

which she was provided in liferent by her contract of marriage. It was answered by the creditors, That she had had a great sum of money in her hand, without paying any interest for it for six or seven years, out of the interests of which she must pay herself the annualrent. But to this she replied, that no executor is bound to pay interest for sums not bearing annualrent, uplifted by him, because he is obliged to keep the money by him to pay any creditor who shall recover decreet against him; and she was to be considered as any other executor though she happened to be likewise a creditor: Which the Lords sustained, *dissent*. Auchinleck. In this case the relict claimed no preference for her debt because she was executrix; and my Lord Pitfour said that she was not entitled to any, notwithstanding the decision in a case which he mentioned, observed by my Lord Kaimes in his late Collection.

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1766. *February 12.* MARY BLAIR *against* ———.

THIS was a question about proving a marriage by the acknowledgment of the husband. The fact was, that a man and a woman had been long in the way of cohabiting together privately, but not at all as man and wife. One night, as they were together, two women, not of any rank, listened at the door, and deponed that they heard him say, that he would never deny her as his wife.

Lord Gardenston said that there were four ways in this country of making a marriage: the first was by the religious ceremony, the second was by a promise and subsequent *copula*, the third by living publicly as man and wife, and the fourth was by acknowledgment of a woman as a man's wife. As to the last method, he thought it must be solemn and public, and not at all equivocal or ambiguous, and not transitory or occasionally, but deliberate; whereas what the man said in this case, supposing it proved by unexceptionable witnesses, which he did not think it was, was not, properly speaking, an acknowledgment, as it was not spoken before witnesses, and it was very plain, from some circumstances that followed after, that the man would not have said it if he had thought any body had been hearing him. And all the Court were of this opinion, *dissent. tantum* Pitfour.

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1766. *February 18.* FACTOR upon the SEQUESTERED ESTATE of KELHEAD.

SIR John Douglas of Kelhead, after a ranking and sale of his estate was raised, set a tack to a tenant in possession, to endure for 15 years, and to commence at the expiration of the current tack, which was at the distance of four or five years. Two or three months after setting this tack, Sir John's estate was sequestrated, and a factor appointed by the Court, who now pursues reduction of the above tack; and the Lords unanimously reduced it, (*dissent. tantum* Pitfour,) upon this ground, that it was not an ordinary act of administration, and therefore Sir John could not do it after

a ranking and sale of the estate was raised. But I think the thing is otherwise clear upon the principles of law; for the new tack, till it was clothed with possession, was no more than a personal obligation, which could not be effectual either against a purchaser, or against creditors entering into possession. There might have been some more doubt, if the tenant had renounced his old tack and taken a new one for nineteen years; but I should have been of the same opinion even in that case: and there I think the principles the Lords went upon will very well apply to an extraordinary act of administration, which Sir John could not exercise while his creditors were *in cursu diligentiae*, to get the estate sequestrated.

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1766. *March 4.* SPENSER BOYD *against* ———.

THIS case was before the Court 22d January last, and this day the Lords adhered. Lords Pitfour and Coalston gave it as their opinion that a personal right to lands was affectable by every personal obligation relative to the lands; yet, if it was intended that the proprietor should be debarred from alienating or contracting debts, it must be done in the form of prohibitory, irritant, and resolute clauses; because, although the Act of Parliament 1685 does not relate to such personal rights to lands, yet, by the common law, before that Act was made, a proprietor could not be restrained from the free use of his property except in that form, and it would be unjust that a man's debts should not affect his estate, and yet that he should be allowed to enjoy it. The only difference, therefore, in this matter betwixt a personal and a real right to lands, is, that, where the right is real, there must be two registrations, both of the tailyie and of the sasine, whereas in the case of a personal right there is no occasion for any recording at all.

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1766. *June 13.* DODDS *against* ———.

THE question here was about lands purchased by a wife, the disposition bearing that the price was paid by her, though it did not appear that she had any money of her own. These lands she afterwards sold, and the husband now comes and claims them from the purchaser, upon this ground, that the money with which they were bought was the husband's, which the wife had either stolen, or the husband had given her it. Lord Pitfour said, that in either case the singular successor was safe, for, having purchased the lands upon the faith of the records, he was not concerned how the money was got with which his author bought the lands; and the case is quite different from that where the lands themselves are gifted by the husband to the wife; for, in that case, no doubt, the husband, by revoking the donation, annuls the sale, and can evict the lands from any purchaser from the wife. Lord Kaimes went so far as to say, that even the husband could not have action against the wife