1590. NEWTON *against* The TUTOR of LANGTON.

THE tutor of Langton being pursued by one Newton for the spuilyie of certain goods, corns, and cattle; Alleged, That the pursuer having committed a slaughter, the defender, being sheriff of Berwick during the minority of Langton, intromitted with the said goods and gear by virtue of his office, and offered that which was extant again. Answered, That the Act of Parliament gave no power to sheriffs to intromit, but only to arrest, especially the party not being convicted. In respect of which reply the exception was repelled.

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1591. DAVID WOOD of CRAIGE *against* DAVID MONCUR.

ROGER Wood of Craige, liferenter, contracted with his son David, fiar, to excamb the lands of C. with the lands of D. during their lifetime; in the which contract it was provided, that the tenants and possessors of the lands should not be removed, but should continue in their possessions as long as their tack lasted which they had to run. After both their deceases, David, the fiar's son, warned one David Moncur, tacksman of the lands of C. to flit and remove. Excepted, That he ought not, because he had tacks for terms to run, set to him by the pursuer's father, to whom he was heir, and so behoved to warrant the same. Replied, That any tack he had was by virtue of the excambion, and the excambion being made but for the lifetimes of the two contractors, it could not be extended to a third person, not being a contractor, nor any mention being made of him in the said contract. Duplied, That, albeit the defender was not contractor, yet there was a provision made in the same in his favours, that his tack should be kept to him, which provision the complainer should keep to him, he being heir to his father. The Lords found that the provision ought to be extended to the third person, being tacksman.

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1591. COLONEL STUART *against* The TENANTS of HOUSTON.

COLONEL Stuart, cessioner and assignee constituted by John Steil to his liferent of the lands of Houston, warned certain tenants to flit and remove. Excepted, That they had tacks for terms to run, from them who had right to set them, *viz.* Mr John Sharp, who was heritable proprietor of the said lands, and who had been in possession of them, he and his authors, for the space of thirty-eight years. Replied, That any infeftment Mr John or his authors had, the same proceeded from Matthew Hamilton of Milburn, unto whom the cedent John Steil disponed these lands, with reservation of his own liferent; and so Mr John or his authors could be in no better case than he to whom the first alienation was made. Duplied, That, according to the common law and daily practice, the defenders and their authors, being so long in possession by virtue of

titles standing unreduced, without any reservation of liferent, they could not be compelled to enter in question of their rights and titles, but behoved *gaudere privilegio interdicti, uti possidetis.* To all this it was answered, That Mr John Sharp could never be heard to say against the reserved liferent of John Steil in Matthew Hamilton's infeftment; because he had used the said infeftment judicially, and had obtained decreet and sentence by virtue thereof, in so far as the Lords had decerned a reversion given by John Hamilton of Shawton, (who was author to Matthew,) to appertain to him, *tanquam jus superveniens et quod accreverat illi,* because he had bought the lands. And so, having both judicially confessed the said liferent, and having allowed the infeftment whereinto it was reserved, and having also reported commodity by virtue thereof, he behoved, *ex necessitate,* to abide by the same, and consequently to fulfil the reservation of the liferent specified therein. The Lords, *in presentia regis,* admitted the exception qualified with the thirty-eight years possession. *Nonnulli DD. contra.*

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1620. *January* 8. The LAIRD of CLACKMANAN *against* JAMES ALLARDES.

THE Laird of Balnamoon having united the mains of Balnamoon and other lands lying contiguous to it, within the parish of Menmuir, in a barony called the barony of Menmuir, 1610: Long after, he gives an infeftment of an annual-rent of 600 merks to the Laird of Clackmanan, to be uplifted out of the lands and barony of Balnamoon, lying within the parish of Menmuir. When Clackmanan sought the ground to be provided for his annual-rent, it was alleged by James Allardes, who had comprised certain parcels of land lying within the foresaid barony from Balnamoon, that his lands should be free of the poinding, in respect they lay not within the barony of Balnamoon, but that of Menmuir. Replied, That it was only *falsa designatio, quæ non debet vitiare actum cum constet de corpore;* specially seeing he offered to prove that he had taken sasine at the place of Balnamoon, where it was appointed to be taken in the charter of union; likeas, the whole lands lay contiguous. Duplied, He being infeft in the barony of Balnamoon, which was not, his sasine could be extended no further than the mains of Balnamoon, and not to the rest of the lands contained in the barony of Menmuir. Triplied, If the word of Balnamoon had been left out, and he had been only infeft in his barony lying within the parish of Menmuir, it had been sufficient; and the adjection of that word, which was superfluous, should not vitiate the rest, *cum utile per inutile non vitietur.* After great reasoning and diversity of opinions, it was carried, by one vote only, that the wrong designation of the barony of Balnamoon for Menmuir should not prejudge the pursuer. And so the exception was repelled.

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