

sub-dean ; and his subsequent consent was not sufficient, in a formal manner, to dismember the said benefice, when the same did not vaik ; and so the pursuer might have letters conform. In respect of the which reply, the Lords repelled the exception.

*2d MS. Page 128.*

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1630. *July 23.* The LAIRD of PITSLIGO *against* ALEXANDER DAVIDSON.

IN an action of reduction intended by the Laird of Pitsligo, against Alexander Davidson, for reduction of a retour, whereby the said Alexander was served heir of line to the Laird of Pitsligo, his mother's father ; by reason the said Alexander was a bastard, in so far as his mother was first married to the Laird of Auchinhove, and, during his lifetime, married to Thomas Davidson, father to the said Alexander ;—it was alleged in this action, That this matter of the bastardy was merely ecclesiastical, and so pertained to the commissary courts. The Lords repelled the allegiance.

*2d MS. Page 25.*

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1631. *February 23.* HENRY *against* LYON.

WHERE an exception is proponed, and the excipient has raised an incident for proving his exception ; and, circumducing the first term of his diligence, refers the exception to the pursuer's oath, and, at the day assigned to the party to depone, he would resile ;—the Lords would not suffer him, in respect of the state of the process.

*2d MS. Page 162.*

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1632. *February 8.* RAMSAY *against* DURHAME.

IN contracts matrimonial, where some deeds are to be done to the wife, and some to the heirs of the marriage, the contract cannot be registrat, but at the party's instance that wants implement of that part.

*2d MS. Page 220.*

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1633. *March 21 and 26.* KING CHARLES I. *against* The EARL of MONTEITH.

WILLIAM, Earl of Monteith, in May 1629, is served heir, by a general service, to Malise Grahame, Earl of Strathern ; and at the same time, by another service, he is served general heir to Eupham Stewart, mother to the said Malise, and Patrick Grahame, her spouse, as Earl and Countess of Strathern ; and, by a third service, he is served general heir to David, Earl of Strathern, son lawful to Ro-

bert the Second, King of Scotland ; which David is alleged to have been father to the said Eupham, Countess of Strathern. Thir retours are sought to be reduced at the instance of Charles, King of Great Britain, &c. ; by reason nothing was produced to the inquest bearing Malise to be son to Eupham, nor Eupham to be daughter to David ; and, if any such writ were, the King's Advocate offered to improve the same ; and, in that process, did call for all writs that anyways designed Eupham to be mother to Malise, or daughter to David, to hear and see them improven. And insisting first in the improbation, nothing being produced, certification is granted in favours of the king. Then it was excepted, by the Earl of Monteith's advocates, (himself being present at the bar,) That the retour ought not to be reduced ; because he offered him to prove, by charters under the Great Seal, or extracts furth of the register, That Malise Grahame was son to Eupham, and Eupham was daughter lawful to David, Earl of Strathern. Against the which exception the King's Advocate proponed an emergent reply, That, although the exception was relevant, yet, in respect of the former certification, against all writs that were not produced in the improbation, the same could not be proven by these writs that were not produced therein ; seeing certification was already granted against them, and the writs produced in the cause did not prove the exception. The Lords found the exception relevant, but not proven ; 21st March 1633 ;—and therefore reduced the retours, and the other writs called for to be produced and reduced ; and found the King's Majesty undoubted heir of blood to the said David, Earl of Strathern, and descended from King Robert the Third, who was eldest brother to the said David ; which David had no children ; neither is there any succession extant descended from him or any of his brethren.

And, because the said summons concluded not only reduction of the said retours, but, *per consequentiam*, wilful, at the least ignorant error, against the inquest, for the which they had incurred *pœnam temere jurantum super assysam*, it was alleged for the inquest, That no such pain could be decerned against them ; neither could the king nor his advocate pursue them for error ; because his majesty's advocate, compearing the time of the service, produced a renunciation made by the Earl of Monteith, of the earldom of Strathern, as apparent and undoubted heir of blood to the deceased David, Earl of Strathern, son lawful to King Robert the Second ; and protested that this service should be for corroborating of the said renunciation ; so the assize did no wrong, nor deserved any punishment, in serving the Earl of Monteith heir to the said David, whom the king, in accepting of the said renunciation, acknowledged to be heir to the said David. And if they committed any error, it was not wilful, seeing there was nothing produced or alleged in the contrary ; but the most that could be objected was ignorance, and that not wilful, which deserved no punishment. Which exception the Lords found relevant and proven ; and therefore absolved the assize from the pain concluded in the summons.—26th March 1633.

2d MS. Page 221.

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1634. January 18. LORD LORN against JAMES STEWART.

JAMES Stewart is pursued by the Lord Lorn for the maills and duties of the