tromission before his father's death; so that he died not vassal to the king. It was answered, *Non relevat*, unless, in the defunct's time, the apprising had been declared extinct, or an order of redemption used; for, albeit satisfaction of an apprising is receivable, by way of exception, amongst creditors, yet it is not competent against the king or his donatar, unless the apprising had been declared extinct in the defunct's life. The Lords found the defence relevant, that the apprising was extinct by satisfaction with intromission in the defunct's life, seeing thereby the former vassal's right revived, and needed no new infeftment.

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1673. *January* 8. STIRLING *against* HAMILTON.

STIRLING of Bankel, having feued the third part of the lands of ——— to the Laird of Keir, who had set the two part of the said lands, in tack, to the Laird of Bardowie's predecessor, for several liferents and nineteen years; and the lands being possessed by small divisions, some being roods, and the common pasturage being possessed promiscuously:—Bankel, with consent of Keir, the heritor, obtained a decreet of the baron court, for altering the former division, and dividing the whole land in two entire tenements, wholly separate, one-third to Bankel, and two-thirds to Keir and Bardowie. Bardowie suspends upon this reason, That, he having a long tack, little inferior to heritage, and that the outfield and infield being divided, the division could not be altered without his consent; and specially seeing his tack bore the lands as they were then possessed, which is according to the present division. It was answered, That a tack, of whatever endurance, was never found sufficient to hinder heritors to divide their lands as they pleased, especially if the tacksman had no detriment; and the clause in the tack, "as they were possessed," is a common clause of course, expressing the quantity and extent of the lands set, but not the adjacency thereof, and is ordinary in all tacks; so that, if that could hinder division, scarce any division would proceed; and this being a common interest for the improvement of land, and for good neighbourhood, and being of advantage to both parties, the wilfulness of a tenant, without any reason, ought not to hinder the same. The Lords repelled the reason, and decerned the division to proceed, providing that either party had as much land in value, jointly, as what they now possess severally; without limiting the same precisely to a two part and third part, in respect that, there being a division in small parcels before, the advantage that either party had by that division, or the improvement thereof, ought not, by this division, to be lost.

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1673. *January* 14. JAMES SYMONTOUN *against* THOMAS and JOHN BROCKS.

JAMES Symontoun pursues Thomas Brock his apprentice, and John Brock his cautioner upon the indenture, for payment of a merk for each day's absence out of his service. It was alleged for the defender, 1*mo*. That the apprentice's

absence was not in his default, but that he necessarily withdrew, because his master had neither work as a goldsmith, nor did he give the apprentice entertainment, and that he caused the apprentice oversee masons for twenty weeks together. *2do.* Neither he nor his cautioner can be liable for a merk *per diem*, or any other damage, for his absence; because, by the indenture, the damage by absence is liquidated to two day's service for one; which the apprentice offered, by instrument, to perform. The pursuer answered, That he offered him to prove, that he had both work, and gave sufficient entertainment to his apprentice; and, for his attendance on the masons, it was to a public work belonging to the calling, which every master was appointed to oversee week about. And, for the damage of absence, it is in favour of the master; and he may choose whether to make use of it, or of the true damage. The Lords preferred the master's probation of the sufficiency of his entertainment: but found that he ought not to have employed the apprentice in any other work than his calling; and allowed the time that he was employed to oversee the masons to compense as many of his absent days; and found, that the damage by absence being liquidated by the indenture [to] two days' service for one, that he could pursue for nothing else; and that the offer to make out the service was sufficient, the apprentice now performing the same.

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1673. *February* 3. HUGH M'LEOD *against* RORIE DINGWALL.

HUGH M'Leod having obtained decreet against Rorie Dingwall, for the profits of a ferry-boat and fishing, *in anno* 1657, the decreet is now craved to be reduced, on this reason, as being null for want of probation, in so far as the quantities were not proven. It was answered, That, the duties being specially libelled, and defences proponed, without denying the quantities, the pursuer was thereby liberated of probation; and yet he is willing, in fortification of his decreet, to instruct the same. It was replied, That the decreet being null, all defences *in causa* might now be propounded; the decreet, at best, being but to be sustained as a libel. And it was offered to be proven, that the defender was then seven years in possession, by virtue of an infeftment, and so would exclude the pursuer *in judicio possessorio*; which cannot be repelled as competent and omitted, seeing the decreet is null. It was duplied, That this defence, being *dolose* omitted, cannot now be received after sixteen years' time, that the means of probation of interruption hath failed. The Lords found that the decreet might be astructed as to the quantities, without admitting this defence upon the possessory judgment, after so long time; seeing the defence related more to the point of possession than to the point of right.

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1673. *February* 27. ——— *against* MOWAT.

A FRENCHMAN having arrested certain sums belonging to ——— Mowat,