

The creditor deceases. The wife, who was the person substituted in the bond, being left executrix to her husband, confirms the said bond in testament, and registers the same at her own instance against the debtor, and charges him to make her payment. The defender suspends, *alleging*, The sum being moveable, came under testament, and so behoved to be the relict's, as executrix, and the charge could not be sustained at her instance, as person substitute. THE LORDS sustained the charge.

No 6.

*Auchinleck, MS. p. 145.*

1629. February 13. COCHRAN against DAWLING.

AN husband being obliged to employ 10,000 merks to his wife in liferent, and when it was uplifted, to employ the same again as commodiously as he might to her use; and he having employed the same, after his decease, it is redeemed from her and his heirs by the debtor; at the time of which redemption, the heirs being minors, and the curators offering the money to the relict to be employed by herself, and offering their concurrence thereto, which being refused by her, and they desiring her concurrence to seek and find one to take the same for profit, and she not finding any, but refusing to meddle therewith, and the minor having done most exact diligence to get employment, and finding none till mid-term was past, and then being constrained to let it out for a quarter-term's profit, and so contending that they had done all they might, and which the most provident could do in their own affairs, they alleged that they could be no further obliged; notwithstanding whereof it was found, albeit the contract obliged only to employ to the best commodity might be, that for the bygone terms no more should be asked and paid to the liferenter but that quantity which was received for the money; but found, that in time coming, the heirs remained ever and still obliged to the liferenter in annual-rent for that money, of all terms after the term of payment of the money employed by them as is above written, albeit the heirs did never so great diligence, and albeit they should never get it employed, which should not liberate them thereafter.

Act. Aiton & Stuart. Alt. Advocatus & Neilson. Clerk, Scot.

*Durie, p. 425.*

1630. June 17. CRAUFORD of Carse against LUBBERLONE.

No 8.

A bond bearing the sum to be payable at a certain term, and failing thereof, the master borrower of the sum of 500 merks from his own tenant, by the bond allowed to the tenant 50 merks for the annualrent of the said sum out of the

No 8.

readiest mails and duty by his said tenant to his master, and that yearly so long as the principal sum was unpaid. The bond was found by the LORDS heritable, and not to pertain to the executor but to the heir.

*Auchinleck, MS. p. 146.*

No 9.

A person in the contract of marriage of his natural daughter, stipulated to her a liferent right in lands, and took a back-bond from her. She never had obtained possession; but her right was preferred in competition with a party in possession.

1632. July 17.

L. AUCHINLECK *against* CATHCART.

THE deceased Lord Cathcart, in his bastard daughter's contract of marriage, is obliged to infeft her and her husband, during their lifetime, and their heirs, in some lands, whereof the daughter sets presently a back-tack to the Lord Cathcart, for payment of a silver duty, of which silver duty there were twenty years paid by the father, but never got any payment from the tenants, nor out of the said lands. The said daughter pursuing upon the infeftment granted to her, following upon the said contract, which was a base infeftment holding of the granter, the tenants of the lands, for payment of the mails and duties, and they alleging them to be tenants to the L. Auchinleck, who was infeft in the same lands by the Lord Cathcart, holding of him sicklike, and confirmed by the King, and by virtue thereof six years in possession of the very duties of the lands from the tenants, occupiers thereof; likeas, since the decease of the Lord Cathcart, his author, he charged his son to enter to the superiority of these lands, and for not doing has obtained decret of tinsel of superiority, whereupon he is infeft by the King, and in possession both real, by uplifting from the tenants the duties, and also civil, by obtaining sentences against them; likeas the tenants these thirty years bypast ever since paid their duties to the Lord Cathcart, while the L. Auchinleck acquired his right and possession, the pursuer's infeftment being ever obscure and unknown, nor ever clothed with possession;—the LORDS repelled the allegiance, albeit it was also proponed for Auchinleck compearing with the tenants, in respect of the pursuer's right, which was anterior to the defender's, and that the same depended upon a contract of marriage, and that they got payment of the back-tack duty from the Lord Cathcart, albeit they never had any other possession, either from the tenants, or out of the lands, and albeit these ten years bypast, they had got no payment, and preferred her to the excipient, albeit real possessor.

Clerk, *Scot.*

*Durie, p. 647.*

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1634. January 10.

MARKLAND *against* THOMSON.

MARKLAND, relict of Thomson, pursues Thomson, son and executor to her husband, for her third part of a bond of L. 1000, made by Summer, to content