was used, he could not be compelled to produce the report, but might keep it up, and the pursuer might take all advantage thereby which he might in law, for furtherance of his process, seeing he was content that process should be granted in the cause, without respect thereto:—The Lords, nevertheless, found, that, seeing the commission was granted, *ex officio*, to try the matter controverted, that thereby the Lords might be informed, that the party ought to produce the report, and that he ought not to keep up the same.

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1631. *February* 11. The LAIRD of TORRIE *against* WILLIAM CARNAGIE.

LAIRD Torrie being convened by William Carnagie, to hear an obligation made by umquhile James Wardlaw, to him, registrat against this L. Torrie, as successor to James, by accepting of a disposition from the said James, for payment of his debts, and of this, amongst other debts mentioned in the disposition;—wherein the Lords found, that the defender could not be convened, *hoc nomine*, for registration of the bond; but, that the pursuer might intent ordinary action against him, *eo nomine*, for payment of the debt libelled, as accepting the said disposition for payment thereof.

Gibson, *Clerk*.

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1631. *March* 4. ALEXANDER HAY *against* KATHARINE M'MICHAEL.

THE deceased Thomas M'Quharg, having made a bond of 2000 merks, in favours of Alexander Hay, his sister's son, and, failing of him by decease before majority, to Katharine M'Michael, mother-sister to the said Thomas; which being deposited by the said Thomas, in the custody of the said Katharine, after the said Thomas's decease,—the said Alexander, and James Hay, his father, son to Mr John Hay of Kennet, as administrator to him, pursues the depositary for exhibition, and the heir of Thomas M'Quharg, granter, to hear the same registrat against him. After the production thereof by the depositary, the defender alleged, that the bond could not be delivered to the pursuer, nor registrat at his instance; because it never became the pursuer's evident at any time before the decease of the granter thereof. And the pursuer replying, that it was put in this depositary's hand, who was the person appointed to have right to the sum, in case of the pursuer's decease before majority, and to be delivered by her, after the granter's decease, to the pursuer,—this reply was found relevant to be proven by the oath of the depositary, whose oath was sustained to prove the same; and it was not found necessary to be proven by writ, or oath of the party, defender, as the excipient contended it ought to be. Which was repelled, especially in respect the party, maker of the bond, was dead, and that the depositary was the maker's mother's sister, and was the second person appointed to succeed to the sum by the bond; and that it was never alleged that the maker, before

his decease, did any deed, or expressed any contrary act, to recal that bond, or to derogate thereto, or altered or changed his will thereanent.

Act. Stuart. *Alt.* ——. Gibson, *Clerk.* *Vid.* 22d January 1624, Lermonth *against* Alexander; 25th November 1631, Lauder *against* Dowglas.

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1631. *March* 9. The Lady Hutton-hall *against* The Laird of Moriston and The Laird of Touch.

La. Hutton-hall being liferentrix of Hutton-hall after decease of her husband, who died before Martinmas, and so thereby had right to the half of that year's duty, and wherein she was preferred to the Lairds of Moriston and Touch, who had comprised these lands from her husband; as is decided, March 8, 1622 years, in the Lady Corsindae's Practique; she craving that term's duty, as the land was worth, and as other lands of the like quality in that part of the country actually paid, seeing they were never set, past memory of man, for farm, but ever laboured in mainsing by the heritor thereof, until the time that they were lately set for farm by their defender's comprisers: and they alleging that they could pay no greater duties to her for this term but the equal half of that quantity for which they set the lands that year; seeing they set the same for as great quantity as they could get for the same, and could get no more; and no reason that they should pay more than they got;—the Lords nevertheless sustained the summons for the half of that duty which should be proven, others, the like lands, paid; but declared, that they reserved to themselves to consider, in the advising of the process, what differences should be found betwixt the quantity to be proven and the quantity for the which the land was set by the compriser, and which now is offered by them to the pursuer, that they might know thereby if the compriser had set the lands near to the avail or not; and, according thereto, they would thereafter modify and decern.

Act. Stuart and Mowat. *Alt.* Nicolson and Craig. Gibson, *Clerk.* *Vid.* 1st February 1631, Blauns *against* Winraham; 15th January 1624, Viscount of Annandale; 21st January 1629, La. Aiton.

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1631. *July* 6. ——— *against* The Bailies of Perth.

The magistrates being convened by a creditor, for payment of the debt, because, the debtor being incarcerated in their tolbooth, they suffered him to escape; and the defenders alleging that the rebel brake the tolbooth in the night, and came out at the roof of the house, and so escaped, without the knowledge, consent, or accession of the magistrates, or any fault on their part; the house being a sufficient ward-house, where there was no infirmity or defect, and being sufficiently timbered and slated in the roof; so that, therefore, it were hard to find the magistrates liable in the debt, who had not failed;—this allegeance