

sentence ;—the Lords, before they would discuss whether this reason should be received or not, notwithstanding that the party contended that it ought not to be received, in respect of the said sentence given against them compearing, and that he alleged *res judicatæ non debent retractari prætextu instrumentorum noviter repertorum* ; and also (notwithstanding that the tack was not instantly produced, to verify the reason, as the party alleged ought to be done in the case of instruments new come to knowledge,) they assigned a day to the suspender to produce these tacks, and to recover the same out of the parties' hands in Ireland; and reserved then to the party, after sight of the tacks, to oppone what he might against the same, either why it should not be received then, or why it proved not the reason; to which time all further proceeding was superseded, *sed cum onere expensarum*.

*Act.* Nicolson and Gilmor. *Alt.* Mowat. *Scot, Clerk.* *Vid.* 9th June 1624, L. Touch; and 20th January 1631, E. Galloway.

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1633. February 20. LADY ATHOL against The EARL of ATHOL.

A SUBMISSION being made by the Lady Athol to the Earl of Kinghorn, the Lairds of Auldbar, Inchmartine, and ———, immediately after her husband's decease, of all which she could crave of the Earl of Athol by any right competent to her; and they decerning her to have yearly 500 merks for all:—this decret being desired to be reduced upon the reason of most *enorme lesion*, qualified in that she was provided to a conjunct fee of fifty chalders of victual, beside that she was one of the heirs of the Earldom of Athol; for all which rights the said judges had ordained only the said 500 merks yearly, which was *vehemens læsio*, and so insufficient for the entertainment of the meanest person whatsoever, far less for one of her birth and estate;—that the Lords, who were supreme judges, ought to reponne her against that unjust decret, which was so partially pronounced by the arbiters, wherein they had not behaved themselves as *boni viri*, according to trust committed to them; and, therefore, ought to be mended by the Lords, who were sovereign judges, and to whom recourses were permitted in law, as to the best men, to rectify such wrongs;—the parties being heard to reason in this cause at great length, and having considered the defender's exception, specially that in law it was alleged that both in *ff.* and *c.* it is expressly decided, *Quod sit standum sententiæ arbitri, sive æquæ sive iniquæ, et sibi imputet qui compromisit, nam et minus probabilem sententiam ferre debet æquo animo*; and the pursuer's answers in law made thereto, as may be more particularly considered in my other book of notes, fol. 27;—and also, the Lords having heard the defender, upon declaring the burdens wherewith the conjunct fee lands were alleged to be affected, before her conjunct fee granted thereof to her, and whereby he alleged the most that was free to her did not exceed 19 or 20 chalders of victual; so that he alleged that the *lesion* was not so great to reduce the decret given by so honourable arbiters, granting that that *lesion* was a cause of reduction, which he altogether denied;—the Lords found this *lesion* to be most *enorme*, and that it was a cause to rectify the said decret-arbitral, notwithstanding of the allegiance. And, therefore, they found that the lady ought to have

yearly given to her, in place of the 500 merks decerned, 1200 merks yearly in all time coming, during her lifetime; for which sum they ordained the lady to have right sicklike as if that sum had been decerned by the sentence; and also, they ordained to be paid to her, for the space of a year which was expired since her husband's decease, 1000 pounds, by and attour 500 merks which she had gotten paid to her before. And this the Lords ordained to stand, as if it had been expressly decerned by the arbiters in their sentence.

*Act.* Stuart and Baird. *Alt.* Nicolson and Nairn. Hay, *Clerk.*

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1633. February 26. The LAIRD of CONHEATH against The LAIRD of EARLSTON.

MAXWEL of Conheath being made assignee to certain goods, by Katharin Glendinning, owner thereof, which were intromitted with by Gordon of Earlston, and for which he was pursued by the assignee; and he dying, *pendente lite*, the action was transferred in the heir of Earlston; who compearing, alleged that the cedent was at the horn before the making of the assignation, and he has obtained the gift of her escheat and declarator thereon; which, albeit it be after the assignation, yet the horning is anterior to the assignation; after which horning she could do nothing in prejudice of the fisk, which might derogate to the escheat. This exception was found relevant, and admitted to the defender's probation; whereby the donator was preferred to the assignee made before the escheat was gifted, seeing the cedent was at the horn when the assignation was made by her, at which time she could do no deed to prejudge the fisk. The act of litiscontestation in this cause is dated December 6, 1631, and it was decreet-ed February 23, 1633.

*Act.* Cunninghame. *Alt.* Nicolson and Mowat. Scot, *Clerk.* *Vid.* 2d February 1632, Lindsay; 6th December 1631, betwixt these parties.

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1633. July 20. LADY ROTHEMAY against JANET OGILVIE and GEORGE ABERNETHY.

THE Lady Rothemay, as infest in the lands of ——— in conjunct-fee, pursues Janet Ogilvie and George Abernethy her son, for the duty of the said lands divers years bypast; who alleging, that she bruiked by tolerance and right from her said son, who was apparent heir to Ogilvie his father, which father had a right of heritable infestment of wadset of these lands from the pursuer's husband's authors, before the right made to her umquhile husband; by virtue whereof her husband was in possession: and the lady replying that the defender, *viz.* the relict of the obtainer of the wadset, had taken tacks from the pursuer's husband, wherein she had obliged her to pay the duty now acclaimed; and albeit that tack was expired before the years now acclaimed, yet, seeing she bruiked *per tacitam relocationem*, she ought still