that they found a man's writing of two sheets of paper sensibly, and to good purpose, sufficient to sustain a disposition of his heritage made before, though they could not qualify he ever came to kirk and market thereafter; because they judged this equipollent thereto, and a manifest demonstration of *sanitas mentis*. As also, in *February*, 1668, in the action *Pargillis* against *Pargillis*, it was found that the riding on horseback, though the disponer was proven to be sick, and to have been supported on his horse, were sufficient qualifications of health: *ergo* going to kirk and market is not absolutely necessary for validating such dispositions. Yet all thir were answered; and it was farther urged, that on this consideration the Parliament had lately, in 1669, refused to allow parents the power of providing their younger children, (than which nothing imaginable can be more favourable,) to small portions on their deathbed. At last the Lords would find no acts equipollent to going to kirk and market; but that it behoved so to be done in *forma specifica*: and resolved they would make that a constant practick by which they would decide the like cases in all time coming.

Vide *infra* 11*th December*, 1677, *Lockhart, No.* 677;—*Stair's Decisions, 3d February* 1663, *Robertson and the Town of Lanerk.*

Advocates' MS. folio 61.

1669. *July* 28. WAUCHOP of Niddry, and his SON JO. WAUCHOP of Edmiston, *against* J. H. of Waughton, and ALEXANDER COCKBURNE of Popill, and the TENANTS of Popill.

THE Laird of Niddry having right by progress, from Raith of Edmiston, to the teinds, parsonage and vicarage, of the lands of Popill, (the conveyance whereof see *alibi* beside me,) pursueth the foresaid persons for payment-making to him as titular, or come in his place, of the valued bolls due furth of the said lands for the space of thirty years by-past. Against which it was ALLEGED, 1*mo*, There could be no process sustained against thir defenders, because the principal and original tack of the foresaid teinds, set by Claud, Commendator of Paisley, and Dean of Dunbar, to Sir George Hamilton, and Greinlaw, his son, is not produced.

ANSWERED and REPLIED,—That the allegeance ought to be repelled, in respect of the decreet of prorogation of that tack produced, which doth particularly mention the production of the foresaid tack before the commissioners of the Plat; which decreet of prorogation is dated the last of January 1678: by virtue whereof, the pursuers and their authors have been in possession of the said teinds past all memory.

DUPLIED,—The allegeance stands relevant, notwithstanding of the answer, in respect the prorogation takes not effect till the expiry of the principal tack; 2*do*, If the principal tack were produced, as it ought to be, there might arise intrinsic nullities therefrom, which might cast the tack itself.

TRIPLIED,—The defenders cannot be heard to propone any thing against the non-production of the tack; not only in respect the same is expressly mentioned in the foresaid decreet of prorogation, but also the same is homologated by the defenders, in so far as there was a decreet of valuation of the said teinds, against the pursuer and his authors; and they have been in use of payment of the valued

teind duty ever since: as also, there was a decreet of buying following thereupon.

QUADRUPLIED,—No respect can be had to the payment of the tack-duty and homologation inferred therefrom, except only as to these years, whereof the tack-duty was paid. *2do*, No respect can be had to the foresaid decreet of buying, to infer any homologation, unless the pursuer instruct a valid and sufficient right in his person to these teinds.

QUINTUPLIED,—That the hail dispute proponed by the defenders ought to be repelled, in respect of the foresaid decreet of prorogation produced, and which bears the production of the principal tack then, and so is *probatio probata*, and must be sufficient against thir defenders, who can pretend no right to thir teinds; and so the defences as to them are *jus tertii*, and the Lords' sentence will be to them a sufficient warrant.

The Lords' answer having been craved on this, they repelled the foresaid allegeance, duply, and quadruply, in respect of the reply, triply, and quintuply, made thereto, founded upon the foresaid decreet of prorogation produced; which mentions the foresaid tack and homologation of the same, by payment of the foresaid teind, at least the valued teind duties thereof.

