1632. *February* 2. AGNES LICHTOUN *against* ARCHIBALD STEWART.

UMQUHILE Andrew Lichtoun, his son James went furth of the country divers years before his father's decease; and a daughter called Agnes, which daughter supposed her brother to be dead, and served herself heir to her father in a tenement of land, and she, as heir, pursues her father's relict, for exhibition and delivery of the writs. Compears Archibald Stewart, who alleges, The writs should be delivered to him; because he has a disposition and assignation of the said tenement made to him by the said James, who (albeit he was supposed to be dead,) is yet living; and, by a procuratory subscribed by him in Queensbridge, is served and retoured heir to his father. It is replied, That this procuratory verifies not him to be in life, or to have been living when he was served heir; for it may be some other supposititious person, calling himself James Lichtoun, son to Andrew, has made this procuratory and disposition to Archibald Stewart; and so the sister's retour standing, must be reduced. The Lords found no necessity of a reduction; but, that the user of the procuratory, whereupon the retour proceeded, should prove clearly, by testificates from the magistrates where he remained, or depositions of famous witnesses who knew the said James Lichtoun that he was living the time of the service. *Page* 206.

1632. *February* 7. [illegible]ME *against* HOME.

A DECREET-ARBITRAL is pronounced by the judges and oversman, wherein the parties, submitters, are ordained to do certain deeds to others; and, farther, one of the parties submitters is ordained by the said decreet to discharge a contract, wherein the oversman was obliged, for certain sums of money, to the said party submitter. The sum being charged for by the party, the oversman suspends upon the said decreet-arbitral, That by virtue thereof he was discharged. Against the which it was replied, That this decreet-arbitral cannot be respected; because there was no submission betwixt the charger and the suspender, and he, being oversman, chosen in the submission betwixt the charger and another party, could no ways take a decreet to himself, decerning that which was not submitted to him. To the which it was duplied, That the charger had homologated the decreet, in so far as, conform to the said decreet, he had performed to the other party, submitter, what he was ordained to do by the said decreet; and so having homologated the same in a part, he could not resile from the same in another part. The Lords found the decreet-arbitral should stand, if the party, proponer of the homologation, could, by writ or oath of party, prove that the deeds done by them to the other party, submitter, were done for the performance of the said decreet-arbitral: Otherways repelled the exception.

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1632. *February* 22. KENNEDIE of CARLOUK *against* KENNEDIE of BARR.

KENNEDIE of Carlouk, tacksman to my Lord Ochiltree of the teinds of the

parish of ————, pursues Kennedie of Barr for wrongous intromission with the teind-sheaves of Carlouk. The defender alleges, He has tack of my Lord Ochiltree for terms to run, prior to the pursuer's tack. It is replied, That the defender his tack is null, being set by the Lord Ochiltree, the time of his rebellion. To the which it is duplied, That the pursuer's tack *laborat eodem vitio*, and the pursuer has no interest to propone a nullity against his tack, except he were a creditor. To the which it was triplied, That the donatar to the Lord Ochiltree's escheat and liferent has consented to the pursuer's tack, and ratified the same; and, albeit the donatar's gift be long posterior to the horning, yet the rebel had no power, during the time of his rebellion, to set tacks in prejudice of the king and his donatar, who might object nullity against such dispositions made by a rebel. Which duply the Lords found relevant to make the tack null *quoad futurum*, but to serve for all years preceding inhibition.

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1632. *January* 16, *and June* 18. ARCHIBALD MARTINE *against* ALEXANDER STEWART.

ARCHIBALD Martine, as heir served and retoured to Katherin, his daughter, who died without heirs gotten of her body, pursues Alexander Stewart, spouse to the said Katherin, for a certain sum of money which was destined to pertain to the said Katherin her heirs. It was alleged, No process at the father's instance, as heir served and retoured to his daughter; because the said Katherin had a brother bairn living, who was nearest heir to the defunct. It was replied, That the exception ought to be repelled, in respect of the retour standing unreduced. The Lords found no necessity of reduction, seeing the verity of the exception was referred to the pursuer's oath.

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1632. *July* 4. JOHN BURNETT of BARNS *against* LORD BALCLEUGH and LAURENCE SCOTT.

IN an action of reduction pursued by John Burnett, fiar of Barns, against my Lord Balcleugh and Laurence Scott, there being sundry exceptions proponed to be proven *scripto vel juramento partis*, they, for proving thereof, raised an incident; and the same being sustained, there was a day assigned for proving of the incident; at the which day, diligence is produced against the witnesses, and another day assigned for using further diligence. At the which second day no diligence being produced, the said John Burnett, defender in the incident, and pursuer in the principal cause, craves the term to be circumduced. To the which it was answered, No circumduction can be granted; because they are now content to refer the having of the writs contained in the incident, to the parties called in the incident, as alleged havers of the writs, their oaths of verity. It is replied by John Burnett, That the pursuer of the incident can have no farther diligence; but the most that can be granted to the defender