1681. *June* 16. REVEREND ANDREW URIE *against* JAMES NAIRN.

IN the case of Mr Andrew Urie, minister at Morningside, against James Nairn in St Andrew's, the Lords, upon Haddo's report, admitted Mr Andrew to reply upon the Act of Parl. 1621, against a fraudulent disposition made by Nairn's father to him, being then his second son; and ordained Nairn to condescend on the onerous causes thereof; and would not (as commonly they require,) put him to a reduction on that Act; and this because it was *in re parvi momenti*, and fell *incidenter* only into this process on the passive titles, and was a transaction *inter patrem et filium*. *Vol. I. Page* 142.

1681. *June* 16. The COMMISSIONERS of EXCISE in Fife *against* The CREDITORS of SIR ALEXANDER BRUCE of BROOMHALL.

THE Commissioners of the King's Excise, in Fife, against the Creditors of Sir Alexander Bruce of Broomhall, who, for several years, had collected the said Excise; for, by the law of the kingdom, failing the Collectors, the gentlemen who, by the 14th Act of Parliament 1661, are appointed to uplift it in every shire, their estates are hypothecated and liable for the same *in subsidium*.

The debate was a competition of preference betwixt the said Commissioners and Broomhall's creditors, as to the right of his estate. The King's tacit hypothec in the goods of all those that uplift his revenue, making him preferable to all other creditors, was urged for the Commissioners; likeas, it could be made appear that Bromhall with the public money paid his own debts.

It was ALLEGED for the creditors,—That they had real rights upon his lands, perfected with all the solemnities required by the laws of the kingdom; which behoved to be a security to them.——As to such creditors whose debts were contracted, or real rights perfected, after his intromission with the King's money, and his collection, they were judged to be in a less favourable case than the anterior ones. See, of the regal hypothec, *Peregrinus de Jure Fisci*. *Vol. I. Page* 142.

1678, 1679, 1680, *and* 1681. DAVID JACK *against* CLAUD MUIRHEAD.

1678. *February* 14.—DAVID Jack pursues reduction of a comprising led against him, as lawfully charged to enter heir to his father, and of the grounds of it against Clerk and Muirheads. The 1*st* reason of reduction was, One of the bonds was null, because subscribed by two notaries before three witnesses only: the Lords repelled this, because there were four inserted and designed in the body. 2*do*, That, in the decreet *cognitionis causa*, the procurator's name was blank: this the Lords regarded not. 3*tio*, That the charge to enter was wrong signeted: this they also rejected. 4*to*, That a sheet in the executions and another in the comprising were cutted and falsified.

Before answer to this, the Lords ordained John Hamilton, writer of the apprising, to be examined. *Vide 12th December* 1678, in another MS. thir same parties. *Advocates' MS. No.* 726, *folio* 320.

1678. *December* 12.—John Hamilton, the writer of the apprising, being examined, and having, in some measure, confessed the cutting and altering of the two sheets, the one in the execution and the other in the apprising, in respect a wrong market-cross was inserted; the Lords first inclined to restrict the comprising to the precise sum for which it was led, cutting off penalties and sheriff-fees, and to make it redeemable, though the legal was expired; but, the parties not agreeing on that, the Lords, upon ocular inspection and John Hamilton's declaration, reduced the said comprising *funditus.*

I hear of a case betwixt Janet Gall and the E. of Weymss in 1675, wherein the Lords, upon naked inspection of the writ, and upon comparing it with other hand-writs of the party, found it false and null; but declared that her bypast using of it should not import any corporal punishment or infamy against her, as producer and user.

Thereafter Jack gave in a bill, craving that Muirhead might account to him for his intromissions.

The Lords, in regard it was represented that they were *fructus bona fide consumpti,* on the 8th of Feb. 1679, adhered to their former sentence; and reserved action to Jack against Muirhead and the other representatives of Muirhead's father, for the intromission with the maills and duties had by them, more than will satisfy the debts for which the comprising was led. *Vide infra,* 19*th Feb.* 1679; *item* 31*st Jan.* 1679, *Irvine;* 1*st Feb.* 1679, *Seton.*

Vol. I. Page 28.

