

1625. July 29. The EARL of WINTON *against* TENANTS.

IN a removing, at the instance of the Earl of Winton, as donatar to the L. of Touch's ward, against certain tenants,—the Lords found the gift of ward, which was the title of this pursuit, was dated before the warning, but was not sealed while after the warning, and could not be a ground or title whereupon warning might be used; and that the sealing thereof could not be drawn back to the time of the date thereof, seeing it was not a perfected gift before it was sealed; therefore found no process upon that warning, as wanting a warrant to make the same.

*Act.* Craig. *Alt.* ———. Gibson, *Clerk.* *Nam jus superveniens actori, lite pendente, regulariter ei non prodest.* *Socin. Reg.* 269. *Vid.* 20th November 1624, L. Lagg; and the cases there cited.

Page 184.

1625. July 29. TOURIS *against* DOWGLAS.

IN an action betwixt Touris and Dowglas, a decret was desired to be transferred; and this nullity being proponed against the same, by the defender, *viz.* that it was given without probation, in respect that the pursuer referred his summons to the defender's oath, who, being summoned by the pursuer to compare to depone, and he compearing to give his oath, the pursuer produced horning, and so debarred him to depone, whereupon the sentence was pronounced; and so, in effect, wanted probation, by the pursuer's choosing of that manner of probation, and then not suffering him to depone; which could not be the ground of a lawful sentence, specially where the process and action was deduced before an inferior judge, *viz.* the commissaries of Edinburgh. Which allegiance was repelled, and the decret found lawful, and sustained as good; for the debarring by horning was alike as if, for non-compearance, he had become *contumax*, and as sentence in that respect had been pronounced against him.

*Act.* ———. *Alt.* Mowat. Hay, *Clerk.* *Vid.* 15th July 1624, Dickson; which appears to be contrary to this decision.

Page 184.

1626. March 8. The LAIRD of CAPRINGTOUN *against* BARTILMEO.

IN a suspension betwixt the Laird of Capringtoun and Bartilmeo, wherein L. Capringtoun, being charged to pay Rebekah Bartilmeo for herself, and also as heir served and retoured to Masie Bartilmeo her sister, the sum of 600 merks, which, by contract, he was obliged to pay to them two, and their heirs, equally betwixt them; and so the one sister being dead, and the other being heir to her, charged for the whole sum;—the Lords suspended the charges executed for that half pertaining to the deceased sister, notwithstanding that the charger was heir to her; because the Lords found, that that contract concerning the