1670. *January* 20. EARL of KINGHORNE *against* LAIRD of PITTARO.

THE deceased Earl of Kinghorne having left a bond blank in the creditor's name, in the hands of Alexander Keith, who was the Earl's agent, containing the sum of 1000 merks; this bond lay in Alexander's hands a long time while he was in life, and being found amongst his papers long after his decease, his wife delivers it to the Laird of Pittaro, who fills up his own name therein, and gets decreet against this Earl of Kinghorne, on the passive titles. Which being suspended, and the way of the conveyance of it being referred to Pittaro his oath, he confessed the truth of the business, in manner above narrated. Whereon the Lords assoilyied from the decreet: though it was ALLEGED that Alexander Keith was creditor to the Earl, and the Earl his debtor, in the like sum.

*Act.* Lockart. *Alt.* Cunyghame. *Advocates' MS. folio* 61.

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1670. *February* 20. DAVID KINLOCH *against* JAMES OGILBIE of Clunie.

IN the case David Kinloch against James Ogilbie of Clunie, FOUND, A contravention of lawborrows may be turned in a declarator of property, where the deeds are not founded on violence, but on damage done to the property and lands. *Item*, That the penalty of contravention belongs to the heir of him who was infeft in the lands contraverted; and the charge being given by Bandoche's father, That the action of contravention did belong to his heir. But he was ordained to warrant the defender at the executor's hands.

*Act.* Dinmuire. *Alt.* Falconer. *Advocates' MS. folio* 61.

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1670. *February* 20. LORD BALMERINO *against* the EARL of AIRLIE.

IN the reduction of the disposition of the whole estate of Couper, made by the deceased Lord Couper, in favours of his lady, now Lady Lundors, pursued by my Lord Balmerino *contra* the Earl of Airlie; FOUND that the reason of *lectus ægritudinis* was a privilege not personal, nor competent only to the apparent heir; but it was real, and competent likewise to the creditors of the apparent heir, who had comprised from him, as lawfully charged to enter heir. In this process also there was a large debate anent the nature of my Lord Couper's sickness, the time of his making the right aforesaid in favours of his lady; and whether the coming to kirk and market was the only allowable presumption in law of health, or if sanity might be made out by acts equipollent to going to kirk and market: the Informations whereof I have set down at large. Upon thir debates, the Lords have not as yet given their interlocutor.—There was a practique founded on, in the 1647, betwixt *Syme and Grahame*, which stumbled the Lords: which was

that they found a man's writing of two sheets of paper sensibly, and to good purpose, sufficient to sustain a disposition of his heritage made before, though they could not qualify he ever came to kirk and market thereafter; because they judged this equipollent thereto, and a manifest demonstration of *sanitas mentis*. As also, in *February*, 1668, in the action *Pargillis* against *Pargillis*, it was found that the riding on horseback, though the disponer was proven to be sick, and to have been supported on his horse, were sufficient qualifications of health: *ergo* going to kirk and market is not absolutely necessary for validating such dispositions. Yet all thir were answered; and it was farther urged, that on this consideration the Parliament had lately, in 1669, refused to allow parents the power of providing their younger children, (than which nothing imaginable can be more favourable,) to small portions on their deathbed. At last the Lords would find no acts equipollent to going to kirk and market; but that it behoved so to be done in *forma specifica*: and resolved they would make that a constant practick by which they would decide the like cases in all time coming.

Vide *infra* 11*th December*, 1677, *Lockhart, No.* 677;—*Stair's Decisions, 3d February* 1663, *Robertson and the Town of Lanerk.*

*Advocates' MS. folio* 61.

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1669. *July* 28. WAUCHOP of Niddry, and his SON JO. WAUCHOP of Edmiston, *against* J. H. of Waughton, and ALEXANDER COCKBURNE of Popill, and the TENANTS of Popill.

THE Laird of Niddry having right by progress, from Raith of Edmiston, to the teinds, parsonage and vicarage, of the lands of Popill, (the conveyance whereof see *alibi* beside me,) pursueth the foresaid persons for payment-making to him as titular, or come in his place, of the valued bolls due furth of the said lands for the space of thirty years by-past. Against which it was ALLEGED, 1*mo*, There could be no process sustained against thir defenders, because the principal and original tack of the foresaid teinds, set by Claud, Commendator of Paisley, and Dean of Dunbar, to Sir George Hamilton, and Greinlaw, his son, is not produced.

ANSWERED and REPLIED,—That the allegeance ought to be repelled, in respect of the decreet of prorogation of that tack produced, which doth particularly mention the production of the foresaid tack before the commissioners of the Plat; which decreet of prorogation is dated the last of January 1678: by virtue whereof, the pursuers and their authors have been in possession of the said teinds past all memory.

DUPLIED,—The allegeance stands relevant, notwithstanding of the answer, in respect the prorogation takes not effect till the expiry of the principal tack; 2*do*, If the principal tack were produced, as it ought to be, there might arise intrinsic nullities therefrom, which might cast the tack itself.

TRIPLIED,—The defenders cannot be heard to propone any thing against the non-production of the tack; not only in respect the same is expressly mentioned in the foresaid decreet of prorogation, but also the same is homologated by the defenders, in so far as there was a decreet of valuation of the said teinds, against the pursuer and his authors; and they have been in use of payment of the valued