No 54.

*** Spottiswood reports the same case:

JOHN MORISON having comprised certain lands from the Laird of Orchardton, pursued the tenants for payment of their mails and duties. *Alleged*, That they were tenants to John Brown of Mollance, who, long before the pursuer's comprising, or the debt which was the ground of it, had tack and assedation set to him by Orchardton of the same lands, whereof there were terms to run; and that for payment of certain of Orchardton's creditors of their yearly annualrents, and so much of their principal sums as the rents of the lands would extend to, by and attour the annualrents: conform whereunto he hath been in possession divers years of uplifting the mails and duties, and in paying the creditors so far as they did extend to. *Replied*, Not relevant to exclude the pursuer's right, who must be preferred to all the rest of the creditors, although prior, because of his diligence, having comprised and being infeft. *Duplied*, His diligence cannot prejudge the tack that was prior to it, which tack set to Mollance in favours of the creditors, is all one as if it had been set to the creditors themselves; in which case they would have been preferred to the compriser. *Triplied*, The tack is no more in effect than the assignation to the mails and duties, whereunto the assignees can have no more right after the cedent is denuded of the property.——THE LORDS repelled the allegeance, and preferred the compriser to the other creditors.

Spottiswood, (COMPRISING) *p.* 54.

1662. *January* 25. CUNINGHAME *against* TENANTS of POMONT.

No 55.
A woman assigned to her creditor, for his security, the arrears of rent which should be due by her tenants at her death. Having afterwards married, her husband claimed those rents *jure mariti*, which requires no intimation. Found, that being liable for his wife's debt, he could not with effect hold this plea.

SIR JAMES CUNINGHAME, servitor to the Lord Chancellor, having a bond of the late Duchess of Hamilton's, whereby she bound herself, her heirs and executors, to pay to him a sum at the first term of Whitsunday or Martinmas after her death; and, for his security, she did assign him to as much of the readiest of her rents pertaining, or that should pertain, to her at her decease, as should pay the samen. The said Sir James did intimate the assignation to her tenants about the time of her death, and called them, and Mr Dalmahoy her husband for his interest for payment. It was *alleged* for John Dalmahoy, That the obligation *incipit ab hærede*, and the sum of money payable, not till after her death, and consequently the rents which, the time of, and before her death, did belong to her husband *jure mariti*, and as *dominus bonorum*, cannot be made furthcoming for this debt. It was *answered*, That the obligation *incipit a debitore*, by which she has obliged herself, her heirs, and executors; and though the term had been 20 years after her death, yet *cedit dies*, it is a debt upon her *a die obligationis*; and seeing the husband has no right to the wife's moveables or rents, but *cum onere debitorum*, the rents assigned (and which assignation the husband cannot

quarrel, nor any deed lawfully made by the wife when she was *soluta*) ought to be made furthcoming to the pursuer. No 55.

THE LORDS repelled the allegeance. *In præsentia.*

Fol. Dic. v. 1. *p.* 181. *Gilmour, No* 24. *p.* 19.

1666. *February* 6. WATSON *against* FLEMING.

No 56.
Assignation out of the first and readiest of the teinds of several lands in security and payment of a debt, was not found good against a posterior apprising of the lands and teinds.

THERE being an infeftment of annualrent granted out of lands and teinds, and an assignation to the teind duties, in so far as extended to the annualrent, the teinds and lands were thereafter apprised from the common author before the annualrenter had obtained possession, by his real right, of the annualrent, but only by his assignation to the teind duties. It was *alleged* by the appriser, That the assignation to the teind duties could give no longer right than the property thereof remained in the cedent's person; which ceasing by the apprising, the assignation ceased therewith, as is ordinarily and unquestionably sustained in assignations to mails and duties of land. It was *answered*, That there was great difference betwixt lands which require infeftment to transmit the same, and teinds which require none, but are conveyable by an assignation; for, if this had been by an assignation to the tack of teinds, *pro tanto*, it would have been unquestionably valid; and therefore being an assignation to the teind duties, it is equivalent as a disposition to lands, which would carry the right of a reversion, though not exprest, and though there were no more to dispone but the reversion only. It was *answered*, That if the assignation had been to the teinds, that is to the right, or if it had been to the full teind duty in the tack, or of certain lands, then the case might have been dubious; but being not of the teind duties of any particular lands, but out of the first and readiest of the teinds of several lands, it was not *habilis modus*.

Which the LORDS found relevant.

Fol. Dic. v. 1. *p.* 181. *Stair, v.* 1. *p.* 348.

1732. *November.* BAILLIE *against* EARL of MARCH.

No 57.

A PROPRIETOR of an entailed estate having granted to a creditor assignation of mails and duties, the assignation, after the granter's decease, was found effectual against the heir; for, though he did not represent the defunct with respect to the debt in question, contracted contrary to the entail, yet, the entail not being recorded, the debt might be made effectual against the estate by adjudication, and therefore the heir could have no just interest to quarrel the form of the conveyance. *See* TAILZIE.

Fol. Dic. v. 1. *p.* 181.