

*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

he might maintain his possession ; and he was not rebel the time of his intromission ; and, by his becoming cautioner for the relict decerned to remove, he could not ascribe the possession to himself, which, *re vera*, pertained to the said relict, who had a pretended title of liferent. Which allegiance was repelled, and the pursuit sustained, in respect of the rebel's possession, offered to be proven at the time of the warning made to the relict, and sensine, and of the crop libelled : and it was not found necessary to allege that he possessed by virtue of a right to the lands libelled ; for the Lords found that the corns, being sown after a decret of removing, by another person against whom no decret was given,—albeit the person who did sow the same had no right to the lands wherein they were sown, and that his possession could not have been maintained, if he had been pursued either to remove or as succeeding in the vice,—yet that the said corns pertained to him who sowed the same, and consequently to the donatar to his escheat ; and that the same could not be intromitted with by him who obtained the decret of removing, the same not being given against the party who sowed the land ; and that his entry to the possession, by virtue of charges to the sheriff thereupon, could not give him right to meddle with the corns growing thereupon pertaining to any other person, than that person against whom he had received the sentence of removing.

*Act.* Neilson and Mowat. *Alt.* Stuart. Gibson, *Clerk.* *Vid.* 21st November 1628, Bruce *against* Bruce.

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1629. January 31.

MAWER *against* HADDEN.

A DECREET dated and given the 27th of December 1628, by the Provost and Bailies of Edinburgh, being desired to be reduced, because it was given in the time of Yule vacation, which was *feriot*, and wherein no judicial act ought to be done ;—this reason was not sustained, but the decret found well given, because the decret was desired to be reduced by him who was pursuer of the cause wherein decret was given ; for, albeit absolvitor was given to the defender, by reason the pursuer failed in probation, yet, seeing the pursuer then insisted in his pursuit, the Lords found he could not reduce the same upon that reason, no more than the defender could, if sentence had been given against him compearing, and that no dilator had been alleged before the sentence.

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1629. February 10.

FALCONER *against* BLAIR.

It was questioned, if the creditor to a defunct, by an heritable bond, might seek payment thereof from the defunct's executors, before the heir were first pursued therefore, as the pursuer contended ; who affirmed that the heir, specially he being responsal, ought to pay the defunct's heritable debt, as the executors are obliged to pay the moveable : even as the executors have no right but only to the defunct's moveables ; and the heir, to the defunct's goods immoveable,