

1629. *March 20.* JAMES WEEMS *against* JEAN MACKGILL and WILLIAM GOURLAY, her HUSBAND.

By contract of marriage between William Gourlay of Kincaig and Jean Mackgill, Thomas Gourlay, father to William, obliges himself to infest her in the Sunny-half Lands of Kincaig; and also to warrant and defend her, during her lifetime, from payment of any teinds of that part wherein she was to be infest, except the tack-duty, he being himself tacksman of his whole teinds: And, in case her husband should decease before his father Thomas, she set a back-tack to Thomas during his life, of the same lands, for payment of five chalders victual and 300 merks, as a duty for both stock and teind; conform whereunto Thomas possessed all his time, for the space of fifteen years, for payment of that duty. The said Thomas, before his decease a year or two, makes James Weems assignee to his tack of the teinds; upon which the assignee served inhibition against Jean and her husband, the laird of Finmouth, and pursued a spuilvie. Alleged, That obligation in the contract of marriage, and her possession conform. Replied, It was only personal, and could not strike against a singular successor. Yet the Lords found the exception relevant, in respect that contracts of marriage are favourable; the true meaning whereof was to be looked into.

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1629. *June 26.* WILLIAM ROBERTSON *against* MARGARET DALMAHOY.

WILLIAM Robertson, as assignee constituted by James Traquair, brother and heir to umquhile Robert Traquair, husband to Margaret Dalmahoy, pursued the said Margaret as intromissatrix with certain moveable heirship, libelled belonging to Robert, and in his possession the time of his decease. Alleged, She could not deliver the heirship libelled, because the defunct, whose heirship is craved, had two children that lived long after their father, whom she entertained all their lifetime, having no other means to do it upon but the said heirship. Replied, Not relevant against the pursuer, who is assignee by the heir; likeas the defender alleged no right proceeding from her bairns, who were never served heirs to their father; and, as for their entertainment, it should be imputed to her motherly piety; and she could not have retention of the heirship libelled, especially they being yet extant. The Lords sustained the exception.

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1629. *June 27.* The LAIRD of CARNOUSIE *against* The LAIRD of MELDRUM.

IN an action between the Laird of Carnousie and the Laird of Meldrum, Carnousie gave in a supplication, showing that he had summoned certain witnesses to depone in that cause, who were servants to Meldrum, whom he could not get to compear for fear of their master, albeit he had used his whole diligences

against them ; and therefore desired letters to charge Meldrum, their master, to produce them. Which desire the Lords granted.

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1629. *July 17.* ANDREW CALDWELL *against* ROBERT STIRK.

ANDREW Caldwell pursued Robert Stirk for a house-mail of a tenement in Dumfermling belonging to the pursuer, and that for the term betwixt Whitsunday and Martinmas, 1624. Alleged, absolvitor ; because the pursuer sold the tenement to the defender before Martinmas ; and so he, being denuded by virtue of that disposition before the term, could pretend no right to the subsequent term's mail. Replied, That ought to be repelled, in respect the disposition was but immediately before the term, *viz.* the sixth of November, and the defender was not infeft till after the term ; likeas the money which was the price of the house, was not payable till after the term ; and so, unless the mail had been discharged, it is due to the pursuer. Duplied, In respect the pursuer had no right at the term, he cannot have that term's mail, unless it had been specially reserved. The Lords found the exception relevant.

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1629. *July 23.* ARCHIBALD MONCRIEF *against* ROSS of BALNAGOWAN.

AN action of mails and duties was sustained at a compriser's instance, because a comprising gives a man sufficient right to seek the mails, &c. although he be not infeft upon his comprising, if he hath to do with the tenants only, or with him from whom he has comprised, and not with another creditor who has done more diligence.

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1629. *July 29.* JAMES LANDS *against* JAMES DOUGLASS and ROBERT GEDDES.

JAMES Lands, as father and administrator of the law to his son Robert, heritable proprietor of a tenement in Edinburgh, sets, in tack and assedation, the same tenement to his brother, John Lands, for seven years, for the yearly payment, by him, of 675 merks. James Lands, being addebted in certain sums to James Douglass and Robert Geddes, makes assignation to them of the same tack-duty, aye and while they were paid : Upon which assignation they charge John Lands for payment of his tack-duty, who suspended upon this reason, That James, as tutor, &c. could not assign the tack-duty for payment of his own proper debts. Answered, As he had power to set the tack, being administrator to his son, so he might assign the duty. *2do.* This allegiance was not competent to the defender, who was obliged to pay to the cedent, and consequently to his assignee ; and as James, if he had received payment of the tack-