1671. *January* 26. CARSE *against* CUNYGHAME.

IN this action the Lords FOUND, That albeit the genuine and natural action that flows from an infeftment of annualrent, is a poinding of the ground, and a decreet for the same; yet that an annualrenter might compear in a process for mails and duties pursued at the instance of other creditors, and be admitted for his interest, and take forth a decreet for mails and duties against the same tenants.

In this same cause, they ordained doctor Cunyghame to count and reckon with the pursuer, anent his intromission with the rent of the lands acquired; and that being done, they would give their answer upon all.

This was thought favourable for Carse, for what he has meddled with over and above the annualrent of the money, (which was L.26,000,) these fourteen years in the mails of these lands, it is feared he be ordained to refund it.

Advocates' MS. No. 109, *folio* 86.

1671. *January* 26. GRAHAM *against* SIR JAMES MURRAY of Skirling.

IN anno 1652, my Lord Panmuire comprises Sir James Murraye's estate for certain sums of money. Before the deducing of this comprising Sir James had granted a wadset right of the lands of Skirling, for a certain sum, to one Leviston; which right was afterwards acquired by his brother Sir Robert, and transferred over by him to his nephew James. My Lord Panmuire dispones the grounds whereon the apprising was led, to his son Harie Mauld. Harie makes it, with all the rest of his estate, over to his lady, now married to Douglas of Gogar. She assigns and dispones it to this Grahame, who, as having right by progress to the apprising, had also right to the reversion of that wadset given to Leviston; and upon this progress uses an order of redemption, and pursues a declarator of his order.

Against which it was ALLEGED, 1*mo*, That all parties having interest were not called, *viz.* my Lord Panmuire. 2*do*, Harie Mauld's right can never be found valid to sustain this order, it being only a clause of substitution, making that sum contained in Sir James Murraye's bond payable to Harie, after the decease of the Earl his father: now his father, in his own lifetime, led the comprising in his own name, and never made any disposition of it to Harie; and what way can Harie, or any deriving right from him, pursue a declarator on this apprising, to which he can show no right in his person. 3*tio*, The bond wherein Harie was substitute, bears an express power to the father to uplift the same, to discharge it, dispose of it, or alter it at his pleasure, any time in his lifetime; but *ita est* this comprising must be repute an innovation of the same, *hoc maxime attento* that he apprised the lands to himself, and his heirs whatsomever, which is a most evident revocation of the substitution; and so the right of the apprising must be in my Lord Panmuir's person as heir.

To this it was ANSWERED,—That Harie having right to the sum by virtue of the clause of substitution in the bond, he behoved of all necessity to have right to all that had followed thereupon, since the bond, and the diligence done thereon keep the same channel, and cannot in law be divided, *ubi accessorium sequitur suum principale;* and Harie needed no other thing to give him right to the apprising, but the clause of substitution conceived in his favours: and the leading the apprising after the bond, and the Earl's taking the infeftment to himself and his heirs whatsomever, must be repute, no change of the substitution, nor exercise of that power reserved him by the bond, but must be ruled by it as relative thereto; and to propone upon the Earl's right as heir, is not competent unless he were compearing.

It was REPLIED,—That Harie and those who have succeeded in his right, should have raised a declarator of their right to the apprising, as consequential to the bond, ere they could use any order of redemption by virtue thereof.

They were to have the Lords answer upon both these points. See a case not much unlike, 26*th July*, 1610, *Douglas of Cavers* contra *Elliot.*

Act. Lockhart. *Alt.* Wallace. *Advocates' MS. No.* 110, *folio* 86.

1671. *January* 27. MACKEINZIE *against* MACKEINZIE.

THIS is a reduction of a decreet of the commission for plantation of kirks, at a minister's instance, against his parishioners. My Lord Advocate refused to find the Lords Judges competent to the reduction of the plats decreets, because it is a committee of Parliament, and at least co-ordinate to the Lords themselves. But it being called before my Lord Gosford, he SUSTAINED it, seeing the Lords are not obliged to decline themselves. *(Vide infra, June* 1677, *Number* 586, *Minister of Nig's case.)* And this were very acceptable to the lieges, if it were drawn in a custom, because they get far more speedy justice before the Lords of Session, than they do before that commission. See something not unlike sustained in the English time, 11*th June* 1656, *Earl of Roxburgh.* •Yet see 6*th February* 1658, *Mr. Robert Hodge;* but at this time there was no such court as a commission.

Act. Rory Mackenzie. *Alt.* Sir G. Mackenzie.

Advocates' MS. No. 111, *folio* 87.

1671. *January* 27. GEORGE GORDON *against* REIDS.

THIS was a reduction, at the instance of Mr. George Gordon, son to George Gordon, messenger, against thir Reids, of a disposition made by his father to them on death-bed. Against which it was ALLEGED,—That he had no interest to pursue this action, because he wanted an active title; *viz.* he was not served and retoured heir. ANSWERED,—He had a service, and that was enough. REPLIED, It was never heard of, that a service (which is only a passive title without a re-