sum of 200 merks, resting to her by Nicol Edgar, to Mr William Stirling, minister of Edinburgh, for the behoof of such poor persons within the town of Edinburgh as he should think fit. The said Mary being bastard, the gift of bastardy was disposed in favours of David Home; and, by an act of Exchequer, the same was burdened with payment of the said 200 merks, of the date of the gift. Upon which assignation and gift of Exchequer, Mr John Stirling caused arrest the said 200 merks in Nicol Edgar's hands, and raised summons against him and the donatar for payment thereof; but, before Mr John could obtain payment, the gift was declared generally and specially. Whereupon there being a double poinding raised by Nicol Edgar, against the assignee and the donatar, it was excepted by the donatar, That the assignation was null, not being subscribed by two notaries, before four witnesses. To which it was answered, That the donatar could not quarrel, because the Exchequer, who was his author, had acknowledged the solemnity to be sufficient; in so far as, by an act of Exchequer, it was declared that her gift should be affected with the payment of that debt. To which it was replied, That his gift could not be affected with that debt, because it did not bear the same; and the act of Exchequer was but the assertion of one notary, being subscribed by the clerk; and the gift is passed the seals simply, without any such condition. To which it was duplied, That the act of Exchequer being passed *simul et semel* with the gift,