1710. *February* 1. ÆNEAS MACDONALD of AUCHTERAW *against* MACDONALD of GLENGARY.

RONALD Macdonald of Auchteraw enters into a submission with Macdonald of Glengary to the late Marquis of Athole, anent his pretensions to some part of the succession of the deceased Lord Macdonald; and there having been a decreet-arbitral signed, decerning Glengary to pay him 8000 merks and some other things, this decreet being accidentally lost and amissing, Æneas Macdonald of Auchteraw, son to the submitter, raises a summons for proving of its tenor against Glengary; who alleged, No process at your instance; because you produce no title nor right to the decreet-arbitral, *esto* it were lying there; and your being apparent heir can never sustain the process.

ANSWERED,—This is a preparatory action, like an exhibition *ad deliberandum;* and when I prevail in the tenor then it will be time enough to make up a title to it: Why should I put myself to the expense or danger of a service till I see the decreet made up? And apparent heirs have been allowed to defend their predecessors' possession, and to pursue reductions on the head of death-bed, and why not a tenor: and before I seek implement of the decreet, I shall produce a sufficient title.

REPLIED,—Every process should have a legal contradictor, that, if I be assoilyied, it may afford me the benefit of a *res judicata.* But, *ita est,* an absolvitor from the process will not secure against any who shall hereafter make up a title to this decreet-arbitral, and then pursue him for the same thing over again. And so the Lords, on the *22d June* 1671, *Leslies* against *Jaffray,* refused to sustain process for a count and reckoning at the instance of an apparent heir; because, when the account was closed, the defender could not be exonered, but might be put to a new litiscontestation and probation afterwards. And this differs much from a process *ad deliberandum,* which is only for inspection to know the conditions of the heritage.

The Lords sustained the dilator, and found, No process at the apparent heir's instance.

There was another point moved, but did not require to be decided at this time; *viz.* how far the tenor of a decreet-arbitral could be proven; seeing the Lords have demurred as to the proving decreets of apprising, as Dirleton observes; and the tenor of decreets-arbitral are more nice and various, according to the parties' claims, circumstances, and mutual prestations. But this was not decided. *Vol. II. Page* 561.

1710. *February* 4. THOMAS CALDERWOOD *against* SIR JAMES COCKBURN of RYSLAW.

Thomas Calderwood, in Dalkeith, being creditor in considerable sums to Ryslaw, partly due to himself, and partly to Alexander Martin in Dunse, his father-in-law, he pursues a roup and sale of his lands on the statute of bankrupt: And, in the probation of the rental, several points came to be discussed; such

as, that part of the lands holding black or simple-ward, and part taxed-ward; the Lords put eighteen years as the value of the simple-ward, and twenty for the taxed; and that teinds, being subject to many burdens, were only worth fourteen or fifteen years' purchase, where they had an heritable right, or long tacks and prorogations; but if they had no right but kindliness, then five or six years' purchase; and may be bought from the patron or titular for nine years; and that mill-rent, being casual, was of less value than land-rent; and there being a mill in the ground, though it was fallen down, yet, having the barony thirled to it, the same deserved a separate valuation: and they put £5 sterling *per annum* upon it. And, coming to advise the probation of the estate's being bankrupt, they found it very narrow and scrimped; for, at the price determined as the *minimum quod sic*, the price extended to £48,000 Scots, and the list of debts was but £52,000, so it only exceeded the price in £4000 Scots, and which was made up of the penalties of bonds, termly failyies, and other accumulations in the adjudications; and if these were deduced, the price was more than the debt. Besides, Mr Calderwood, in his oath upon the verity of his debt, confessed that he, and Martin his author, had been several years in possession; so it was contended, That, if he fairly counted, a great part, not only of his annualrents, but even of his principal sums, would be found paid; which would diminish the debt, and bring it to that pass, that the estate could not be reckoned bankrupt; besides, he was only cautioner in sundry of the bonds for Lanton and Cockburn, and so had his relief against them, which, when recovered, would still lessen his debt; so that he can never be called bankrupt.

ANSWERED,—The £52,000 is all principal sums; and there is a liferent of £50 sterling a-year affecting the lands, which, at seven years' purchase, will augment the debt in 6300 merks more; so it is clearly overburdened.

The Lords thought this point deserved to be better cleared, how far it was a bankrupt estate: And therefore remitted it to one of their own number to hear the parties thereupon. *Vol. II. Page* 563.

1710. *February* 7. ISOBEL STEEL *against* ROBERT INNES.

STEEL against Innes. Isobel Steel having been servant, by the space of several years, to Robert Innes, merchant, in a toy and sweetmeat shop in Edinburgh; and he, from time to time, missing sundry things, at last suspected the said Isobel; and having questioned her, she confessed her disposing on some sugar, confections, and small quantities of herring and beef. But he contending she had embezzled much more, and threatening her with delating to the magistrates to get her imprisoned, scourged, and banished for her theft, she, to prevent disgrace and public hearing, gave him an assignation to sundry bonds she had, which he said was the product of the money she made by his goods; but she affirmed it was legacies left her by some friends. But, after she was liberated and out of his house, she raised a summons of spuilyie against him, for taking away her bonds out of her chest, which he broke up; and likewise intented a reduction of her assignation to him, on thir grounds,—That they were elicited and extorted by fear and concussion, by keeping her *in privato carcere*,