

1633. *February 4.* HOME *against* HOME.

A DECRET, obtained before the commissary of Lauder, reduced, at the least not respected, but the parties ordained to dispute their rights before the Lords; because the defences and answers were neither repelled, nor admitted by any signator of the process, but any act of litiscontestation. The defender summoned to give his oath.

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1633. *February 14.* RANKEN *against* JAMES WATSON, JOHN MILL, &c.

RANKEN, in Dundie, pursues James Watson, John Mill, and certain other persons in Montross, for certain sums of money alleged resting owing by them, conform to their subscribed account, dated *in anno* 1608. It is alleged, That the count produced cannot prove against the defenders, because it wants witnesses. To supply this defect, the verity of the subscription is referred to the defender's oath. It was duplied, That it was not relevant to refer the verity of the subscription to the defender's oath; but the pursuer must likewise refer the verity of the debt to their oaths, as was decided betwixt Jack and Auld. The Lords found the exception and duply relevant.

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1633. *February 16.* JAMES BANE *against* HUGH MITCHELL.

JAMES Bane pursues Hugh Mitchell, as heir to his father by intromission with his father's heirship goods and gear. It was excepted, That his unquhile father's escheat was disponed, and he had right thereto from the donatar; and so cannot be convened as intromitter with his heirship goods. To the which it was replied, That the exception is not relevant, except it were alleged the gift was declared before the defender's intromission. But it is offered to be proven, That he intromitted with the said heirship goods, many years before the said gift of escheat was declared, and or he got right from the donatar. The Lords repelled the exception, in respect of the reply.

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1633. *February 16.* JAMES STEWART of FALSCASTELL *against* CHRISTIAN BANNERMAN and ROBERT STEWART.

A DECRET being obtained against Robert Stewart and Christian Bannerman, his spouse, for erection of a tenement forth of the said Bannerman's conjunct fee lands, before the sheriff of Pearth; and both the husband and wife being denounced to the horn, James Stewart of Falscastell takes the gift of their escheats,

and pursues general declarator of both their escheats. It is alleged for Bannerman, That the horning is null *quoad eam*, in so far as she was clothed with a husband when she was denounced. To the which it was replied, That the horning stands good, in respect the same proceeds upon a fact and deed done by herself as well as her husband, whereupon decret was obtained against them both compearing. The Lords found the horning null *quoad* the woman.

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1633. February 16. JOHN KERR against MARK KERR.

JOHN Kerr pursues his brother Mark, as heir to his brother James, for fulfilling of a bond made by the said James to the said John; Mark takes a day to produce his renunciation to be heir; and at that day offers to improve the bond produced registrate; but produces no renunciation. It is alleged by the pursuer, That he cannot improve the registrate bond *hoc ordine*, but must use an ordinary action, seeing the principal bond was not produced, but the extract out of the register. The Lords ordained the defender to pursue improbation by way of action.

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1633. February 20. MARY STEWART, Relict of the late Earl of Athole, against
The present EARL of ATHOLE.

DAME Mary Stewart, relict of unquhile James, Earl of Athole, being infest, conform to her contract of marriage, in the lands and barony of Reidcastle, which, by contract, her husband bound him and his heirs to warrant to be worth at least fifty chalders victual,—pursues the tenants and the Earl of Tullibardin, for his interest, for the maills and duties of the crop 1632. Compears the Earl of Athole for his interest, and alleges, That the pursuer cannot claim the maills and duties: because by decret-arbitral pronounced by the Earl of Kinghorn, the Viscount of Stormonth and the Laird of Inchmartine, to whom the said pursuer had submitted herself in a compromitt betwixt her and the said Earl of Athole, her sister son, who was bound to warrant the lands of Reidcastle to the Earl of Tullibardin, of her conjunct fee, what she should have for her right to the said lands of Reidcastle; the said arbiters had, by their decret, ordained her to renounce her conjunct fee and right to the earldom of Athole for 500 merks by year during her lifetime. It was alleged by the pursuer, That this decret ought to be reduced, because it was given against all equity and reason; and, in respect of her enorm lesion, ought to be reduced *ad arbitrium boni viri*, and to be rectified by the Lords of Session, who were supreme judges in such causes. It was triplied by the defender, That, in decreets-arbitral, *standum est sententiæ, sive æqua, sive iniqua sit*. The Lords first ordained the parties to dispute upon the lesion. The defenders then alleged, That the lands were burdened with infestments prior to the pursuer's infestment which would exhaust