

1621. *November 22.* LD. MUCKHALL *against* STEWART.

No 5.

A DECLARATOR of liferent escheat requires continuation; because the superior of a subject must prove that the lands hold of him.

*Fol. Dic. v. 2. p. 178. Durie.*

\*.\* This case is No 297. p. 11623. *voce* PRESUMPTION.

\*.\* In the case of Lochinvar against Lindsay, 24th March 1632, No 42. p. 8358. *voce* LITIGIOUS, it was found, that if the superior produce his own infeftment of the lands libelled, this will save continuation.

1626. *November 8.* PRESTONGRANGE and DICK *against* HAMILTON.

No 6.

IN an action pursued at the instance of the Laird Prestongrange, and William Dick, against John Hamilton, burgess of Edinburgh, for delivery of an obligation of 2000 merks made to him, by the pursuers, to be destroyed by them, in respect of a back-bond, made by the defender to them, whereby he obliged him to redeliver the same bond to them, in case he fulfilled not a condition expressed in the said back-bond, which condition the pursuer subsumed the said defender had not fulfilled, and therefore they concluded, conform to the said back-bond, redelivery of their said bond. The defender *alleged*, That this action should abide continuation, being for delivery of writs, and in effect resolving in a declarator of a failzie, for not fulfilling the tenor of the back-bond, which nature of action he alleged ought not to be sustained without continuation. This allegiance was repelled, and the action was sustained, without continuation, upon the first summons, seeing the pursuer produced the back-bond, whereupon the summons was founded, instantly, and the not fulfilling of the condition thereof, was a negative which proved itself, nothing being alleged to purge the same; but this reason will appear to militate, in all declarators upon failzies, wherein albeit the evident, which bears the condition, be instantly produced, and that the failzie be a negative, which proves itself, yet continuation is ever found necessary, that the party being twice summoned, may be heard to compare to purge the failzie, or to propone his other competent defences; neither will decret be given upon the first citation; yet the LORDS found here no necessity of continuation, no more than if any party had by his bond obliged himself to deliver any writ; and if he had been pursued for delivery thereof, in that case, the bond being produced, there was no ne-

A process to deliver an obligation, conform to a back bond, obliging the defender to deliver it, in a certain event, was sustained upon the first summons.

No 6. cessity of a second summons, so the like in this case ; but this same instance wa  
doubted of by some of the Lords, yet it was found *ut supra*.

Act. *Mowat & Stuart.*

Alt. *Cunninghame.*

Clerk, *Hay.*

*Fol. Dic. v. 2. p. 178. Durie, p. 131.*

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1628. February 23. NASMITH against RUTHVENS.

No 7. DECRET being recovered against a party, and arrestment laid on thereupon  
in his debtor's hands, another decret, at the instance of the pursuer's heir,  
transferring the title *active* in him, and, in the same sentence, decerning the  
party in whose hands the arrestment was used to make forthcoming, was found  
null, because they ought to have been done by two several pursuits, and two  
decreets ; for if confusion of diets be a cause to annul proceedings of inferior  
judges, far more the confusion of sentences.

*Fol. Dic. v. 2. p. 180. Durie.*

\*\*\* This case is No 119. p. 5567. *voce* HERITABLE AND MOVEABLE.

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1628. March 27.

A. against B.

No 8.

A PARTY against whom the action was first intended, being dead, before whose  
decease litiscontestation was past, and probation renounced, the said action be-  
ing sought to be transferred against his heir, and the cause ready to be advised,  
the pursuer *contended*, That the defender should see no more than the act of  
litiscontestation ; the LORDS ordained him to see all, except depositions of  
witnesses.

*Auchinleck, MS. p. 168.*

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1628. June 18.

PURVES against PURVES.

No 9.

IN an action to make arrested goods forthcoming, Purves against Purves, the  
LORDS found the summons needed not to abide second summons of continua-  
tion, albeit there was nothing produced instantly to verify, that the defender  
was owing the particular goods arrested in his hands to the pursuer's debtor,  
the time of the making of the arrestment ; but that the pursuer behaved to take  
a term to prove the same, and referred it to his oath, that he was owing the  
particulars arrested to this said debtor ; whereby the defender *alleged*, That  
the summons should be continued, seeing the same was to be proved by his oath,  
and where any thing is referred to the oath of a party, he ought to be twice