

1636. *January 21.* GEORGE BUCHANNAN, Minister of Kirkpatrick, *against* His PARISHIONERS.

MR George Buchanan, minister of Kirkpatrick, pursuing the parishioners for spuilie of the vicarage teinds,—the Lords found this allegiance relevant, that the intromittors convened bruiked by tolerance of the apparent heir to an umquhile tacksman, who had tacks for terms to run, the years libelled; and found no necessity that the granter of the tolerance should allege that his author was served and retoured heir to the tacksman; seeing, as the apparent heir might himself lawfully bruik, so might any having tolerance from him; for thereby in effect he was heir *passivè*: but this tolerance was only found probable *scripto*, and not by witnesses.

*Vid.* 3d March 1626, Douglas; 14th February 1623, Grahame.

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1636. *February 12.* The SHERIFF of TIVIODALE *against* The LAIRD of GLEDSTANES.

THE Sheriff of Tiviotdale pursuing Gledstanes to remove from the lands of Coliford-hill, as part and pertinent of the barony of Cavers; who alleging that he was apparent heir to his goodsire, who was seised in the said lands, and by virtue whereof they had been forty years in possession: And the pursuer replying, that the exception ought to be repelled, except he condescended by what warrant his goodsire was seised,—if by charter, precept, or otherwise; for a naked sasine, without a warrant, cannot give right against an heritor to possess lands; and it is ever required, that, in such cases, the party allege that he is infest by one having a power, otherwise the exception is never admitted:—the Lords found the exception relevant in this Possessor Judgment, to defend the excipient from removing, in respect of the sasine standing, ay and while the same were reduced, as wanting a warrant; and found no necessity to allege any warrant here in this judgment.

*Act.* Craig. *Alt.* ———. Gibson, *Clerk.*

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1636. *February 13.* NICOL HUME *against* FISH.

ONE Nicol Hume, having sold his lands of ———, with consent of John Hume, his eldest son, and apparent heir to Archibald and Alexander Fishes, for the sum of 6000 merks; which sum, by the contract of alienation, is appointed to be paid to the son foresaid (the father being in distress for debt;) and according thereto, the sum being paid to them, and the buyer having received a discharge thereupon, subscribed both by the father and the son; which discharge the son desiring to be reduced upon a reason of minority and lesion: And the defender alleging, that he offered to prove, that, according to his dis-

charge, he truly and really made complete payment of the sum to the father and to the son, being both personally present together, and receiving the same; which was all he was obliged to do by the contract: likeas, the pursuer was then twenty years of age, neither was he fiar of the land, but the right was only in the father's person, and his consent to the father's alienation was in effect unnecessary and superfluous:—the Lords, in respect of this exception, assoilzied from this reason and action, and found the discharge sufficient, and sustained the same; neither was it respected that it was replied for the pursuer, that the real payment (which was offered to be proven for the defender by witnesses insert,) ought not to be respected; except that therewith the defender would also astrict him to prove that the sum, after the payment, was employed to his use; without which had been done the payment could not be sustained, although never so really made, *quia qui credit vel solvit pecuniam minori, quam scit, vel probabiliter scire potuit, minorem fuisse, consumpturam, sibi imputet; et talis solutio in jure solventem non liberat*: likeas the pursuer, in fortification of his reason, offered to prove that he had right to the land then, by virtue of tacks set to him, for the space of two nineteen years by the father; conform whereto he was in possession; and so he was heavily prejudged, it being of verity that the land was worth a far greater price to buy and sell than the price paid. Which answer was not respected; but the exception sustained, as said is, in respect the son had no other right, and the payment was made to the father and the son, both being present, and that the contract appointed payment to be made to the son, who received it; and the tack was not respected, the son remaining in the family with his father, and being then minor, and so being a private deed betwixt so conjunct persons; neither was it found necessary to prove the real payment, in respect of the discharge subscribed both by the father and the son; in respect of which discharge absolvitor was given.

*Act.* ———. *Alt.* Craig. Gibson, Clerk.

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1636. *March 1.* ALEXANDER GUTHRIE *against* The TENANTS of FRIER-CORSE.

MR Alexander Guthrie, being infest in the miln of Frier-corse and astricted multures thereof; and alleging, that there was a decret obtained at the instance of Mr Samuel Kirkpatrick, author to him in his right, against the tenants of Frier-corse, finding them to be astricted to the said miln, and discerning them to pay, in time to come, such a particular quantity of astriction: upon this decret the said Mr Alexander raises letters of horning, and charges the said tenants to pay the quantity of the multure for their corns abstracted divers years bypast, since the said decret, *viz.* 1632, 1633, 1634, and 1635 years. And the letters being suspended, as given against all form and practique, and against the Act of Parliament, which prohibits such summary charges of horning to be generally executed for any special quantity, until the time that particular parties be summoned for that effect; likeas in these cases there is no other form allowed but to pursue by ordinary action and pursuit, for abstracted multures, as ever has been observed in all times before; and further, this pursuer