

being a son begotten by the father in another marriage, who could only be charged to enter heir to his father, to the effect he might employ the sums of money provided to that daughter; and that the said daughter being served heir, her service was null. *Item*, FOUND that the mother dying, though *regulariter non debetur legitima ex parte matris*, yet the mother's testament being confirmed though she had a husband living, the child behoved to have not only the third, which belonged to herself, but also the third belonging to her dead mother; not as *legitima*, but as the third which belonged to the child by the father's decease, which came in place of the mother's third.

Act. Sinclair and Dinmuire. *Alt.* Lockhart.

Advocates' MS. folio 55.

1666. *January 15.*

Jo. SCOT *against* HOG.

IN a case betwixt Jo. Scot, the Sawcer of Edinburgh, and one Hog, FOUND that the principal lands being dispoed by a base infeftment, and other lands in warrandice also base, and the acquirer of the lands being in possession thirty or forty years, and thereafter being evicted from him by a decreet; the said acquirer has recourse to the warrandice: though the heritor thereof alleged he could not call for the mails and duties of the warrandice, because he stood infeft in these lands by a public infeftment, holden of the superior, by virtue whereof he and his authors had been thirty or forty years in possession but interruption.

REPLY,—The pursuer being infeft, though base, in the principal and warrandice lands, long before this public right, and being in possession of the principal lands long before the defender's right, his possession of the principal must be reputed as possession of the warrandice; and so *fictione juris*, he being prior both in right and in possession, he ought to have a sentence against the tenants of the warrandice.

The Lords having gravely considered this case, both the importance, difficulty, and inconveniences of it, found, that though the defender's right was public, and clad with possession long before the pursuer's right, yet he ought to be preferred to the mails and duties of the warrandice lands, &c.

Act. Lockhart. *Alt.* Cunyghame.

Advocates' MS. folio 55.

1666. *February 12.* LORD LEE *against* PORTEOUS.

MY Lord Lee having bought the lands of Symonton, with the burden of some wadsets, in the which wadsets it is provided that after redemption the wadsetter should have a five years tack of the land for payment of a small duty, far within the rent of the money; and my Lord, having redeemed the wadset to which five years tack is subjoined, did raise a reduction on the old act of Parliament made in King James II.'s Parl. 6. cap. 19. declaring all tacks set for half mail or nearly, not obliging. Against this

ALLEGED, That that act was totally in desuetude, and tacks subjoined to wadsets have constantly been reputed valid notwithstanding that act of Parliament. ANSWER, Though persons have bruiked tacks without controlment past memory of man, yet the act of Parliament standing unrepealed, and it never having been questioned if sic tacks were valid or not; unless it were alleged, That by former decisions *in foro contradictorio* tacks of this kind were sustained, there is no reason why the act of Parliament should not be kept, considering the equity and justice of it.

The Lords reduced the tack and revived the force of that old act of Parliament. Which was well decided.

Act. Lockhart. *Alt.* Maxwell.

Advocates' MS. folio 55.

1666. *February 15.* LORD BORTHWICK *against* _____

IN this case of my Lord Borthwick with some of his wadsetters, found, though by the act of debtor and creditor the wadsetter is bound to count for the duties of lands more nor pays him his annualrent, yet that the wadsetter is not bound thereto from the date of the act of Parliament, but from the time the debtor requires the creditor to accept of security for his money; at which time the creditor may declare himself either to retain his possession or to quit it. And found that paragraph of the act conditional.

Item, found a party could not renounce the benefit introduced in their favours by a public law, before the law was made.

Act. Cunyghame. *Alt.* Trotter.

Advocates' MS. folio 56.

1666. *February 15.* ALEXANDER *against* THOMAS COULL.

IN this case of Alexander and Thomas Coull, found, that where one is in possession of lands, though by a right thereafter reduced, yet that the possessor is not liable for the mails and duties but from the decret of reduction, and not from the time of the citation: though the decret bear the right to have been from the beginning, and in all time coming null; which is only *stilus curiæ*.

Act. Yeoman. *Alt.* Dinmuire.

Advocates' MS. folio 56.

1666. *June 20.* JEAN CUNYGHAME *against* CUNYGHAME of Robertland.

IN a case betwixt Jean Cunyghame, as donater to Sir David Cunyghame of Robertland's escheat and liferent, against this Robertland, found, That though Sir David had his wife and family in Scotland, yet being furth of the country,