

found this defalcation reasonable, and allowed the said payment; and found that the executors needed not to abide any sentence for the said debts to have been obtained by the defunct's creditors against them, but that they might have paid the same without sentence, they proving the debts to have been truly owing. And albeit there had been no payment, nor yet sentence, yet they found the defalcation relevant, bearing that the defunct was owing such particular debts, which being proven, the same ought to be taken off the gear, before the relict or her executors could claim any of the gear, for the relict's portion thereof.

*Act. Baird. Alt. Burnet, major. Gibson, Clerk.*

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1628. *July 9.*

LAUDER *against* JAMES MOWAT.

IN a suspension, Lauder *against* James Mowat, the said James being sheriff-clerk of Berwick, was charged by the said Lauder to extract a decret obtained in the court of the sheriffdom; and the clerk suspending upon this reason, that there was never such a decret, and producing the process to verify the same, no minute of any sentence was to be found in any part of the process; and the charger producing the Laird of Eistnisbet, who was sheriff for the time, his letter to verify that he had pronounced that decret, and which letter bore the same;—the Lords, notwithstanding of the sheriff's writ proporting that there was a decret pronounced and given by him, suspended the letters *simpliciter*, in respect of the said process, which had no such warrant, and that the clerk in his office ought to have greater faith with the process than the assertion of the judge, *cui non creditur nisi quantum constat ex actis*:

*Act. Dunlop. Alt. Mowat. Hay, Clerk.*

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1628. *December 10.* The LAIRD of LEY *against* The MINISTER of LANARK.

THE Laird of Ley, having presented one to the preceptory of the hospital of St Leonard's, who, seeking letters conform to that provision and gift given to him by the Laird of Ley, as patron of that hospital; and the minister of Lanark compearing and alleging, that he was provided to the said preceptory by the king's majesty, and had obtained thereupon letters conform, by virtue whereof he was in possession; likeas his predecessor was presented by the king, and by virtue thereof he was also in possession, whereby it was evident that the right to present was only proper to the king; and they being so in possession, no letters conform ought to be granted upon the Laird of Ley's gift:—this allegiance was repelled against this summons, craving letters conform: without prejudice always of the defender's right thereupon; upon the validity whereof, or of the pursuer's right, the Lords found it not proper to dispute in this process and action of letters conform; but reserved the same to be tried by suspension or double poinding, or in any other lawful pursuit, *prout de jure*, whereto this decret should not be prejudicial.

*Act. Mowat. Alt. Steuart and Sandilands. Gibson, Clerk. Vid. 4th July, 1627, Mackenzie.*

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1629. *January 9.*

SALMOND *against* COURTIE.

A DECRET being obtained before the Town of Edinburgh, against a party holden as confessed, who was warned to compear by the town-officer upon sixty days, he being then out of the country;—it was found that that decret was null, because no inferior judge had power to summon a party out of the country upon sixty days, without a preceding warrant obtained by the party from the Lords, to summon the defender as out of the country; and that such warnings cannot be made by naked warrant of an inferior judge. This was not clearly decerned, but the Lords inclined to this decision; for it is usual, in inferior judgments, to crave their warrants, when parties out of the country are summoned upon sixty days; but in this process the parties were ordained to dispute their rights, without respect to the decret.

*Act. M'Gill. Alt. Craig. Hay, Clerk. Vid. 7th February, 1629, Town of Irvine.*

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1629. *January 13.*

ROSS *against* GEORGE BUTLER.

A DECRET of removing being recovered by Mr George Butler, against the relict of Alexander Vanss; which being suspended, and one Vanss being cautioner for obedience in the suspension; and the suspension being discussed, and the letters found orderly proceeded; and, upon the act of caution, the cautioner denounced, and charged for not obeying of the decret by the said relict; and thereupon the obtainer of the decret, by command to the sheriff, conform to the Lords' letters, being entered to the possession of the lands in July, at which time the corns were growing upon the lands decerned; and thereafter that crop being intromitted with by the obtainer of the sentence:—the escheat of Vanss, cautioner in the suspension, being gifted and declared, the donatar, by the special declarator, seeks the corns intromitted with by Butler, growing upon the lands, as said is, when he entered thereto, to be paid to him as donatar,—the same being the proper corns of the said rebel, who was cautioner, and which was sown thereon by him on the lands, and the lands being possessed by him divers years before that crop, and no decret of removing being given against him, nor of succeeding in the vice of the relict, who was decerned. The Lords sustained the said action, and found that the said corns pertained to the donatar, and not to him who had obtained the sentence; albeit he alleged, that he, having the only right to the lands,—and so found by sentence,—whatever was sown thereon *solo cedebat*, and pertained to him, and came in the place of the violent profits which belonged to him by virtue of his decret; and that the said rebel could qualify no right in his person to the lands, by virtue whereof