

1666. *February 24.* ARDROSS *against* The LAIRD of TOUCH and AGNESS DUNDASS.

IN a double pointing raised at Ardross's instance, against the Laird of Touch, on the one part, and Agness Dundass, heir served and retoured to Mr Hary Mauld, Elder and Younger, on the other part; anent a debt of 8000 merks, owing by Ardross to Mr Hary Mauld, Elder; and which bond, after Mr Hary's decease, was renewed in favours of Grizel Seattou, his relict, and the former bond retired; who did assign the same in favours of Touch:—In this double pointing there was produced, for Agness Dundass, her service as heir to the said Mr Hary Mauld, with a decreet recovered against Ardross in absence.

It was ANSWERED for Touch, That he ought to be preferred: *1mo.* In respect that Ardross was debtor to him in the sum charged for, conform to his bond granted to Grizzell Seattou, his cedent. *2do.* Albeit Ardross had been debtor, by a former bond, to Mr Hary Mauld, yet he, by his testament, had left the heir half of the said sum, *viz.* 4000 merks to his daughter Elizabeth, who was thereafter married to Touch; and, consequently, who had right to the legacy *jure mariti*: and the just half of the said sum to his daughter Anna Mauld; who having deceased before Elizabeth, her part did belong to the said Elizabeth, as to her nearest of kin, and so to Touch, upon the former ground.

To which it was ANSWERED, *1mo.* That the bond granted by Ardross to Grizzell Seattou, meets not with Agness Dundass her decreet and charge, which is for a debt due by Ardross to Mr Hary Mauld, to whom she is heir. And, as to the second, Ought to be repelled, because *non constat* that the debt due by Ardross was moveable; and it is rather presumed to have been heritable, and so to belong to the said Agness Dundass, as heir specially to the said Grizzell Seattou; and Touch having fraudulently retired and concealed the same, of purpose to prejudge the said Agness. *2do.* Mr Hary Mauld's testament produced, being dated *in anno* 1648, and contained the legacies of Ardross's sum, was never confirmed; but on the contrary, Grizzell Seattou, who, albeit she be nominated executrix, yet did thereafter confirm her executrix dative, and misken the said nomination. *3tio.* The testament is null wanting witnesses. *4to.* Albeit the testament could be sustained, yet it could only give Touch a right to the sum of 4000 merks, which was left to Elizabeth his spouse, and not to the other half of the sum left to Anna Mauld; in respect, albeit Elizabeth Mauld was nearest of kin to Anna Mauld, yet she was never confirmed executrix to her; and consequently the defender, being now nearest of kin to the said Anna, and who shall produce her confirmation before sentence, has right to Anna Mauld her part of the said sums.

The Lords preferred Touch for the one half of Ardross's money, and the nearest of kin, Agness Dundass, to the other half, belonging to Anna Mauld, in respect that Elizabeth was not confirmed executrix to her sister.

*Page 58.*

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1666. *February 24.* The LAIRD of WEMYSS *against* DUNCAN MENZIES of CONVIE.

IN a pursuit at the instance of the Laird of Wemyss against Duncan Menzies

of Convie, upon the passive title as successor *titulo lucrativo* to his father *post contractum debitum*,—the said Duncan having proponed a defence upon a disposition granted to him by his father, for an onerous cause; and the onerous cause being condescended on, the same was quarrelled, as not being adequate to the value and worth of the estate disposed to him by his father: as also, the debts he had paid for his father were but voluntarily, without an obligation upon his part to pay the same; whereby, if that should be sustained, it might be in his power to pay what of his father's debts he pleased, and prejudge others of his creditors, whom he would not pay.

This was not decided, but the parties agreed; but the Lords thought it a very considerable point.

Page 60.

1666. June 7. WILLIAM CRAWFORD *against* ANDREW DUNCAN.

ANDREW Duncan, being debtor by bond to William Crawford, in the sum of 200 merks, and being pursued for payment,—

It was ALLEGED by the defender, Andrew Duncan, That the bond is null, wanting date.

It was REPLIED, There was no necessity of a date, but in case of improbation or preference amongst creditors, or inhibitions; and there needed no condescendence of the date, seeing the pursuer was content to refer the verity of the subscription to the defender's oath. And it being questioned whether or not the ticket, being intrinsically null, wanting date, and the date being referred to the defender's oath, the defender might depone, not only as to the date, but qualification, whereby he might totally elide the bond:—

The Lords repelled the defence, and found, That the defender might have his oath upon the verity of the subscription; and, protesting for a qualified oath, might adject what quality he pleased, for eliding of the debts,—such as minority, or payment.

Which the Lords declared they would take to their consideration, the time of the advising of the oath; as was allowed to Sir James Murray, in the case betwixt the Earl of Kinghorn and him, in January 1666.

Page 61.

1666. June 26. ROBERT BROWN *against* The HEIRS of ANDREW BRYSON.

ROBERT BROWN having obtained decret, before the commissaries of Edinburgh, against Mary and Anna Brysons, as executors to Andrew Bryson, their father, for payment-making to him of the sum of 2500 merks Scots, addebted by the deceased father to him; and having arrested the said sum in the hands of Alexander Bruce of Broomhall, whom he now pursues for making forthcoming:—

In this process compearance is made for Margaret Bryson, and ALLEGES, She must be preferred to the said Robert, as having only right to the foresaid sum;