No. 17. some of the authors, who died *pendente lite*, were called.

representing him were called; for as *in initio*, there could be no process against Troup, the present heritor, till Muiresk, his author, were called, so neither can there be any procedure now till some representing him be called. It was answered, The pursuer declares that he insists against Lesmore's right *principaliter*, against which only the reasons are sustained; and as for Muiresk and Troup's rights, they will fall *in consequentiam*.

The Lords found, That the process behoved to be transferred against Muiresk's apparent heir before it could be advised; for as the declaring that the pursuer insisted *principaliter* against the first right, would not have been relevant *ab initio*, seeing the law allows all mediate authors to be called, that they may defend the right, whether the reasons be libelled against their rights or their authors', which comes in the place of the old custom, of sisting process until the defender's warrant were called, and discussed, so every author has alike interest to object against the reasons, although libelled *principaliter* against the first author's right.

But the Lords declared, that seeing the defender made this unnecessary delay, they would be more favourable in drawing back the reduction, *ad litem motam, aut contestatem*.

Stair, v. 1. *p.* 396.

1666. *November* 24. ——— *against* MILN.

No. 18. Transference of an order for redeeming a wadset.

An order being used for redeeming a wadset, the executor creditor of the wadsetter pursued the person in whose hands the consignation was made for payment of the sum consigned; and in the process the user of the order was called, and decree was obtained; but before it was extracted he deceased; and there was debate upon the oath of the consignatar. The Lords found, That the user of the order being a person having interest, and called *ab initio*, nothing could be done until the process was transferred against some person representing him.

In the same process, it was argued amongst the Lords, Whether a sum being consigned upon an order of redemption, the user of the order may pass from it, and lift the sum without consent of the wadsetter? and it was remembered by some of the Lords, That upon an instrument of consignation process was sustained at the instance of the wadsetter against the depositar, in whose hands the sum due upon the wadset was consigned, for making the sum forthcoming; but in this case nothing was done.

It appeareth, that after consignation, *jus* is *quæsitum* to the wadsetter; so that the sum, being consigned and sequestrated to his behoof, cannot be uplifted without his consent.—See WADSET.

Dirleton, No. 52. *p.* 12.

1668. *November* 26. MAITLAND *against* His VASSALS.

No. 19. A father and son were cit-

There being an improbation pursued at the instance of Charles Maitland of Hatton against his vassals, whereof William Douglas, elder, of Over-Gogar, and

Alexander, his son, were called, certification was granted *contra non producta*, in July last, conditionally, that what they should produce before the 10th of this instant, should be received; after which diet, an extract of the certification being craved, it was alleged for the son, That he being only cited to produce such writs as he had of the said lands libelled, or which his author had, to whom he was a singular successor, certification could only be extracted as to these writs; but as to any other writs he had from his predecessors, to which he had right *jure sanguinis*, the certification being granted against his father, who before the extracting was dead, the process should be transferred *in statu quo* against the said Alexander, his son. This allegeance was repelled, and the Lords found there was no necessity for transferring, because the son was called *ab initio*, and the certification was given against the father only. They assigned a long day, in respect that his father was but lately dead, and in the meantime discharged the extracting of the certification.

No. 19.
ed in an improbation, whereon certification was granted, but before extracting the father deceased. No necessity for transferring against the son.

Gosford MS. p. 19.

1676. *January* 7. DAGLEISH *against* The LAIRD of DUNTREATH.

No. 20.
In a transference, a passive title libelled, which was not in the former process, was sustained.

The deceased Sir James Edmonston of Duntreath, and William Edmonston, his son, became obliged to pay 6000 merks to Mr. John Edmonston, son to Sir James; whereupon Jean Edmonston, as having right from Mr. John, her father, pursued Duntreath, as representing his goodsir, and he having died *pendente lite*, there is a transference of that process pursued by Anna Dalgleish, as heiress and executrix to the said Jean Edmonston, her mother, against Duntreath, as son and apparent heir to Archibald Edmonston, his father, who was son and heir to the said William Edmonston, party obliged with his father; and the process being thereupon transferred, the said Anna insisted in the principal cause, and a term was assigned to prove the passive titles; against the extracting of which act, it is now alleged for Duntreath, No process in the principal cause, upon the transference, because the principal cause is libelled against Archibald Edmonston, who is brother to Duntreath, and not against Duntreath himself, whose name is William; *2do*, In the transference there is a new member libelled against Archibald, the second brother, "as he who received the disposition from his father, with the burden of his debt;" which form allows not to be accumulated in one process with a transference, which is wholly heterogeneous. It was answered for the pursuer, as to the *first*, That albeit, by mistake, he be named Archibald, yet an erroneous designation hath no effect, *ubi constat de persona*; for the christened name was not necessary to be expressed; but if it had been "——— Edmonston, son and apparent heir to Duntreath," it would have been sufficient; and here William is designed "eldest son and apparent heir to Duntreath. As to the *second*, There is no inconsistency in a transference against the apparent heir, to adject a conclusion of payment against the second brother, as undertaker of the debt.

The Lords repelled the first defence upon the wrong name, the pursuer abiding by the executions, as truly given to the eldest son; and repelled the second