

merks granted to him by the umquhile Lord Borthwick upon a reason of interdiction, and producing the extract of the interdiction registrat; the defender alleging, that the principal interdiction should be produced, because he offered to improve the same, therefore this extract ought not to be respected, as is provided by the 118th Act Par. 7. K. Ja. VI. which appoints this objection to be received by way of exception;—the Lords found no process ought to be granted upon this extract, while the principal were produced, in respect the defender proponed presently improbation, which the Lords found ought to be received by way of exception, to stay further process, in respect of the said Act of Parliament: but the Lords doubted, and decided not, if the principal had been produced, if the defender might be heard to propone any other exception *in causa*, or against the interdiction, except the said exception of falset; as they appeared to incline that he could not be heard to do.

*Act.* Nicolson. *Alt.* Stuart. Hay, *Clerk.*

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1635. *June* 17. IRVIN *against* The COMMISSARY of DUNKEL.

ONE Irvin pursuing the Laird of Weym and his other curators, for account of their intromission, &c.; in this process compeared the commissary of Dunkel, who was constituted factor by the curators to intromit with some of the goods belonging to the minor, for a certain sum which the commissary was obliged to pay to the curators for the same; which process, after divers times calling thereof, the said commissary compeared therein, and took a day to account, and nominated auditors for that effect; and, at the day appointed for accounting, being desired to give in his account, he declared he would not compear in that process, seeing he was not a party called, but only the curators were called, to whom he would remit to give in their own accounts, and nominate their own auditors, and that he would not meddle therein;—the Lords, in respect the commissary compeared in the process, *et suscepit in se judicium*, and took diets therein, found that he could not *defugere susceptum*, unless he would pay such a pecunial sum, which instantly the Lords modified to the party for his expenses, through his delay of process.

*Act.* ———. *Alt.* M'Gill. Hay, *Clerk.*

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1635. *July* 22. MOSMAN *against* The EARL of ABERCORN.

ONE Mosman, donatrix to the escheat of one Nisbet her husband, after general declarator, pursuing a special against the Earl of Abercorn, as intromitting with the goods of the umquhile Lady Abercorn his mother, who was debtor to the said husband in 500 pounds, for payment of the said sum to her, as donatrix;—the Lords sustained this action, notwithstanding the defender offered to purge his intromission, alleging that his umquhile mother's escheat was gifted and declared in favours of Sir James Fullarton, from whom he had obtained as-

signation thereto, and, conform to the same, intromitted; and so ought not to pay any of her debts. Which allegiance was repelled; seeing the assignation made by Sir James Fullarton was confessed to have been made before the lady's decease, and it was made to a conjunct person, *viz.* to her own son; notwithstanding whereof the lady still retained possession, during her lifetime, to the time of her decease, at which time the Earl her son intromitted; and so, in respect of the Act of Parliament 1592, the gift is null, in prejudice of the creditors, as this pursuer is; which reply the Lords sustained.

Gibson, *Clerk.* *Vid.* 17th July 1635, Lord Johnston.

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1635. July 22. The LAIRD of RENTON *against* The LAIRD of WEDDERBURN.

THE L. Renton, being made assignee by one Heriot, to a contract betwixt Heriot and the L. of Wedderburn, whereby he made to Heriot an heritable feu of an husband-land in ———, for payment of the feu-duty therein contained, and bearing no other clause obligatory upon the part of the feuar; upon which contract there was a charter subscribed to Heriot, bearing some clauses different from the tenor of the contract, as a clause irritant to amit the feu if the feu-duty should not be paid two years together, and that the feuar should compare in the Laird's courts, &c.; and upon the charter Heriot being infeft and seised, and by virtue thereof, since the date thereof, ten years in possession of the land,—thereafter Heriot makes the Laird of Renton assignee to the contract, who charges Wedderburn to give him, as assignee, infeftment of the land, conform to the tenor and clause of the contract; alleging that the charter subscribed and given to his cedent was different from the tenor of the contract, and therefore he ought to give him another charter agreeing with the contract: Who alleging that such summary charges ought not to be sustained at the assignee's instance, seeing there was an heritable infeftment and sasine expedite upon the contract, which, being a real security, could not be transmitted by a simple assignation, to produce such summary charges; but if any difference was therein from the contract, the assignee ought to pursue by way of action and ordinary pursuit therefore, to hear it be found that the contract was not fulfilled, or by any other pursuit which he might best move in law thereanent; but it ought not to be sustained, after this manner, by charges upon an assignation:—This allegiance was repelled, and the order and charges were sustained, without necessity of any other action to be made thereanent. And because Wedderburn alleged that the cedent, having accepted a charter from him, whereupon he was seised ten years since, and bruiked it, and possessed the lands ever since, conform thereto; so that this being done, *inter majores prudentes et scientes et tacentes*, and wherewith he acquiesced, therefore it ought not to be permitted to an assignee to charge for any other charter than for that which was accepted by the cedent, as said is, albeit it be of a tenor different from the contract;—the Lords, before they decided this allegiance, found that they would examine the cedent, who was a mean, simple, ignorant man, who could neither read nor write, and the notary, writer of the charter, who was also notary to the sasine, and the witnesses inserted therein,—to try if the charter, at the delivery thereof