1692. *December* 6. EDGAR of Wedderly *against* THOMAS CALDERWOOD.

IN the complaint pursued by Edgar of Wedderly *against* Thomas Calderwood, in Dalkeith, for refunding his damage sustained by giving order to a messenger to poind him after a sist, upon a bill of suspension; which was most unwarrantable, and found so by a decreet of secret council against the messenger; and whereto the said Thomas was also called, and a decreet passed against him, on a circumduction of the term, for not deponing on his giving a commission to the messenger to poind after the stop; the Lords, upon a bill of suspension, finding the informality of the said decreet, they opened it, and having turned it to a libel, they reponed him to his oath, if he employed the messenger. But the pursuer declaring he would prove it *aliunde*, the Lords advised the decreet of Council, whether it was *res judicata* or not; and found, though Thomas Calderwood was neither condemned nor assoilyied in the decerniture, yet he was convened in the process, and it was expressly libelled, that he should take the horning out of the register, and refund Wedderly's expenses for his illegal poinding; and so, though it was not *res judicata*, yet Calderwood had the *exceptio litis contestatæ*, that it was tabled before the Privy Council, by the pursuer himself, and so could not be taken away till it came to a sentence there. So Calderwood was assoilyied *ab hac instantia* before the Session. And in regard he could not get the suspension past without consignation of the sums, the Lords allowed him now to get up his consigned money. *Vol. I. page* 527.

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1692. *December* 6. The DUKE OF HAMILTON *against* LORD BARGENY.

THE Duke of Hamilton *against* the Lord Bargeny, for the lands of Greenlees. The Lords were not clear to sustain the Duke's title to these lands, on the instrument of resignation, made by Sir James Hamilton to Marquis James in 1624, that being only *assertio notarii*, nor on the accounts of the rentals of the family of Hamilton, where thir lands are in the charge, both before the registration and after, and in some places bears to be in my Lord Bargeny's good-sire's hands, as if these great families kept still in their rentals the lands sold off, but in the discharge mentioned who had them; and that any right Bargeny retained was only the feu-duty, and his infeftment was in trust. The Lords declared they would hear the parties farther on these points. *Vol. I. page* 527.

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1692. *December* 7. ALEXANDER HAY'S CHILDREN, DYKES, and INGLES *against* HAY and BETHIA LOW.

THE children of Alexander Hay, and Dykes, and Ingles, their husbands, against Hay, his heir, and Bethia Low, his relict. The daughters reclaimed against a former interlocutor in June 1692, whereby the Lords found a

tutor having lifted a moveable sum and secured it heritably, that this altered the succession, and made it fall to the heir; whereas, formerly it would have belonged to the executor, and that because it was not *in bonis defuncti patris*, but he was denuded by an assignation. And the daughters alleged he was not fully denuded, in respect the assignation bore a faculty and power to him to alter and uplift, and so it was still *in bonis defuncti*. But the Lords adhered to their former interlocutor, and preferred the heir, and found the reserved power, never being exercised, did not alter the case. It occurred to the Lords of how dangerous a consequence it might be, if a tutor might, by changing securities, alter the succession; for though a tutor may meliorate the minor's condition, and get additional security for their means, yet it deserves consideration, if this should put the sums out of the natural channel of succession the parent had left it in, and alter his meaning, who of design left moveable sums for his younger children's provisions; and if a tutor should, by getting an heritable security, make these belong to the heir, then he should be more than a father and proprietor, and invert the father's destination, if the daughters had been admitted to the sum.

Then it was ALLEGED for one of them,—That the sum being left to her sister, now deceased, and her *in eodem grœmio* of an assignation, *jure accrescendi*, her sister's portion accresced to her, with seclusion of the rest of the children not mentioned in that right, being both *re et nomine conjunctæ*.

ANSWERED,—There could be no *jus accrescendi* nor *jus non decrescendi* here, because they were *verbis conjunctæ et non re*, the sum being left equally betwixt them. But the heir being preferred, there was no use for deciding this subtile point between the sisters. *Vol. I. page* 527.

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1692. *December* 7. The DAUGHTERS of ARTHUR STRAITON of Kirkside *against* STRAITON, their Brother.

IN the case of the five daughters of Mr. Arthur Straiton of Kirkside *against* their brother, the Lords doubted much if the factory Mr. Arthur left to Straiton, apothecary in Montrose, his cousin, to set his lands, and divide the price equally among his six children, giving the son a double portion, was obligatory and effectual now against his heir, to cause him sell in that manner, and distribute the price conform to the factor's appointment; seeing it took no effect in his own lifetime, and his factor had not executed his order; and so it was alleged, *quod morte mandantis perimitur mandatum;* but they thought the case very favourable, if it could subsist yet, or was only of a testamentary nature, or *donatio mortis causa*, not obliging the heir; and therefore ordained it to be heard in their own presence. *Vol. I. page* 528.

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1692. *December* 7. BOGLE *against* ARMOUR.

BOGLE *against* Armour. The first point was, whether the modification of the aliment, made against him, would go back for years preceding the same, or only