in 1643, when Episcopacy was abolished. The Minister of Creiff said, he had the benefit of a possessory judgment, and could not be quarrelled *hoc loco.*

The Lords found he was not *decennalis et triennalis possessor*, because the Bishop had interrupted within the 13 years; and therefore preferred the Bishop.

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1684. *December* 23. BRUCE of BORDY *against* JOHN KIERIE.

IN a cause between Bruce of Bordy, and John Kierie, chamberlain to the Earl of Mar, the Lords loosed a decreet led upon probation by witnesses, so far as to ordain the depositions to be put by the clerk into the President's hands, that he may revise and peruse the same; and, as he reported, the Lords did incline to re-consider the same, if they should re-advise proven or not; though this may reflect on their former advising. But they did the like for the *Marquis of Queensberry* in his process against the *Children of Douglas of Monsuall,* on the *20th of December* 1682. *Vol. I. Page* 323.

1685. *January* 7. CORNELIUS VANHEYDE *against* JAMES GRAHAM.

ONE Cornelius Vanheyde, a Dutchman, pursues James Graham, late bailie of Edinburgh, on a bond granted by one whom he had intrusted as merchant and factor in a ship, *actione institoriâ.* ALLEGED,—He offers to prove that the man was furious the time he subscribed the bond. ANSWERED,—1*mo,* He took not the fury till he was coming home in the ship; and, if he was subject to it before, he was in a lucid interval when he gave it; for it is all written with his own hand. REPLIED,—That is no argument; for it was all dictated to him.

Yet a madman will not readily write as he is directed. But, in regard Bailie Graham had given a bond of corroboration of this debt, the allegeance was repelled, especially seeing it depended on an onerous cause; though the Bailie pretended, that the price in the bond was most exorbitant, and his prentice's *mania et rabies* did not consist with his knowledge at the time he signed the corroboration.

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1676, 1677, 1679, 1682, 1683, *and* 1685. SIR ALEXANDER and SIR PETER FRASER of DURRIS *against* JAMES HOGG of BLERIEDREN, and JEAN LINDSAY, Lady Bleriedren.

1676. *June* .—SIR Alexander Fraser of Doors, principal physician to his Majesty, against Hog of Blyriedren.

The Doctor, as having right to the reversion of the lands of Bleriedrene, causes use an order and pursues a declarator of redemption. In which, 1*mo,*

there are several objections proponed against Kilmundie's factory, not expressly empowering him to use an order, and then against the legality of the order itself, *viz.* that he was not personally premonished, the reversion was not shown nor the money consigned; all which see answered in the information: but there were two principal difficulties. The first was in regard *non constabat* if the defender had a real right derived by progress from Monan *(Monanus,)* Hog, the first wadsetter, since they had not produced any infeftment in their person but merely the contract of wadset and a charter; for, 1*mo*, it seemed if they had never been infeft, that Sir Alexander might, by reduction, maills and duties, or removing, attain to the possession of the land. But we found *res* was not *integra* as to this, because he had accepted his right and disposition with the burden of that wadset of Bleiriedrene, and so would never be heard to impugn and quarrel the same.—*Infra, numero* 488, *Abotshall* and *Kinloch.*—*Secundo,* It was doubted how the defender should validly renounce, and Sir Alexander safely give up the money, if none of them were found infeft; for a renunciation upon a general service were not secure. The only way to establish the right validly in their person were either upon bonds granted by this defender, apparent heir, to adjudge the right from him; or to wair the money upon other land to be liable in real warrandice. See thir points and sundry other pretty things marked in another paper book *alibi.*

The second difficulty was,—The reversion bore a provision that Hog, the wadsetter, should have a tack of these lands for nineteen years after the redemption; and they objected against the order, that no such tack was offered and consigned, and so the order was null as disconform to the reversion; which is *strictissimi juris,* and must be fulfilled *in forma specifica.*

Answered for Sir Alexander,—The tack was exorbitant and null, as contrary to the 19th Act in 1449, Ja. 2d,—the tack-duty being only £16 Scots, and the rent 1000 merks by year, and the sum of the wadset but 3000 merks; so that they have bruiked since 1596, (which is the date of the contract of wadset,) an intolerable and lucrative bargain.

Replied,—The said Act of Parliament meets not this case; because the wadset proceeded upon an excambion of other lands, then disponed to the Earl of Marshall, wadset granter, and it bears Hogg to have had a rental on the wadset lands, and they were of little value then; so that the onerosity of this wadset was not merely the 3000 merks given, whereupon it is declared redeemable, but also the excambed lands, the rentals and liferents Hogg had of thir lands; and, in contemplation of these, that this nineteen years' tack was provided.

