absence was not in his default, but that he necessarily withdrew, because his master had neither work as a goldsmith, nor did he give the apprentice entertainment, and that he caused the apprentice oversee masons for twenty weeks together. *2do.* Neither he nor his cautioner can be liable for a merk *per diem*, or any other damage, for his absence; because, by the indenture, the damage by absence is liquidated to two day's service for one; which the apprentice offered, by instrument, to perform. The pursuer answered, That he offered him to prove, that he had both work, and gave sufficient entertainment to his apprentice; and, for his attendance on the masons, it was to a public work belonging to the calling, which every master was appointed to oversee week about. And, for the damage of absence, it is in favour of the master; and he may choose whether to make use of it, or of the true damage. The Lords preferred the master's probation of the sufficiency of his entertainment: but found that he ought not to have employed the apprentice in any other work than his calling; and allowed the time that he was employed to oversee the masons to compense as many of his absent days; and found, that the damage by absence being liquidated by the indenture [to] two days' service for one, that he could pursue for nothing else; and that the offer to make out the service was sufficient, the apprentice now performing the same.

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1673. *February* 3. HUGH M'LEOD *against* RORIE DINGWALL.

HUGH M'Leod having obtained decreet against Rorie Dingwall, for the profits of a ferry-boat and fishing, *in anno* 1657, the decreet is now craved to be reduced, on this reason, as being null for want of probation, in so far as the quantities were not proven. It was answered, That, the duties being specially libelled, and defences proponed, without denying the quantities, the pursuer was thereby liberated of probation; and yet he is willing, in fortification of his decreet, to instruct the same. It was replied, That the decreet being null, all defences *in causa* might now be propounded; the decreet, at best, being but to be sustained as a libel. And it was offered to be proven, that the defender was then seven years in possession, by virtue of an infeftment, and so would exclude the pursuer *in judicio possessorio*; which cannot be repelled as competent and omitted, seeing the decreet is null. It was duplied, That this defence, being *dolose* omitted, cannot now be received after sixteen years' time, that the means of probation of interruption hath failed. The Lords found that the decreet might be astructed as to the quantities, without admitting this defence upon the possessory judgment, after so long time; seeing the defence related more to the point of possession than to the point of right.

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1673. *February* 27. ——— *against* MOWAT.

A FRENCHMAN having arrested certain sums belonging to ——— Mowat,

factor in Paris, and pursuing to make forthcoming, but the process not being ready to come in by the course of the roll,—the pursuer supplicated, that, in respect the arrestment was loosed, and a cautioner altogether insufficient found, that therefore the Lords would declare the loosing of the arrestment null, and a new arrestment to be granted. The Lords having considered the case, and, finding the cautioner could not be known, but was altogether insufficient, they insinuate to the clerks of the bills, that cautioners taken for loosing of arrestment had been admitted, without any notice of their sufficiency; that, in time coming, the same care should be had of their sufficiency, as of cautioners in suspensions. And, as to this case, the Lords ordained new arrestment to be raised upon this special warrant; and declared the same should be sufficient as to any goods or sums that should happen to be in the hands of Mowat's creditors, the time of the execution of the second arrestment, notwithstanding the former arrestment was loosed; but would not declare the loosing null, as to what these creditors might have paid *bona fide* to Mowat, after the loosing of the first arrestment, and before the execution of the second arrestment.

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1673. *July* 4. DAVID MURMAN *against* CAPTAIN FRENCH.

DAVID Murman having obtained decreet against Captain French for spuilyie, or wrongous intromission with forty sheep, he suspends on this reason, That, since the decreet, he had obtained the charger's discharge. The charger answered, That the discharge was elicited from the charger, who is an idiot, and understood not what he was doing, by touching the pen of the notary in subscribing the discharge. It was replied, That idiotry was not receivable till it was instructed by a service of idiotry, as law requires. It was duplied, That a service of idiotry is necessary for taking away all deeds done by the idiot; but, where a particular deed is only questioned, it may be taken away, either upon the reason that the party at the time was not *mentis compos*, or was circumvened, which are relevant reasons of reduction, without a service; and here the charger hath a reduction. The Lords having called for the charger, and finding him a very weak simple person, but not absolutely an idiot, they sustained his reduction upon the circumvention, without a service of idiotry.

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1673. *July* 24. CAPTAIN BENNET *against* The MASTER of the PEARL.

CAPTAIN Bennet having taken the Swedish ship called the Pearl, she was adjudged prize;—whereof reduction being raised and disputed, the Lords found the ship and loading prize on these grounds:—That the ship, being bound for Amsterdam, laden with 491 fats of potashes, there were only documents aboard to show the property of 447 fats; and of these a great part was marked with several merchants' marks, and the initial letters of their names; which they found a clear evidence that the property belonged to these merchants, and not to mer-