1669. *June* 17. JAMES RIDDELL *against* The LAIRD of GRAINGE HAMILTON.

IN a declarator, pursued at James Riddell's instance, against Grange, for doing wrong in stopping the level of his coal, to which he had right by contract made by Grange's father,—there being a commission granted for examining witnesses upon the place,—after report made, it was debated amongst the Lords, If tenants, who had tacks standing for years to run, might be admitted witnesses for their masters.

It being ALLEGED by some, That no tenants, but such as had liferent tacks, or nineteen years' at least, could be admitted; and by others, that no tenants could be rejected but such as were removeable at pleasure, their tacks being expired. But there being witnesses before, who did sufficiently prove, that question was not decided; yet there is strong and probable arguments for both opinions; the old practicks running for the first, and the custom of late, both in Council and Session, not being so strict: And in reason, tenants against whom no other objection can be made, having tacks standing, and not in their masters' reverence for bygones, and it being supposed that their tacks are set for a just duty; there is no ground to make them be suspected, and rejected upon that only reason, that, after expiring of their tacks, their master may remove them; which will as well militate against a nineteen years' tack, if the most part of them be run the time of the deponing. But it is hard to determine a general rule; and, according to circumstances, it should be left to the arbitrament of the Judges to admit or reject them.

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1669. *June* 17. The HEIR-OF-LINE of TOWIE BARCLAY *against* BARCLAY of AUCHREDY, who had Right from the Heir-Male.

IN an improbation of the disposition of the barony of Towie, made to Auchredy from the next heir-male,—Auchredy himself being next to him in succession, the last term in the improbation being running,—a bill was given in for the heir-of-line, craving one of the two witnesses inserted in the disposition to be examined, that his deposition might lie *in retentis.*

It was alleged, That the desire could not be granted; because the witnesses were neither aged nor infirm, and that he could not depone till the disposition itself was produced, that he might see his own hand-write.

Notwithstanding whereof, the desire of the bill was granted; which was very hard, the whole terms for satisfying the production being so near run out; but the case was so odious.

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1669. *June* 17. MOOR of OTTERBURN *against* BENNET of GRUBBET.

THERE being mutual declarators betwixt the said two persons, anent the

property of Greenlaw, Otterburn contending that it was part and pendicle of the lands of Otterburn, wherein he and his authors were infeft by Sir John Ker of Littledean, who was common author to both; and by virtue thereof had been in immemorial possession, without interruption. Likeas *in anno* 1616, in charter of the third part of the lands of Otterburn, Greenlaw was expressly designed and disponed therewith, to the said Moor's authors.

It was ALLEGED for Grubbet, That, in the disposition of the lands of Otterburn, made to Moor *in anno* 1662, after the disposition and procuratory of resignation of the lands of Otterburn, with the parts and pertinents, there was likewise an assignation, to all right, kindness, and possession, which the disponer or their predecessors had of the lands of Greenlaw; which was declared to be their only right.

The Lords, notwithstanding, did sustain Otterburn's right of property, in respect that that declaration was only general, and could not take away an express right of property contained in a prior charter; and that the said lands were never particularly designed in the common author's right, or his predecessor's right, as a distinct tenement; and that he had never quarrelled Moor and his predecessor's right, in his time; nor Grubbet, nor his father; who had no other right to Greenlaw but by a new charter, granted *in anno* 1635, upon his own resignation, and not in the first right made to him of the lands of Morebottle.

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1669. *June* 22. HAMILTON of CROSS *against* a VISCOUNT of FRENDRAUGHT.

HAMILTON of Cross having obtained a gift of the liferent escheat of Cowbardie, as likewise a disposition of his lands, which was posterior to a disposition of a part thereof, made to the Viscount of Frendraught's author, and insisting as donatar to the liferent escheat, which fell before Frendraught's right was made by the common debtor:—

It was ALLEGED, That the gift was simulate, as being purchased by the rebel's means; in so far as he had allowed the sums of money bestowed for the same, in the first end of the price of the lands disponed.

It was REPLIED, That albeit it was so, yet it was lawful to Hamilton, it not being to the behoof of the rebel, but for his own security.

The Lords found the allegeance relevant,—that Hamilton did know of the prior right before he did bargain with the common author,—to be proven by his oath; which they thought sufficient to infer collusion, and that the gift was simulate.

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1669. *June* 22.

IT was moved to the Lords, if one, being cited before the justices, who had no constant residence, might be apprehended in the Session-house, by virtue of