

1637. February 22. JOHN MUIR of ANNISTOUN against CALDER.

JOHN Muir of Annistoun pursuing registration of a bond against Janet Calder, as she who behaved herself as heir to the granter of the bond, in so far as she had served and retoured herself heir to him, by which retour she had behaved herself as heir: And the defender alleging, that, if the pursuer insisted against her as heir served and retoured, she was content that sentence should pass against her *eo nomine*; but, where he insisted against her, as behaving herself as heir *hoc medio*, seeing she had retoured herself heir to him, that cannot be found lawful, in respect the pursuer will not acknowledge the retour to be lawful, but quarrels the same; and it being so quarrelled, and alleged by the pursuer to be unlawful, no reason that thereby she should be found to behave herself as heir;—the Lords found, in respect that the pursuer insisted not against the defender as heir retoured, (which he might prove by the retour produced,) but that thereby he would insist against her as behaving herself as heir, therefore they found that they would not sustain process against her *eo nomine*, upon that member and alternative; without prejudice to him to insist against her as heir by the retour produced; wherein he might protest, that, by the said insisting and production of the retour, he did not approve the lawfulness thereof, but that he might be heard to quarrel the same upon any ground of nullity, or other thing competent to him in law against the same.

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

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1637. February 24. ROBERT ELIOT against The EARL of BUCCLEUGH.

CAUTION being found by the Earl of Buccleugh to desist and cease *simpliciter*, in obedience of a decret of removing recovered against him by the said Robert Eliot, under the pain of 50 pounds *toties quoties*; and thereupon the charge upon the decret being suspended simply thereafter, the said Robert Eliot, upon the extract of the said decret suspending the letters, whereupon caution was found, charges the said Earl, by letters of horning raised upon the said act of cautionary, to pay the said sum: which being suspended as an unlawful charge, so summarily to use horning, for payment of that sum, except that there had been ordinary actions intended first, to have heard it been tried, that the defender had contravened the act of caution, and so had thereby incurred the pain; which not being done, such charges could not be sustained to charge by letters of horning first, and then to try; which in effect is to raise execution before the debt be constituted for the which execution is used; for if, upon thir letters of horning, he had been denounced, that horning could not have been sustained to make his escheat fall, and consequently the letters and charges could not been so summarily executed. The Lords, although they found that, in form, and by rigour of law, no such charges of horning could be direct, except it had been first tried, in an ordinary pursuit, that the party had contravened, (which they found ought to have preceded;) yet, in respect of the dis-

tress of this party, who was a mean gentleman, and heavily prejudged by sundry occasions, which had made his estate weak, they found that they would sustain this charge as a pursuit, for trying of the contravention ; for the party offered, in this place, to prove that the Earl possessed the lands continually since the caution was found ; and therefore they assigned to the Earl's procurators a competent day to answer to this contravention ; which they found they would try and discuss in this place, without any further pursuit to be intended thereanent.

*Act.* Nicolson and Scot. *Alt.* Mowat and Hart. Gibson, *Clerk.*

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1637. *March 9.* ROBERT BROUN *against* GILBERT ATCHISON.

ONE Gilbert Atchison being made assignee, by Isobel Marshel, to some heritable bonds made in her favours ; one Mr Robert Broun, being made assignee by George Marshel, who was retoured heir to the said Isobel, pursues reduction of the said assignation made by the said Isobel to Gilbert Atchison, as done *in lecto ægritudinis* : And the defender alleging, that the pursuer's assignation made to him by the said heir was also made *in lecto ægritudinis*, and who died immediately after making thereof ; and therefore, seeing *laborat eodem vitio*, it ought not to be found a title to pursue this action ;—the Lords repelled the allegiance ; for, as it was competent to the excipient to quarrel the same *super hoc medio*, so they found it could not be taken away *ope exceptionis* so summarily, but the same ought to abide reduction.

*Act.* Gilmor.

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1637. *March 22.* ANDERSON *against* HENRY GIBSON.

In a double pointing betwixt one Anderson and Mr Henry Gibson ; umquhile George Reid in Glasgow, having acquired from Marion Dorroch her liferent of some lands in Glasgow, whereof himself was heritor, for which, by that security, he was obliged to do certain deeds to the said Marion ; after which contract the said George Reid being deceased, and the said Marion Dorroch being married upon John Anderson, burges of Glasgow, the said Marion and her said spouse dispone her said liferent right to the said Mr Henry Gibson, and oblige them to warrant the same from all preceding deeds : and the prior disposition being comprised by Gabriel Cunninghame for a debt owing him by the said George Reid : Whereupon it being questioned, if the said John Anderson should be holden to warrant the alienation thereafter made to Mr Henry of that same liferent, from that prior disposition ; and sicklike, because there was an action of double pointing against Gabriel and Mr Henry, as both claiming the right of the mails and duties of that liferent, by virtue of their said rights ;—in which action the Lords found that Mr Henry had best right to be answered ; and preferred him to Gabriel Cunninghame, because the right made to umquhile George Reid, by the said Marion, and which was comprised, was found not effectual to