1633. *January* 29. Helen and John Daills *against* John Mackison and Eupham Harlaw.

Helen and John Daills pursue Eupham Harlaw, as executrix to umquhile Barbara Harlaw, her sister, relict of umquhile John Daill; and John Mackison, spouse to the said Eupham; to pay to ilk one of thir two pursuers the sum of 100 merks and a pair of plaids worth ten pounds, addebted to the pursuers by umquhile John Daill, husband to the said Barbara Harlaw; and which sum, the said Barbara, immediately after her husband's decease, promised to pay to the pursuers; and therefore they craved the same against the said Eupham, executrix to the said Barbara, her sister, who made the said promise; and against John Mackison, her husband, for his interest. The defender alleging, that the said umquhile Barbara, her sister, alleged maker of the promise, was executrix to her husband, alleged debtor to the pursuers, who, after the alleged time of her promise, had obtained sentence of exoneration and a sentence against the creditors of the said umquhile John Daill her husband, wherein thir parties were called and compeared, and other creditors preferred to them, and they found not creditors to her husband; so that that sentence being given against them, at which time they might have claimed the benefit of the promise, and did not, nor at no time thereafter during her lifetime, she living two years thereafter, or thereby, they cannot now come back, after her decease, to prove this promise against her executrix; especially to be proven by witnesses. The Lords found this allegeance relevant, in respect of the said decreet of exoneration, given against the pursuers compearing; they never pursuing the defunct nor her husband while they lived; except that they would prove the promise by writ:—and it was not respected, what the pursuers alleged and replied, that that decreet exonerated her only of her office of executry; *quo nomine* this sum is not sought, but only upon the ground of her promise, which cannot be prejudged by that sentence; and, in respect of the smallness of the sum, *viz.* as if there were two libels for one hundred merks ilk one, they contended that the same was probable by witnesses. Which was repelled, as said is.

Act. ———. *Alt.* Burnet. Hay, *Clerk.*

Page 665.

1633. *January* 31. Hamilton of Sheills *against* The Tenants of Milnhouse.

A decreet of removing given against the tenants, *in foro contradictorio,* in November 1632, being suspended upon a reason of a tack set to the defender's father for terms yet to run, to whom they were apparent heirs; which they proponed as *noviter veniens ad notitiam,* and offered to make faith thereon, and qualified the cause of their probable ignorance thereof, *viz.* that one of the decerned tenants, being one of the daughters and apparent heirs of the tacksman, who was in Ireland the time of the sentence, and yet is there, had and hath the tack foresaid in her keeping; whereupon one of the parties present made faith, and sware the verity thereof, and that she never knew the same but since the

sentence;—the Lords, before they would discuss whether this reason should be received or not, notwithstanding that the party contended that it ought not to be received, in respect of the said sentence given against them compearing, and that he alleged *res judicatæ non debent retractari prætextu instrumentorum noviter repertorum;* and also (notwithstanding that the tack was not instantly produced, to verify the reason, as the party alleged ought to be done in the case of instruments new come to knowledge,) they assigned a day to the suspender to produce these tacks, and to recover the same out of the parties' hands in Ireland; and reserved then to the party, after sight of the tacks, to oppone what he might against the same, either why it should not be received then, or why it proved not the reason; to which time all further proceeding was superseded, *sed cum onere expensarum.*

Act. Nicolson and Gilmor. *Alt.* Mowat. Scot, *Clerk.* *Vid.* 9th June 1624, L. Touch; and 20th January 1631, E. Galloway.

Page 667.

1633. *February* 20. LADY ATHOL *against* The EARL of ATHOL.

A SUBMISSION being made by the Lady Athol to the Earl of Kinghorn, the Lairds of Auldbar, Inchmartine, and ———, immediately after her husband's decease, of all which she could crave of the Earl of Athol by any right competent to her; and they decerning her to have yearly 500 merks for all:—this decreet being desired to be reduced upon the reason of most *enorme lesion,* qualified in that she was provided to a conjunct fee of fifty chalders of victual, beside that she was one of the heirs of the Earldom of Athol; for all which rights the said judges had ordained only the said 500 merks yearly, which was *vehemens læsio,* and so insufficient for the entertainment of the meanest person whatsoever, far less for one of her birth and estate;—that the Lords, who were supreme judges, ought to repone her against that unjust decreet, which was so partially pronounced by the arbiters, wherein they had not behaved themselves as *boni viri,* according to trust committed to them; and, therefore, ought to be mended by the Lords, who were sovereign judges, and to whom recourses were permitted in law, as to the best men, to rectify such wrongs;—the parties being heard to reason in this cause at great length, and having considered the defender's exception, specially that in law it was alleged that both in *ff.* and *c.* it is expressly decided, *Quod sit standum sententiæ arbitri, sive æquæ sive iniquæ, et sibi imputet qui compromisit, nam et minus probabilem sententiam ferre debet æquo animo;* and the pursuer's answers in law made thereto, as may be more particularly considered in my other book of notes, fol. 27;—and also, the Lords having heard the defender, upon declaring the burdens wherewith the conjunct fee lands were alleged to be affected, before her conjunct fee granted thereof to her, and whereby he alleged the most that was free to her did not exceed 19 or 20 chalders of victual; so that he alleged that the *lesion* was not so great to reduce the decreet given by so honourable arbiters, granting that that *lesion* was a cause of reduction, which he altogether denied;—the Lords found this *lesion* to be most *enorme,* and that it was a cause to rectify the said decreet-arbitral, notwithstanding of the allegeance. And, therefore, they found that the lady ought to have