1630. *July* 9. L. ROWALLAN *against* BOYD.

No 639.
Part and pertinent.

IN a removing from a piece of land, set in rental to the defender by Rowallan, wherein the Lord Boyd compeared for his interest, *alleging*, That that land was part and pertinent of his land, and was so bruiked before this rental produced, past memory of man; and the other alleging the same to be part of his lands, and so bruiked by him continually; and so the parties being alike pregnant in their contrary qualifications; the LORDS found, that the readiest way to try the verity was, by giving a commission to a Gentleman in the country, to see the ground controverted, and both the parties' lands alleged, and to take all the most exact trial that might be had by inspection, and deposition of witnesses *hinc inde* unsuspected, and by any other presumption, or probable circumstance, and to report the same to the Lords.

Act. ——. Alt. *Boyd.* Clerk, *Gibson.*

Durie, p. 528.

1631. *January* 29. BUTLER, L. HIRDMISTON, *against* VAUSE.

No 640.
A party, who had sold the lands in dispute, and was liable in warrandice, was received as a witness.

THE heritor, after the liferenter's decease, charging summarily, without preceding warning, to remove from the tower and manor-place, and some other houses pertaining thereto, wherein the defender *alleging*, That these other houses, by and attour the principal house acclaimed by the pursuer, pertained not to the pursuer's predecessors, nor to those lands wherein they were infeft, but that the same pertained to the defender, and stood upon the lands pertaining to the defender heritably, which were lying contiguous to the pursuer's lands; and either of the parties qualifying certain arguments and presumptions, whereby they alleged these houses controverted to pertain to either of them; the LORDS, before, having given commission to two of their number to visit the said lands and houses, and to take trial by witnesses, and all other lawful manner, to which of the party's lands these houses belonged; after report made by the two Lords, and consideration of the depositions of witnesses taken by them, which were produced by either of the parties, they finding the matter not to be clear, to which of the parties they belonged properly, they ordained both parties to produce before them an equal number of witnesses, for qualifying of either of their arguments, that, after consideration thereof, they might proceed and decide the cause: And this was done, albeit it is not ordinary in this judgment to take witnesses for both parties; but this was ordained in this case, where the matter was perplexed and uncertain on both sides, for their claims to the houses controverted; and as their probation should be found most clear and un-

No 640. suspected, according thereto the Lords would decern: And it was found, that the pursuer might lawfully use the Laird of Blauns to be witness for him, albeit he had sold the lands controverted to the pursuer, and was subject in warrandice thereof, seeing the same was sold under reversion, to which reversion he had made the defender and his authors assignees.

Act. *Nicolson*; Alt. *Stuart*.. Clerk, *Gibson*.

Durie, p. 561.

1631. *July* 22. AITCHISON *against* MURRAY.

No 641.
Effect where the counter part of an indenture, respecting lands, was in the opponent's hands.

IN an action pursued by Sir Archibald Aitchison against John Murray of Broughton, as heir, at least behaving himself, to his umquhile father, George, viz. by selling certain lands which pertained to his father in Ireland, to the Earl of Annandale, litiscontestation is made in the cause. The defender being absent *in termino probatorio*, Sir Archibald produces, by other writs, an indenture subscribed by the Earl, anent the said lands, annailzied to him by the defender, and because the other half of the indenture, subscribed by the defender, was in the Earl's hands, for shortening process, in raising incidents, Sir Archibald referred to the defender's oath of verity, that his indenture, produced, was the true double of that part which was subscribed; but the defender referred it to his oath; after which production, compeared his Advocate, Sir Thomas Hope, and *alleged*, The defender could not, by any form of process, be compelled to give his oath, seeing the pursuer had referred nothing to his oath by the libel, and seeing he had produced writs to prove his libel, he would not use probation of that same member by oath of party also. To which it was *answered*, That the pursuer used his oath in supplement of the objection, which might be made against the inventory produced, viz. that it would not prove, because it was not subscribed by the defender; and if this had been objected, the pursuer might have replied, that he referred the verity of the deed to the defender's oath; so it might be sustained *hoc loco*; which the LORDS sustained.

Auchinleck, MS. p. 158.

1663. *January* 24. SYDSERF of Ruchlaw *against* WOOD.

No 642.
In a case of contravention of marches, where proof had been taken, a new proof, before answer, was ordered.

THERE being mutual contraventions betwixt Ruchlaw and Wood, both relating to a piece of ground, upon the marches of their lands, which Ruchlaw alleged to be his property, and that Wood had contravened by needful pasturage thereon, himself being present, when he was desired to remove his goods off the same; and the other alleging commonty, and that Ruchlaw had contravened, by wilful debarring him from his commonty;