1671. *January* 25 and *November* 28. SANDILANDS and MR. MATTHEW M'KELL and Her HUSBAND *against* Her CHILDREN and their TUTORS.

January 25. THIS is the relict of Bailie Alexander Sandilands, who married this Mr. M'Kell against all her friends' will. By contract of marriage betwixt her former husband and her, she was provided to a jointure: but it was not declared to be in satisfaction, nor was she debarred from terce and third. Whereupon she intents a pursuit, against her children and their tutors, for their interests, of declarator of her right to a terce and third.

Whereunto it was ANSWERED,—That she could never be heard to claim a terce, &c. because in that same contract which she hath assented to, there is a clause whereby the whole conquest during the marriage is provided to himself in liferent, and to the bairns of the marriage in fee; now what, shall the whole go to them in fee, if it bear a defalcation of a third to her? And therefore it must be interpreted to have been the meaning of parties by that clause to seclude her from it, seeing she is not named in the clause of conquest.

Whereto it was REPLIED,—That she was founded *in jure communi* which ordains wives to have a terce, unless the same be *per expressum* discharged; and she can never be supposed, by such tacit and remote presumptions, to be prejudged therein, especially considering that *in dubiis pro dote est respondendum.*

Notwithstanding whereof the Lords, *in presentia,* found her debarred therefrom by the conception of the foresaid clause; only found her to have right to a third of the household plenishing.

It was thought strange how they came to find her to have right to this last more than to the rest, since there is a like reason in all.

Advocates' MS. No. 108, *folio* 86.

28*th November* 1671.—Agnes Sandilands and Mr. Matthew M'Kell, now her spouse, against her children and Patrick Tailzefer, their tutor.

We find before at number 108, that in her pursuit for a third, the Lords found the clause in the contract of marriage, anent the conquest, did seclude her from any third of her first husband's means and moveables, except a third of the household plenishing. Yet, upon a supplication given in by her, the Lords found this allegeance relevant to give her an interest to a third of what superplus she should prove her husband had more than the L.10,000 added to her tocher, to make up her jointure, viz. that her umquhile husband, before and at the time of the contract of marriage with her, had more sums and other means and estate than the said L.10,000 contracted. For proving whereof there was an account produced, of L.10,000 more, which they had alleged he had at the time of the marriage; and for instructing of it produced sundry memorandums under the defunct's hand, wherein he makes an estimate of his own estate.

Against which many things were OBJECTED, as making no probation of his fortune, viz. either they are not written with the defunct's own hand; or are two years before his marriage, and so cannot prove what he had the time thereof; or were given up largely by him to be a ground of credit to him, being a young man and a merchant, and to be an inducement to his uncle, the Dean of Guild, to give

him a greater tocher; upon which account he might also omit or conceal his debts; or they are desperate sums, or sums owing by bonds bearing annualrent, and so heritable *quoad relictam, &c.*

Advocates' MS. No. 274, *folio* 116.

1671. *December* 1. CRICHTONE *against* CARRUTHERS of Hoilmaynes.

IN this cause the Lords found,—where a man had got a tack of lands, and the same was delivered blank in the ish or endurance of the tack, only the receiver of the tack grants a back-bond of the date of the tack, declaring that the tack was set for nineteen years. Thereafter he fills up eighty years in the tack, and assigns it for onerous causes to a third party. Which third person, after the elapsing of the nineteen years, is warned to remove. He defended upon his tack for years yet to run. REPLIED,—His author, by back-bond of the date of the tack, (and so is *pars contractus et pactum incontinenti adjectum,)* confesses he had got it blank, and that it was to endure but nineteen years. DUPLIED,—The back-bond is nothing to him; who, seeing a simple tack relative to no back-bond set for eighty years, he was in *bona fide* to take a right thereto, and had paid a sum of money therefore; and that the pursuer justly suffered, in trusting his cedent with a blank tack.

The Lords found the back-bond could not meet the singular successor, but that the tack behoved to stand good for all the years filled up in it *quoad* him; unless the pursuer will say that the assignee was *particeps fraudis,* and knew then of the back-bond.

The advocate fought mightily against this interlocutor; but in my humble opinion it was *bene judicatum.*

Vide Dury, 21st December 1621, L. Barnbarro. *Vide supra, 25th February* 1671, *numero* 154.

Advocates' MS. No. 275, *folio* 116.

1671. *December* 1. HOME and PRINGLE *against* ———.

THIS is a pursuit at a relict's instance, for removing from some lands whereof she was liferentrix.

ALLEGED,—I cannot remove, because having lent a sum of money to the pursuer's husband, he had granted him an heritable right to the said land, to be bruiked by him aye and while the sum lent were repaid to him.

REPLIED,—That right was null, and notwithstanding thereof he must remove; because, though it bore these words, " sets, wadsets, dispones, and annalyies," and though it bore an yearly duty to be paid to this pursuer as a tack-duty, yet in effect it is neither a wadset nor a tack. A tack it was not, because it wanted a definite ish. A wadset it could not be, because it bore no precept of seasine or ob-