

1638. July 25. JAMES KENOWAY *against* RODGER MOWAT.

ONE James Kenoway being donator to the liferent-escheat of Patrick Austine, husband to Agnes Boyd, who was liferenter of a part of the lands of Gellies, and which she and her husband had set in tack, for payment of certain victual duty to be paid therefore yearly to them by the tenant; and Mr Rodger Mowat being assignee by the husband and the wife, after the rebellion, to the same tack-duty of the years 1636 and 1637, for a just cause of debt owing by them to him; contending which of them should have right to the said tack-duty; which the donator alleged he must have, as said is, by virtue of his gift, and whereupon he had inteded declarator presently depending, which is only impeded by this same assignee; likeas the tenant produced a discharge, granted by the donator of the crop 1636, which he alleged should liberate him, being paid before any intimation or knowledge of the assignee's right: And the assignee alleging that this payment could not defend the tenant, being only made voluntarily, without any necessity of law; and there being no declarator, neither general or special, at the donator's instance, it cannot be sustained that the tenant should, without sentence or legal compulsion, invert his master's possession: And the donator alleging that he ought to have the year already paid, allowed to the tenant, and ought to be answered of the other year controverted, in respect that his general declarator was only stopt by the assignee's compearance;—the Lords, in respect the payment was made for the first of the years controverted by the tenant, before he was interrupted by the assignee, allowed the same, notwithstanding that the escheat was neither generally nor specially declared; and, for the other year, in respect interruption was made by the assignee, and that it was not paid to the donator before, and that there was opposition made against the declarator; therefore they ordained the assignee to be answered of that crop, he finding caution to refund the same to the donator, *cum omni causa*, in case he prevailed in his declarator; seeing the assignation was made to a true creditor.

*Act.* Bruce. *Alt.* Mowat for himself. Gibson, Clerk.

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1638. December 20. JOHN RENTOUN *against* RENTOUN of LAMBERTOUN.

UMQUHILE John Rentoun of Lambertoun, being married upon one Hume, father-sister of Huine of Rentoun, to his second wife; by contract of marriage he is bound to infest her in certain lands, during her lifetime; and the said umquhile John Rentoun the husband being deceased, she makes the said Laird of Rentoun assignee to the said contract, who pursues registration of the said contract against John Rentoun, eldest son to the said umquhile John Rentoun her husband, contractor, and convenes him as successor to his father *titulo lucrativo post contractum debitum*; and, for verifying of him to be so successor, produces a bond granted by the defender to his umquhile father, of this tenor, *viz.* for sa meikle as his said father had provided and given way (thir are the words,) to his provision to the lands of Lambertoun; therefore he obliged him to relieve his father

of all debts and sums owing by his said father : And the defender alleging that this bond could not prove him successor *titulo lucrativo* ; for that narrative clause anent the providing of the defender, or giving way to his provision, being but narrative words, cannot be found obligatory to constitute the defender successor *titulo lucrativo* ; seeing the truth is, and he offers to prove, that, whatever provision he has attained to, it is for causes most onerous, and for sums of money debursed by the excipient, far exceeding the avail of that which he has obtained by the said provision ; and condescended on the particulars and instructions thereof : and albeit that clause of the bond, obliging him to pay his father's debt, be a good ground whereupon he might be pursued by way of action to pay the same,—in which case, when he is so pursued, he shall elide the same,—yet, that he can be convened as successor *titulo lucrativo*, where he does instruct so clear a cause onerous,—it is against all reason, law, and conscience ; and only for a word narrative, which by no equity can be drawn to such an extent ; for if, by the bond produced, the defender had been obliged to pay some particular designed debts therein-named only, it were iniquity to conclude (albeit the narrative had been of the same tenor whereof it is,) that therefore the defender should be found successor *titulo lucrativo* to his father, and were thereby holden to pay all his father's other debts, by and beside the special debts which he was bound to pay, and which he never could eschew in law, if this ground hold that the words foresaid in the narrative makes him successor ;—the Lords repelled this allegiance ; and,—in respect of the foresaid words, by the which the Lords found that the defender had acknowledged himself to be provided by his father, and so to be successor to him,—they decerned the contract to be registrate against him, *hoc nomine*, as successor, as said is.

*Act.* Advocatus and Nicolson. *Alt.* Stewart and Craig. Gibson, Clerk. *Vid.* 21st March 1634, Orr. Page 868.

1638. December 21. ————— against —————.

IN a pursuit for payment of the sum of 60 pounds contained in this defender's bond, which bore to be all written and subscribed by the defender's own hand ; and the defender compearing and alleging the bond to be null, because it wanted witnesses : And the pursuer opposing the bond, bearing the bond to be the defender's own hand-write, as said is ;—the Lords repelled the allegiance, in respect the bond bore to be the defender's own writing, all written by himself ; which the Lords sustained, without necessity of witnesses, seeing the defender denied not the same to be his hand-write ; in which case, if he had denied, the pursuer behoved to approve the same.

*Act.* ———. *Alt.* Nicolson, younger. Gibson, Clerk.

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1642. February 10. JOHN LESLIE against JOHN DICKSON.

MR John Leslie being retoured heir to his umquhile brother, Colonel George