time of the roup, else he would not have bid so great a price. Yet the Lords thought, where a party does not know the holding of lands, they ought to presume they are ward. But this was reserved to further consideration.

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1694. *July* 11. WALTER BUCHANAN and JOHN ANDERSON, Tacksmen of the Milns of GLASGOW, *against* The MAGISTRATES thereof.

THE reason of suspension was, They craved abatement, because there was a committee named by the town-council, to consider on their losses, and they had made a report that they deserved some ease.

The Lords found, that the report of a committee, not approven, was not probative; though some urged it might be produced before answer.

The next point put to the vote was, Whether it was a relevant exception against paying the whole tack-duty, that a contest arising between the magistrates and the maltmen, anent their obligation to go to the milns with malt bought within the thirlage, there was a great abstraction during that time, whereby they were losers.

The Lords considered, that setters of tacks were not bound to warrant against these eventual chances in fact, but they took them with their hazard. If the maltmen had prevailed, it would have afforded a ground, as being *in jure:* but they having succumbed, they had a clear remedy against them, by pursuing them for abstracted multures. And, therefore, the Lords also repelled this allegeance; though some thought there might be oppression to exact the whole in such a case.

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1694. *February* 16 *and July* 11. MARY GRAY, LADY EDINGLASSIE, *against* SIR JOHN GORDON of PARK, &c. her Curators.

February 16.—MARY Gray, Lady Edinglassie, against Sir John Gordon of Park, and her other curators, for making up her damage, in not securing her in her jointure upon her contract of marriage. The Lords thought it would be hard, and dangerous, to overtake curators on such nice omissions; seeing they are bound to act, in their minor's affairs, as rational provident men do in their own. And, seeing they had consented to dispone her tocher of 25,000 merks to her goodfather, Sir George Gordon of Edinglassie, and had nominated no friends, at whose instance execution should pass, for implementing the contract to herself and her children; and, though they had inserted a procuratory of resignation, yet there was no precept of seasine on which she might have been summarily infeft, and afterwards confirmed that base seasine: therefore, they ordained the curators, subscribers of her contract, to expede her infeftment presently, on the procuratory of resignation foresaid, conform to the new Act of Parliament 1693, on their own charges and expenses; reserving to themselves to consider, how far they may be made liable for her damages, in the

same process, if her infeftment prove ineffectual, or if she happen to be debarred by preferable rights, by eviction or otherwise. *Vol. I. Page* 610.

July 11.—Lady Edinglassie against Sir John Gordon of Park, and her other curators, mentioned 16th February 1694. They proponed another defence, That they could not be liable to make up her damage; because she was not lesed by the contract of marriage, being null; so that she may recur against her debtors in the tocher, and recover it: because, by her act of curatory, three is a *quorum;* and, though there be three curators subscribing this contract, yet one of them must be subduced, and cannot be one of the number,—*viz.* Sir John Gordon of Edinglassie, the husband's father; because, though he was a curator, yet he acted here in the capacity of a disponer, and takes burden for his son to implement the provisions for his son, both to the Lady and her children, and the tocher is assigned to him; so, his subscription being discounted, there are but two curators signing; and so the deed is null, and not binding on her: and she may recover her tocher assigned; and so has no lesion, and, consequently, no recourse against her curators.

ANSWERED,—It is noways competent to you to object against your own deed; and however it were null, you cannot say it, who made me engage in that contract, and consented with me.

The Lords found the defence not relevant to liberate him from being liable in warrandice, to secure the Lady's jointure, which they had neglected to do,—neither putting in a precept of seasine, nor parties, at whose instance execution should pass; and he, being the husband's uncle, had drawn on the marriage, and left her insecure. But, as to the conclusion of refunding the tocher, the Lords assoilyied the curators from that; seeing the articles and terms of the contract were equal, just, and rational enough, if they had been fulfilled; and they would not too much over-burden nor discourage curators. As also, the Lords rejected that conclusion, anent making the curators liable to secure the fee to the heir-male of the marriage; both in regard that it was but a mere destination, and that they were not curators to the children, who were not then in being. *Vol. I. Page* 629.

1694. *July* 12. AGNES BURNET *against* MR RODERICK MACKENZIE of PRESTONHALL.

AGNES Burnet against Mr Roderick Mackenzie of Prestonhall, for declaring his father-in-law Archbishop Burnet's adjudication extinct by intromission. Mr Rory clothing himself with an assignation to the liferenter's right; and it being replied, that he entered to the possession by the right of the fee he had by the adjudication; and he denying it:—the Lords found it relevant to prefer him, if he had both the right of fee and liferent in his person before he attained to the possession; in which case, they would ascribe his entry to the liferent, as the *jus potius*, which would have excluded his right of property by the adjudication, as prior thereto. For, as others may not invert the title of his possession, so neither can he ascribe it to any other right, save that by which he began his possession. *Vol. I. Page* 630.