

1649. *December 6.* EUPHAME BLAIR *against* MARGARET BLAIR, and her Husband TAYERIE.

IN the process by Euphame Blair, eldest sister, who went out of the country, against Margaret, the younger, and her husband Tayerie, who intromitted with her father's gear and heritage,—the Lords found, That the father giving, by the elder's contract of marriage, 2230 merks of tocher, and, in the same, restricting the rest's tocher to £1000, with condition and provision that the eldest should have as much as any of the rest at his decease ;—they found, I say, that the defender having gotten 1600 merks in tocher, suppose she had, in her contract, that she should get as much as any of his bairns had gotten, or was to get, should not be meant or understood of making her tocher equal with the eldest, but of what should be by and attour at his decease, there being then other daughters alive ; suppose now, after the father's decease, the rest being dead, the defender urged to be alike with her elder sister in all, *obligatione confusa*, and that upon her contract of marriage. For the Lords thought, that, according to law, *prior obligatio in contractibus prevalet* ; and he might have given the second a like tocher with the first, if it had been his mind, *licet in ultimis voluntatibus posteriora derogent prioribus*.—See page 430.

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1649. *December 6.* KER *against* KER and HEPBURNE.

IN the double pointing, Ker against Ker and Hepburne, the Lords thought not the diligence done by James Ker, upon his arrestment before the commissary of Peebles, of that effect, in respect of anteriority, against Hepburne, who got decret posterior to him before the Lords ; because Hepburne's process was sisted by concurrence of the commissary of Peebles himself, in taking term after term to produce the debtor in whose hands the monies were arrested.

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1649. *December 6.* The LAIRD of ARDROS *against* THOMAS ABERCROMBIE and JAMES CHRIGHTOUNE.

THE Laird of Ardrös prevailed against James Chrichtoune for a debt aughting by Thomas Abercrombie of that ilk to his father, because, by the bond charged upon, the said James was obliged to relieve the said Thomas of that debt ; notwithstanding that James opponed a renunciation of the lands, by payment of 12,000 or 13,000 merks. This bond of Thomas Abercrombie to Ardrös his father, bearing the sum to be eiked to the reversion, because it was never registrate, and remaining so, personal, it was understood that the said James did refuse to pay it, the time of the renunciation granted. Whereupon, within 24 hours, Ardrös his father caused arrest some of the price of the land : but deceasing, or otherwise hindered, while the said Thomas Abercrombie came out of Ireland. He then, being urged upon his own bond, did assign this bond of

warrantice and relief, whereupon the suspender is charged : notwithstanding it was alleged, in fortification of the reason, that John More received the said debt, being 1,000 merks, and that my Lord Innerpeffer, in the pursuit of declarator or some such process, had taken some dealing in the matter ; and therefore the suspender urged that they might be examined *saltem ex officio*. Which the Lords refused.

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1649. December 6. The TENANTS of RIPPET *against* The EARL of HOME and MARY JOHNSTOUNE.

IN the suspension of double pounding at the instance of the Tenants of Rippet against the Earl of Home, and Mary Johnstoune, relict of Mr James Thomsons,—the Lords preferred the said Mary *in judicio possessorio* ; because, by virtue of her contract of marriage, she and her umquhile husband had been in possession as having right from Archibald Thomsons, her father-in-law, and John Stewart of Coldinghame ; likeas, in a prior suspension, the letters were found orderly proceeded : the Earl of Home, his procurators, having produced nothing. And suppose having produced now, they did allege that, by a decret in the 1643, the said Earl of Home was reponed to all the teinds of Coldinghame, for satisfaction of £300 sterling ; in payment whereof the said John Stewart, and others obliged, had failyied : the said Archibald Thomson being called, but not his son nor good-daughter, who were in possession.

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1649. December 6. JOHN HORSBURGHE *against* JOHN MAXWELL.

MR John Horsburgh pursuing, by bill, John Maxwell before the parliament, is remitted to the session : where the said Mr John Horsburgh, having delivered to the said John some Irish bonds, addebted by the folks of Duntreath to his umquhile father, craves redelivery of the bonds, or else that he pay him the sums contained therein ; but it was excepted, that he, being an advocate, was not tied to prove redelivery, affirming that he had given them back to him. It was replied that he took a factory for the pursuit, and so was not in the case of an advocate. He duplied that it was only a procuration taken from the said Mr John, as use is, because he was a resider in England. The Lords examined witnesses *ex officio*, and found it a factory ; and, having taken the pursuer's oath whether or not he had gotten back the papers, he denied the same ; whereupon the said John Maxwell, defender, was decerned to deliver those bonds, or else to make them up by proving the tenour thereof, and make them as effectual, as concerning the responsality of the parties, as if they were presently redelivered ; and, for that purpose, gave him three whole sessions after this, to insist thereon. And herein it was disputed amongst the Lords, anent the probation of the tenour of the bond, how difficile it might be ; both in respect of discharges, and in respect of the common rule of law, that *instrumentum nominis apud debitorem repertum presumitur rescriptum et solutum*.

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