Then it was farther ALLEGED for Waughton, that he ought to be assoilyied from the valued teind-duty of 1646, and all preceding crops, because the same were paid to the said umquhile Mr. Ja. Raith of Edmiston, the pursuer's author and cedent, conform to his discharge, dated the 7th of August, 1647. *2do*, The pursuers could not acclaim the valued duties for any years since the decreet of buying, but at most the annualrent of the price.

ANSWERED,—The first ought to be repelled, in respect of the discharge produced, which is only granted for the year 1646, to Jo. Johnston, tenant in Popill, but does not discharge preceding years. To the *2d*, Ought to be repelled, unless the price had been paid: and if this should be sustained, the titular should never get payment of the price, but only annualrent, after the decreet of buying; which were absurd.

REPLIED,—Albeit the preceding years be not discharged *per expressum*, (it being only a discharge to a tenant who paid the same, and possibly possessed only that year;) yet it must be presumed, that Waughton, the heritor, or his tenants, paid the preceding years: else Mr. Wm. Raith would not have received or discharged that year, but some preceding year, whereof he was unpaid; at least he would have inserted a provision, that it should be but prejudice to him to seek preceding years, which undoubtedly he would have done if any had been resting. And craved the pursuers' and their cedent's oaths of calumny, if they had just reason to deny that the preceding years were paid. And to the second allegeance, oppone their former answer.

DUPLIED,—That they oppone the common axiom, that it must at least be a discharge of three consecutive years that can infer in law a liberation from all preceding: but however they declare, they insist *primo loco* since the year 1646.

The Lords repelled the second allegeance about the annualrent since the decreet of buying, in respect of the answer made thereto; and found the defenders liable for the valued bolls and silver duty ever since 1647, and in time coming, ay and while the price be paid.

Farther ALLEGED for Alexander and Patrick Cockburnes, who have a right of wadset in the said lands,—That they cannot be liable but since the years of their possession, which began in July 1653; because the foresaid teind or valued duty is not *debitum fundi*, but the possessors are only liable for the same.

Which allegeances the Lords found relevant; and therefore found the said Alexander and Patrick Cockburnes only liable for the foresaid valued teind duty, and silver duty, the crop and year of God 1653, and since syne.

Advocates' MS. folio 61.

1668. *July* 24. ALEXANDER RITCHIE *against* GEORGE WAUCHOP of Gleghornie.

ALEX. RITCHIE, son, and heir served and retoured, to umquhile Mr. James Ritchie, his father, pursues for poinding of the ground of the lands of Cleghornie, upon an heritable bond, containing the sum of 12,000 merks, and infeftment taken thereupon.

Against which, it was ALLEGED,—That no process ought to be granted upon the heritable bond, till the pursuer deliver and procure to the defender a disposition from Doctor Jo. Levingstone to the teinds of Gleghornie, conform to a minute of contract past betwixt the pursuer's father and the defender, and which was partly the onerous cause for which the said bond and infeftment was granted.

ANSWERED and REPLIED,—The foresaid allegeance was not relevant *hoc loco*, but the defender must pursue the minor and his tutors; who cannot be holden to fulfill that part of the foresaid minute, anent the said teinds of Cleghornie, until decreet be recovered against them therefore: especially considering that the price allowed for the said teinds is a very small part of this principal sum of 12,000 merks, specified in this heritable bond, and which haill sum lies in the defender's hands; and therefore he cannot, upon that pretence, stop now the pursuer, who only craves poinding of the ground for his annualrents.

The Lords repelled the allegeance, in respect of the answer and reply made thereto, and therefore decerned.

Vide *infra, Jan.* 1676, No. 456; [thir same parties.]

Advocates' MS. folio 62.

1669. *February* 11. JANET SHAW *against* MARGARET CALDERWOOD, relict of George Shaw.

IN the action of reduction, pursued by Janet Shaw, heir served and retoured to Charles Shaw, who was son and heir served and retoured to umquhile George Shaw, against Margaret Calderwood, relict of the said George Shaw, to exhibit a disposition of the liferent of certain tenements of lands lying in Leith Wynd, made to her by the said George, to be reduced, 1*mo*, because all dispositions made by persons on death-bed, and after they have contracted a mortal disease, and whereof they never recovered but die, in favours of any, in prejudice of the immediate