

1626. July 7.

GUTHRIE *against* GUTHRIE.

IN a suspension betwixt Guthrie and Guthrie, where the executrix to a defunct being charged to pay the debt owing by her husband, contained in a sentence recovered thereon, and the executrix suspending, upon a reason that all the goods contained in the testament were exhausted; in the qualifying of which exoneration, an article being given in, desiring allowance of a year's mail for the dwelling-house of the defunct, the said defunct dying shortly after the term of Whitsunday, and the house-mail being desired to be allowed to the executrix, for the whole year after that Whitsunday, in respect of the alleged custom of taking of houses within Edinburgh for mail, which was alleged to be for a year, *viz.* from Whitsunday to the next Whitsunday; whereby the suspender alleged, that, albeit the defunct died shortly after that Whitsunday at which he entered to the said dwelling-house, yet the whole year's mail thereafter ought to be found his debt, and the same ought to be a necessary exoneration to the relict, *pro tanto*:—this reason was not found relevant, albeit it was given up and allowed by the commissaries in the testament, which was but a testament dative, seeing it was not tried, nor proven in any lawful judgment, that the defunct promised to pay the whole year's mail, and that he took the house from the owner for a year thereafter: without which had been proven, and that, seeing it was confessed that the relict remained all the year thereafter, and dwelt in the house,—the Lords found the whole year's mail could not be defalcate to the executrix as a debt of the defunct's, and therefore the Lords sustained that article of defalcation only for the half-year's mail, as a debt of the defunct's, to import exoneration, *viz.* from the Whitsunday before his decease unto the Martinmas thereafter, notwithstanding that the whole year's mail was given up as said is, as the defunct's debt in the said testament dative, which, not being the defunct's own deed, not being given up by himself, and no decret being given against his executrix at the owner's instance, trying and constituting the defunct debtor therefor, the exoneration was only sustained for the half-year.

*Act.* Heriot. *Alt.* ———. Hay, Clerk. *Vid.* 24th July 1623, Foulis.

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1626. July 8.

SMITH *against* ———, Cautioner.

ONE called ———, who was acted cautioner in the convention of burghs, for one who was admitted their factor in the Low Countries, that he should do his duty faithfully to all the merchants who should employ him in their affairs in merchandise, according to the order observed in the like cases: this cautioner being pursued by a merchant called ——— Smith, for payment to him of the prices of certain wares sent by the said Smith to the said factor, to be sold to his use, and whereof he had made no satisfaction,—the Lords found that they would grant no process against the cautioner for the said factor, until the said factor had been discussed first, and that sentence were recovered against him, finding him debtor in a particular sum, and so that thereby he had failed against the obligation whereto he was bound when he was admitted factor, and

for the which he had found the foresaid caution ; for, the cautioner being only generally bound that the factor should discharge an honest and faithful duty, could not be specially pursued till sentence were recovered against the factor, constituting him special debtor to the pursuer. Which was so found by the Lords ; albeit the pursuer replied, that he had in effect discussed the said factor, in respect he produced two of his own missive letters, written to the pursuer, wherein he confessed that he had received so many wares from him as extended to the prices now claimed by the pursuer ; likeas he confessed, in the same letters, that he was not then able to give him satisfaction. Which reply was not sustained.

*Act.* Burnet, *major.* *Alt.* ————. *Scot, Clerk.* *Vid.* 10th December 1623, what is noted there.

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1626. *July 12.* The EARL of DUMFERMLING *against* LADY DUMFERMLING.

IN an action of extension of a minute betwixt the Earl of Dumfermling and his mother, pursued at the instance of the Earl, and the Earl of Wintoun his tutor, against the lady,—the Lords found, that neither this minute could be extended nor should produce any other action thereupon, because the same was only set down by way of advice and counsel, and contained only the opinion of certain friends, whose opinions were sought by the said parties in certain particular questions anent matters controverted betwixt the said parties ; which resolution and advice, so set down in the foresaid minute, was found not to be obligatory to bind the parties to their advice, and to the abiding and standing at the same ; and so that it could not produce action against the party who should oppone against the same : And this was found, albeit the inscription bore these words, *viz. Questions to be resolved by the three friends therein named, viz. the Chancellor, the Earls of Melrose and Lauderdale, with the which both the said parties were content ;* likeas the said minute, containing the said questions, was at the end thereof subscribed by both the said parties :—in respect of the which inscription, bearing, as said is, *That the parties were content,* and, in respect of their subscription of the minute, the pursuer replied, that the defender could not be heard to allege that the minute was not obligatory, and that it was but a naked advice, which could not bind by the law. Which reply was not respected, and the minute found not to be obligatory, because it was set down by way of advice, as said is.

*Act.* Hope and Nicolson. *Alt.* Stuart and Aiton. *Gibson, Clerk.*

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1626. *July 14.* The LAIRD of GRANGE *against* BETSON of CARDEN.

IN a contravention, pursued by the Laird of Grange *against* Betson of Carden,—the Lords were of the mind, albeit this was not then in specific terms found, (because that point was not controverted,) that neither pasturage *in confinio,*