1679. *February* 19.—In Jack and Muirhead's case, (12th Dec. 1678,) it was debated, if an apparent heir be served, but warn parties to remove before he is infeft as heir, but infefts himself before the term to which he has warned them, if it be sufficient to validate the warning, and if it will accresce. Some distinguished, if it was on a retour, it was sufficient; but not if it was on a precept of *clare constat,* as in this case of Jack. And thus the Lords positively found, that a seasine on a precept of *clare constat,* after a warning, is not enough; as Haddington observes, 4*th March* 1623, *Hermisheills.*

Others say, there is no difference upon which of the two it proceed; for a seasine, on a precept of *clare constat,* is a good enough title to remove *quoad* the subject-matter and lands contained in the precept of *clare constat,* but *non ultra.* It will not serve for an active title *extra subjectum proprium.* See June 1677, [page 151, § IV.] and 24th July 1679; and Stair, *tit.* Tacks, § 36.

Vol. I. Page 43.

1679. *July* 24.—David Jack pursues a removing against Claud Muirhead, from some tenements in Hamilton, (19th Feb. 1679.) ALLEGED,—The warning is null, because he was not infeft, the time of the warning, but after. REPLIED,—The seasine being upon a precept of *clare constat,* and it being before the warning, it accresces and retrotracted; and so was sufficient.

This being reported, the Lords found the warning null; because the very seasine was not only posterior to the date of the warning, but even to the term of Whitsunday, to which the warning was made to remove. The Lords had decided the same before, as Haddington observes, who makes a difference betwixt

a seasine upon a precept of *clare constat* and a retour. See Dury, *20th Jan.* 1625, *Elphinston.*

If the seasine be prior to Whitsunday, though posterior to the warning, and within the forty days, it will be more dubious if such a warning would be null. See Dury, 18*th July* 1625, *Wallace.* *Vol. I. Page* 52.

1680. *June* 22.—In the action David Jack against Claud Muirhead, (12th Dec. 1678,) craving him to count and reckon for his father and mother's intromissions, and thereby offering to prove him paid:

Alleged,—Their possession was by virtue of an expired comprising, (though now reduced,) and so they were *bona fide possessores, qui lucrantur omnes fructus perceptos ante litem contestatam.* Replied,—The apprising is *funditus* annulled, and so can never be a title.

The Lords repelled the defender's allegeance, founded on his *bona fides*, and find he is liable to count for the bygone maills and duties more than will satisfy the debt for which the comprising was led, though the legal be long ago expired. *Vol. I. Page* 103.

1681. *June* 18.—The case between them was an improbation of a tack of some lands, set by one to his mother-in-law. One of the two witnesses inserted therein being dead, the law held him for a proving witness; the other appearing, deponed he never remembered to have signed such a tack, and his reason for it is, because at other times he subscribed his name Herbertson, and in this it is Herbison.

The Lords having allowed the tackswoman to adminiculate and fortify the tack.—She adduced two extraneous witnesses, who are neither subscribing nor inserted in the tack; but they depone they were present, and heard it read, and saw it subscribed, but that Herbertson was drunk when he subscribed it.

The Lords, notwithstanding of the denial of one of the two instrumentary witnesses, yet sustained the tack, in respect the one who is dead *fictione juris* is reputed to affirm, and the two other (who are famous persons) declared they saw it signed: and for the diversity of his subscription, the Lords regarded it not; seeing it probably appeared he was then in drink.

This was judged arbitrary by some, though others saw not so much iniquity in it. And indeed *interpretatio capienda est ut actus potius valeat quam pereat.* *Vol. I. Page* 143.

1681. *June* 22. John Cheisley of Dalry *against* James and Robert Chiesley.

John Cheisley of Dalry pursuing an exhibition *ad deliberandum* against James and Robert Cheisleys, his brether: Alleged,—He had no interest; because, by a ratification granted by him to his father, he had ratified all the rights granted by his father to his said two brothers; and so it is, that their father had disponed all his estate (except what he formerly had given his eldest son, now pursuer,) in their favours. *2do*, He, being heir, could not call for moveable bonds, bills of exchange, and a sight of the count books, and other personal estate, he having no interest in the executry by law.

The Lords, on Pitmedden's report, found that the ratification did cut him off