No 28.

1629. *November* 13. TROTTER *against* LAIRD of MANDREKE.

ONE Trotter being charged by the Laird of Mandreke to find lawburrows under the pain of 400 merks, Trotter suspends the second charge, alleging, that he did find caution to the charger already for 400 merks, and therefore ought not to find caution of new. THE LORDS suspended the second charge *simpliciter*, in respect of the first caution.

Auchinleck, MS. p. 31.

No 29.

1630. *January* 27. HEPBURN *against* TENANTS of Douglas.

HEPBURN, relict of the parson of Oldhamstocks, having used letters of lawburrows against the Tenants of Douglas, pursues them for intromitting with the teind sheaves, crop 1629, as a deed of contravention; and at the reasoning of the cause, the pursuer is content to restrict her summons to wrongous intromission, which the defenders alleged could not be, because the action of lawburrows and wrongous intromission were of diverse natures; for the one, the cautioner was obliged, and not the other; and in the one, the half of the pain pertained to the King, which fell not out in the other. THE LORDS would not sustain the action to be restricted or converted.

Auchinleck, MS. p. 31.

No 30.
A liferentrix plowed land that was found to be no part of her jointure, and after it was sown by the proprietor, she caused it to be sown again. This was found to infer contravention, tho' violence was not alleged.

1631. *December* 13. LAIRD of WHITTINGHAM *against* The LADY.

THE L. Whittingham being provided to the fee of the lands of Whittingham, after the decease of the Laird, his author, pursues the Lady, relict of his said author, for contravention, she being charged and bound to him in lawburrows, upon this deed, that after her husband's decease, she had tilled a part of the lands wherein he was infeft, as said is. And she *alleging*, that that was no deed whereupon contravention could be inferred, seeing there was no violence qualified to have been committed by her, and the tilling of that land, wherein her husband died possessor, and was in possession ever before, could not cause her to incur the pain of breach of lawburrows, specially seeing she was infeft in conjunct fee, in the lands libelled, which lay *in confinio* with that piece thereof which is alleged to have been tilled by her, and alleged pertaining to the pursuer; so that there being no declarator, nor trial taken, whether this land pertained to the pursuer, or was comprehended in her infeftment, before that was declared she could not be found to have contravened by doing the deed foresaid. And the pursuer *replying*, that the tilling of the pursuer's ground was enough to infer contravention, where-

to she had no right, albeit there was no violence otherwise done by her, specially seeing after she had tilled, the pursuer having sowed the land so tilled up by her, she did thereafter sow the land over again; and where she excepts upon her infeftment of conjunct fee, the same cannot furnish her a right to the lands libelled, because her infeftment cannot extend to the same, seeing the contract of marriage, which is the warrant of her infeftment, provides her to be infeft in the lands at that time set in Aikerdale: And true it is, that this piece of these lands, for tilling whereof this contravention is craved, was not then set out in acres, but was laboured by the Lairds of Whittingham at that time and since with their own goods, and in mansing, and another part thereof was then set out in acres, which she possesses, as her conjunct fee, and cannot claim the other part of these lands; specially seeing in this same contract of marriage her husband is obliged to make her conjunct fee lands worth 18 chalders victual; and the same are worth, and were then worth that yearly duty, by and besides this piece of land now controverted: The defender *duplying*, that her contract of marriage must extend to all these lands libelled, albeit the words thereof bear her to be appointed 'to be infeft in the said lands,' with this adjection, viz. 'presently set out in acres,' for this is no taxative clause, to restrict her right to that part thereof, which was then so set out in acres, and to exclude her from the rest, if any was in mansing, unset out in acres; seeing she is appointed to be infeft in these lands indefinitely and totally, and is not restricted to any part thereof, by any limiting word, which would have been set down expressly, if it had been so intended by some word to import the same, 'as allenarly, or in so far as it was set out in acres,' and the words adjected are only demonstrative, and not restrictive, as the pursuer would mean; and further, to remove all doubt, she offers to prove, that all lands, and particularly this parcel libelled, was set out in acres the time of the said contract; and so she being to maintain her infeftment and contract of marriage, ought to be preferred in probation; and she desires the LORDS, in respect there is no violence, and that her infeftment is now drawn in question, to grant commission to some of their number to visit this ground, and to take such competent trial, as the verity may be known and reported to the Lords before this cause be decided: THE LORDS refused the visitation, and found, that they would presently decide this cause, and they repelled the exception and duply, in respect of the reply, which they admitted to the pursuer's probation; for they sustained the deed of contravention, albeit there was no violence libelled, and found these words of the contract, viz. 'presently set out in acres,' not to be demonstrative, but to be taxative, and to restrict her security to so much of these lands as were set out in acres, and not to any further; and where the Lady duplied, that all was then set out in acres, the LORDS preferred the pursuer, replying, that a part thereof was then in the master's hands laboured in mansing.

No 30.

Act. *Stuart* & *Craig*. Alt. *Nicolson* & *Mowat*. Clerk, *Gibson*.

Fol. Dic. v. 1. *p.* 534. *Durie, p.* 607.