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readiest mails and duty by his said tenant to his master, and that yearly so long as the principal sum was unpaid. The bond was found by the LORDS heritable, and not to pertain to the executor but to the heir.

*Auchinleck, MS. p. 146.*

No 9.

A person in the contract of marriage of his natural daughter, stipulated to her a liferent right in lands, and took a back-bond from her. She never had obtained possession; but her right was preferred in competition with a party in possession.

1632. July 17.

L. AUCHINLECK *against* CATHCART.

THE deceased Lord Cathcart, in his bastard daughter's contract of marriage, is obliged to infeft her and her husband, during their lifetime, and their heirs, in some lands, whereof the daughter sets presently a back-tack to the Lord Cathcart, for payment of a silver duty, of which silver duty there were twenty years paid by the father, but never got any payment from the tenants, nor out of the said lands. The said daughter pursuing upon the infeftment granted to her, following upon the said contract, which was a base infeftment holding of the granter, the tenants of the lands, for payment of the mails and duties, and they alleging them to be tenants to the L. Auchinleck, who was infeft in the same lands by the Lord Cathcart, holding of him sicklike, and confirmed by the King, and by virtue thereof six years in possession of the very duties of the lands from the tenants, occupiers thereof; likeas, since the decease of the Lord Cathcart, his author, he charged his son to enter to the superiority of these lands, and for not doing has obtained decret of tinsel of superiority, whereupon he is infeft by the King, and in possession both real, by uplifting from the tenants the duties, and also civil, by obtaining sentences against them; likeas the tenants these thirty years bypast ever since paid their duties to the Lord Cathcart, while the L. Auchinleck acquired his right and possession, the pursuer's infeftment being ever obscure and unknown, nor ever clothed with possession;—the LORDS repelled the allegiance, albeit it was also proponed for Auchinleck compearing with the tenants, in respect of the pursuer's right, which was anterior to the defender's, and that the same depended upon a contract of marriage, and that they got payment of the back-tack duty from the Lord Cathcart, albeit they never had any other possession, either from the tenants, or out of the lands, and albeit these ten years bypast, they had got no payment, and preferred her to the excipient, albeit real possessor.

Clerk, *Scot.*

*Durie, p. 647.*

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1634. January 10.

MARKLAND *against* THOMSON.

MARKLAND, relict of Thomson, pursues Thomson, son and executor to her husband, for her third part of a bond of L. 1000, made by Summer, to content

and pay to her husband the sum of L. 1000, he being in life, and failing of him by decease, to the said Thomson, his heir, or executor. The husband dies before the term of payment contained in the bond. The relict pursues for her third, as being in *bonis defuncti* so long as he lived; likeas he might have discharged the sum in his own time, and would have fallen under escheat, and that it could not be of another nature than *donatio mortis causa*. To which it was answered, That *lex obligationis*, and the will of the defunct, the time of the making of the bond, should be more respected, who declared by the express words of the bond, that the sum of it was unpaid to him during his lifetime, should pertain to the substitute in the bond, and to no other person, whensoever he should decease; which exception, the LORDS found relevant, and that the whole sum contained in the bond should pertain to the person substituted; and ordained this decision to be observed.

*Auchinleck, MS. p. 145.*

1637. July II.

L. LESMORE against The LADY.

OLD LESMORE contracting with the relict of his oye, dispones certain lands to her in satisfaction of her conjunct fee, which she accepts, and in the same contract she obliges her to relieve the Laird of the teind duties, addebted and accustomed to be paid out of the said lands; whereupon she being charged to relieve the Laird of these teind duties, and for that effect to make payment of a particular quantity condescended on, as has been in use these diverse years to be paid by the tenants of these lands, before this contract; and she suspending, that albeit the tenants of these lands have been accustomed to pay the quantity charged for, yet that is not sufficient to make her obliged thereto; for that cannot be the mind of the contract, that she should pay any further for the teind duties of the whole barony, whereof these lands contained in this contract are but a part, but only that she should pay a proportion of the whole duty, effeiring to the proportion of her lands to the quantity of the whole barony; for albeit the Laird, who was heritor of the whole barony, might appoint a tenant of any part of the lands of that barony to pay the teind duty addebted for the whole, and allow that payment in the first end of the condition betwixt his tenant and him, yet that was no just cause to astrict her to do the like; neither did her obligation contained in the contract bind her thereto, she being bound to pay the teind duty addebted and accustomed; so that albeit the tenants of these lands had formally paid the whole, yet except the whole were addebted for these lands, she cannot be subject thereto, but to her proportional part only. THE LORDS found this reason relevant, and found, that these words in the contract, viz. to relieve the Laird of the teind duties addebted and accustomed to be paid, could import no further;

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If one is bound to pay the duties "addebted and accustomed," these terms must be taken conjunctly.