Duplied,—*Primo,* the said nineteen years' tack was only to have been given in case it had been redeemed before the decease of the granter or receiver. *Secundo,* The nullity of such tacks founded on that Act James 2d is allowed to be proponed by the granter himself and his heirs; *ergo, multo magis* by Sir Alexander, a singular successor, who is not obliged to debate anent extrinsic qualities and causes of granting that wadset; and the narrating the excambion was only to found regress in case of eviction of the wadset lands, which *inest de jure.*

The debate being reported by Castlehill to the Lords, they declared they

would hear that point anent the excambion in their own presence. And Sir G Lockhart thought it a very narrow, strict, and unfavourable point on Sir Alexander's part, and that it was probable the Lords would, before answer, ordain the value of the excambed lands to be condescended on and proven; which, with the tacks the first wadsetter had of the wadset lands to run, the time of the granting the wadset, they would find onerous to sustain this nineteen years' tack after the redemption, and not cause it fall under the Act of James 2d, which is only founded on natural equity; condemning such advantage as intrenching upon usury, and as a too great inequality in human pactions and contracts, and supposing lesion *ex eventu ultra dimidium justi prætii* to be downright fraud and circumvention; and therefore repone against it. *Vide L. 2 C. de rescindenda Venditione.*

But the foresaid onerous causes conjoined take off the inequality of this contract; and upon some such like considerations the Lords have sustained such tacks, and particularly on the *21st of January* 1662, *Home* against *Laird of Polwart*, because it was a part of his portion natural. See Durie, *20th June* 1629, *Keith* against *Ogilvie*. *Infra*, July 1677, No. 631.

Sir Alexander has compounded the plea with Bleriedren, and gives him, besides the 3000 merks of wadset, other 3000 merks, to quit his tacks. *Vide infra*, a plea with the relict, No. 631. *Advocates' MS. No.* 481, *folio* 249.

Jean Lindsay, relict of Hog of Bleriedren *against* Sir Alexander Frazer of Doors: *vide supra*, No. 481.

1677. *July* 30.—Sir Alexander having agreed with the son, as is there marked, compears the relict, and alleges she will not suffer any decreet of redemption to pass of the wadset of Bleridryne, at Sir Alexander's instance, through collusion of her son-in-law, because she stands infeft in liferent of the half.

ANSWERED,—1*mo*, We repeat all the dispute alleged against her good-son, as competent against her. 2*do*, By her contract of marriage, which is the ground of her liferent seasine, it appears she is provided to the annualrent of £1000 as the half of the money of the wadset, in case of redemption; *ergo*, she has no interest to stop Sir Alexander's order from being declared, since she has only personal action against the apparent heir for employing the half of the wadset money to her in liferent; as to which let her age as accords. 3*tio*, Her seasine is null, flowing *a non habente potestatem, viz.* her husband, who was never infeft in the wadset lands himself.

ANSWERED,—Her infeftment cannot be quarrelled now *post tanti temporis intervallum*, being granted *in anno* 1633, and so long ago prescribed.—And Sir G. Lockhart thought this a very dubious point, If she could maintain her liferent charter and seasine from her husband, though he was never infeft, when it is quarrelled upon nullity, as proceeding *a non habente potestatem*, because it is past 40 years since the date of it, and so is prescribed; never being questioned as null all that time. *Vide supra, July* 1677, No. 593, *Minister of Prestonhauch* against *His Parishioners*. Or, if the 40 years must be calculated from the date of her husband's decease, since she was not sooner *valens agere*. See my Annotations from Hadington, at Dury, *26th February* 1622, *Hamilton* against *Sinclar*. *Vide supra, June* 1676, No. 483, *M'Morran* and *Robertsone*. If it be

alleged, that an apparent heir, though not infeft, upon production of his predecessor's seasine, will defend tenants in a removing; *ergo*, the relict may defend from being removed, though her husband, from whom her right flows, was only apparent heir and never infeft. But the disparity is evident. This privilege indulged to the apparent heir is personal: *non egreditur illius personam, non transit ad singulares successores*; but Jean Lindsay is only the apparent heir's singular successor: and though he can defend tenants, yet, *qua* apparent heir, he can grant no positive right to another; for apparent heir is not *nomen juris*. In redeeming and using orders upon reversions, *quilibet hæreditarius possessor*, though merely by a subaltern right, must be cited, as Craig thinks, page 167; yea, though it be only a base or latent right; but he says *usufructuarius* needs not be cited. Then Jean Lindsay, of absolute necessity, needed not be called to an order, though it were safest to do it.

