1671. *July* 18. BLAIR of ARDBLAIR, and ISOBEL STEWART, his Wife, *against* The LAIRD of BETHAICK.

BETHAICK being decerned, by decreet of the commissaries, to pay six years' annualrents of the sum of 8000 merks, belonging to the children of the said Isobel Stewart, as part of the sum of £10,000, for which the Earl of Errol was principal, and Bethaick cautioner; the said Isobel did grant a discharge, bearing a receipt of these annualrents, with an obligement to warrant, not only for these years, but for all bygone years since the date of the bond: whereupon having charged the said Isobel, as being distressed, at the instance of her children, as having right, by assignation, from old Sir William Stewart, their goodsire, who was liferenter of the said sum, he did charge the said Isobel, upon the warrandice contained in the discharge granted by her, as said is; which was SUSPENDED, upon this reason:—That the discharge, containing a particular sum due, for some preceding years' annualrent only, the warrandice could not be extended to any former years; that clause being only put *in terrorem:* and the suspender being but a woman, and ignorant of the importance thereof, it ought not to militate against her, to make her farther liable than for the sums received.

It was ANSWERED for the charger, That the clause of warrandice was opponed; which not being ordinary, but singular, in that it did extend to all bygone years, since the date of the bond,—and Sir Gilbert Stewart, who was sheriff-depute of Perth, and commissary of Dunkeld, being both witness to the discharge, and having all former discharges in his hands, did transact that whole affair, as intrusted by her;—it was hard now, after fifteen years' time, that the said Isobel's children, to whom she was tutrix and executrix, should distress the charger, and he not have the benefit of the said obligement of warrandice, subscribed by her, being *major, sciens et prudens.*

The Lords, in respect of the conception of the warrandice, and that it was drawn by the advice of a lawyer, did find that it was obligatory; and therefore found the letters orderly proceeded.

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1671. *November* 3. MR ARCHIBALD TURNER *against* The LORD BORTHWICK.

MR Archibald Turner, as having right from the relict and bairns of the deceased minister of Borthwick, pursuing for the whole stipend the year 1669, as an annat due by the law, he having died in April that year:

It was ALLEGED, That, the time of his death, the half of the corns not being sown, he could have right only to the half of the stipend payable out of the tithes.

It was ANSWERED, That the Lords, by their several practicks, had decided,—That, where ministers die before the first of January, and after Michaelmas preceding, they get the whole preceding year's stipend. As likewise, that of late they had given their opinion, as said is, upon a *quære* proponed to them by the Privy Council, concerning vacant stipends, finding that the first of January and Michaelmas were the legal terms in the case of annats.

The Lords did decern the whole year's stipend to be due to the pursuer; but, as to the case of transplanting of ministers from one kirk to another, the terms of Martinmas and Whitsunday are the legal terms.

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1671. *November* 8. GROTE *against* SUTHERLAND.

GROTE having freighted a ship belonging to Sutherland, and some other copartners, for carrying merchant goods from Caithness to Leith; it being proven that the goods were spoiled through the skipper's fault, in leaving the ship at anchor in the road with one single buoy; and that another ship having run upon her in the night, which might have been prevented if she had had sufficient men on board:

The owners who had subscribed the charter-party were found liable for the damage: but Sutherland and his copartner being both bound to perform the voyage, but not conjunctly and severally, the question did arise, If each of them was liable *in solidum*, or only *pro rata portione*.

The Lords, having considered the case, and in law, that generally, where two or three are only *correi debendi*, and have not obliged themselves conjunctly and severally, then the obligation divides: As, likewise, the case in law, where two or three are obliged *ad factum indivisibile*, any one of them is liable *in solidum*; if the deed may be performed by either of them: as also, that case in law arising from charter-parties, how far *exercitores navis* are liable *in actione exercitoria*. Without determining these cases, they did decern, conform to the libel, against both the subscribers; but did not decide if they were liable, every one *in solidum*, or only *pro rata portione*: for, *de exercitoria actione*, there is a distinction made,—if *Exercitores per magistrum exercent, aut per se*: and, in the first case, where a contract is made *cum magistro navis, (leg. 1. sect. ultima,) omnes exercitores tenentur in solidum*; and the reason is given, *(leg. 2.) ne in plures adversarios qui cum uno contraxerit*. But, where the owners of the ship, *per se navem exercent, proportionibus exercitationis conveniuntur; neque enim invicem sui magistri videntur.—(Leg. 4. eodem tit.)*

Thereafter, upon the 13th June 1672, this case being resumed, each one of the owners subscribing was found liable *in solidum*.

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1671. *November* 9. SAMUELL and ——— HOYLES *against* The GENERAL and MASTER of the MINT and OTHERS.

THE said Hoyles, as executors to their father, having pursued the Master of the Mint, upon a contract, whereby he was obliged to pay to the defunct, monthly, a sum of money for a quantity of copper, which he was obliged to melt for their use, whereof there was two months resting:

It was alleged for the defenders, That the said Hoyles having served ten months, whereof two are only resting, and during the former months, the copper melted by him having suffered great prejudice through his default in not melting it conform to the conditions agreed upon, the damage whereof did ex-