

1668. July 8. SIR GEORGE M'KENZIE *against* WHITHEAD OF PARK.

SIR George M'Kenzie, pursuing Whithead of Park for the half of the sum of 5000 merks, assigned to his lady by her father, for which he produced a transumpt under the hand of William Downie, then clerk, *in anno* 1653: Compearance was made for James Bannatine of Newhall, who had married Sir George M'Kenzie's lady's sister, who was substitute to her father in the whole sum, and to whom the said James was sole executor; who ALLEGED, that the transumpt could not make faith; it being without any warrant or process; and therefore the principal ought to be produced.

The Lords SUSTAINED the transumpt; the pursuer producing the warrant *cum processu*, or proving the tenor thereof: but prejudice to Newhall to pursue an improbation, seeing the principal was produced, and kept by their elder brother, Laird of Kilbocho, who was tutor to the whole children, and who was long since dead; who was presumed to have left the same amongst his papers.

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1668. July 10. STEWART *against* DENNISTOUNS.

IN an action pursued at the instance of Stewart of Scotstown, as donatar to the marriage of John Dennistoun of Cowgrain, for the avail of the marriage against Cowgrain's daughter, as successor *titulo lucrativo* to her father; being infest by him in the lands of Cowgrain, after his ward and marriage fell;—

It was ALLEGED for the daughter, *1mo*. All parties having interest were not cited,—viz. her father's heir-male of the lands of Auchinduny, which were the only lands that held ward, and whereby the ward of her father's marriage fell to the superior; the heir-male being principally concerned, and obliged to relieve the heir of line.

The Lords found there was no necessity to call the heirs-male; this being a personal pursuit, to which the heir of line and the executors of Cowgrain were liable, as well as the heir-male; and it was enough that the heir of line might intimate this plea to the heir-male, that he might defend; whereupon the heir of line might pursue for relief.

*2do*. It was ALLEGED, That the defender could not be convened as successor *titulo lucrativo* to her father in the lands of Cowgrain; because these lands were tailyied to the heirs-male, and, failyieing of them, to the king, who was *ultimus hæres*; and not to the heirs of line: So that it being impossible that the defender could succeed to her father in these lands as heir, she could not be pursued upon that passive title as successor *titulo lucrativo*; which was only founded by our law, where there is *præceptio hæreditatis*.

This allegiance was sustained; notwithstanding that it was replied, that the tailyie to heirs-male being broken by this infestment to the daughter, who was heir of line, she was the only person who could represent her father: for this passive title being singular, by our municipal law, and the consequence of it being no less than to make one liable to the defunct's whole debt, albeit far exceeding the worth of the lands dispoñed, the Lords would not extend the same;