Advocates' MS. No. 631, *folio* 298.

1679. *January* 21.—In the action Sir Alexander Fraser of Doors, first physician to his Majesty, against Hog of Blendryne, wherein Jean Lindsay compeared for her interest, (of which, see 30th July 1677,) it being this day debated in the Inner-house, and she alleging her seasine could not be now quarrelled, because these forty years her husband and she had been in possession, without interruption, &c.:

The Lords repelled the allegeance of prescription proponed for the relict, in respect her right is not from a third party, but from her husband; and that his seasine, not having proceeded upon a retour, or precept of *clare constat*, (as the 12th Act, Parl. 1617, anent prescription, requires,) it was not a sufficient title to prescription; and therefore declare in the order of redemption; superseding extract until the 1st of June, betwixt and which time, if the defender can recover the warrant of her husband's seasine, and produce it, they will take the same into their consideration. And the Lords repel the said Jean Lindsay her other allegeance, as to the consignation of the money, and of a 19 years' tack after redemption; and find that it cannot hinder the declarator, upon consignation, conform to the reversion. But find the allegeance relevant against Hog, that he represents his father contractor, to the effect that the relict in this process may insist for affecting the money or tack, for implement of her contract of marriage. And assign the first of June next to the relict's procurators, to prove that Hog represents his father. And ordain them instantly to condescend upon the passive title.

There were many indispensable nullities in her seasine; but, for adminiculating of it, she produced the notary's protocol, which *laborabat iisdem vitiis*. And I minded the Lords of the 22d Act of Parl. 1617, anent the falsehood and vitiation of protocols. *Vol. I. Page 35.*

1682. *March* 29.—The Lords, on Newton's report, repone Hogg of Blerydrein, against a certification obtained by Sir Peter Fraser of Durris; because it did not expressly mention the particular lands, against the writs whereof certification was sought, though the seasine of those lands was narrated therein; Hogg always producing immediately, and debating why he ought to produce no farther. *Vide supra*, 21st January 1679. *Vol. I. Page 182.*

1683. *March* 30.—Hogg of Blerydrein against Sir Peter Fraser, (*vide*

March 29, 1682,) reported by Boyne. The Lords sustain Hogg's interest to reduce the decreet of declarator of redemption obtained against himself, though his title to the lands was as heir to his good-sire, and it was instructed that his father stood infeft, whom he should not have passed over; seeing the decreet now quarrelled was obtained against himself. *Vol. I. Page* 231.

1685. *January* 14.—James Hogg of Bleiridryn's reduction against Sir Peter Fraser, mentioned 30th March 1683, was reported by Boyne; and his general service as heir to his father was found a sufficient title whereon he may pursue this reduction.

Yea, this Session, in a case between Falconer of Kincorth and Kinneir, the Lords found a general service was sufficient to pursue an improbation of the rights of lands; though formerly, in the Earl of Hume's improbation against his vassals, the Earl being debarred with horning, they refused to sustain process at Mr Charles Hume, his brother's instance, as assignee, till he were infeft; which decisions are not easily reconciled.

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See several prior parts of the report of this case in the Dictionary, pages 13,475 and 10,784; and the posterior part of the report in page 15,174.

1685. *January* 17. DANIEL LOCKHART *against* CROMWELL LOCKHART of LEE.

DANIEL Lockhart, as assignee by Lockhart of Heids, charging Cromwell Lockhart of Lee, on a minute of sale, for the price of lands; and the reasons of suspension being ordained to be discussed on the bill:—ALLEGED for Lee,—That he was nominated by the Privy-Council to go to Clidesdale, and administrate the oath of abjuration of the Whigs' declaration to the people there; so his absence being necessary, and *reipublicæ causâ*, no process could be sustained against him, but all behoved to sist during that interval.

ANSWERED,—This was but *causa absentiæ affectata*, sought by himself, and he was but one of more commissioners: and it did not begin for a week; so *medio tempore* this affair might be discussed. Pitmedden demurring how far he might sustain process, and having reported it, the Lords, on the considerations foresaid, repelled the dilator. *Vol. I. Page* 332.

1685. *January* 27. ALEXANDER BOTHWELL *against* ALEXANDER HAY.

ALEXANDER Bothwell having charged Alexander Hay, wright, on his bond for £17 sterling, as the price of some plenishing he was obliged to have delivered to him betwixt and the 1st of January 1685, in respect of his failyie to do it:—the reason of suspension was, that he had offered the goods within the days of the charge of horning; and that the delivery of the goods was that which was *principaliter deductum in obligationem*, and the payment of the price