

Leslie, with concurrence of the executors of the said umquhile Colonel, gives in a supplication, craving some bonds belonging to the umquhile Colonel, which was consigned in John Dickson's hands as clerk, to be given up to them by him; and the executors to the said umquhile Colonel's relict alleging, that this summary order could not be sustained by way of supplication, but ought to abide an ordinary pursuit, by way of action, that all parties having interest might be called; likeas they, as having special interest, compear, and allege, that, if they were cited, they would answer that the relict has right to the half of the bonds and sums therein, there being no bairns on life betwixt them: Notwithstanding whereof the Lords ordained thir bonds to be given up to the supplicants by the clerk, upon inventory.

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1642. *February 15.* HALPLAND *against* CRAWFURD.

ONE Halpland having obtained decret of removing against Crawford of Camlarge, pursues his daughters as charged to enter heirs to their defunct father, and their husbands, to pay the violent profits of the said land intromitted with by their umquhile father. This action, and all actions of violent profits, the Lords found, ought to abide continuation; and the rather where the summons bore no privilege, as being accessory to the Lords' decret of removing, which preceded.

Scot, Clerk.

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1642. *July 16.* JOHN ELDER *against* JOHN MERCER.

JOHN Elder, son to Henry Elder, clerk of Perth, being provided to the office of clerkship in Perth, by the council of the town, with reservation of his father's liferent, in April 1623, at which time he was an infant within three years of age; with provision that he, with his tutors, by advice of the council of the town, should appoint deutes to serve therein during his minority; and the father thereafter dying in October the same year, 1623, John Mercer is provided to the same office vacant by his decease, and is provided during all the days of his lifetime; in which provision in the clause of warrandice thereof, special exception is made of that prior provision granted to John Elder, the deceased clerk's son; likeas the said son, when he was past majority, was also admitted and received by the council of the town to that same office: and they contending who should be preferred to the said place, which the said John Mercer alleged was only due to him, he being provided by a lawful manner of vacation, *viz.* the incumbent's decease, and during his lifetime, and having served therein 20 years bygone; and the other provision being null, not having a cause of vacation, but bearing reservation of his father's liferent, who was then living; and being granted to an infant, who could not serve in that office, and he wanting tutors, and no deutes being either sought, or given to him, his gift given to

him for his lifetime ought to be preferred ; and which cannot be questioned now, after his 20 years' possession ; and the clause of warrandice in his gift ought not to be respected, seeing it is not excepted in the dispositive words, but in the general clause of warrandice, which cannot be prejudicial neither to him nor to the town, it being a gift in itself null, being granted to an infant, of a place which deserved to be provided to one able to serve therein : and the other opposing the priority of his gift, whereon he is now, being major, admitted to the office, and wherein he actually serves, and is received, the posterior gift cannot be respected, but as a deputation, during his minority ; seeing, he being then pupil, and under the government of the same John Mercer, who married his mother, and with whom he remained, he ought to have sought tutors to him, and cannot be reputed to have dealt *bona fide* with him, who was under his trust, in not doing the same ; but must be esteemed to have fraudfully abused his trust, in taking a liferent-gift to himself, over the pupil's head. The Lords preferred Elder to Mercer in the right of this office, now after Elder's majority, he being of new again received therein, by consent of the most part of the council ; and respected not, that there were no tutors given to Elder, nor that Mercer had obtained another gift of the office from the town, *in anno* 1627, wherein there was no such clause of exception from the warrandice. But, in respect of the foresaid prior gift, and new admission of Elder, and in respect of all the circumstances, which they found very considerable in this matter, they authorized Elder's right to this place.

*Act. per* Nicolson ; Mercer, *per* Cheap. Hay, Clerk.

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