

would do, to get the benefit of the astriction, by sustaining and fulfilling the decret-arbitral. *Vol. II. Page 32.*

1699. *January 6.* MARION MAXWEL, Lady Rosyth, *against* DRUMMOND of INVERMAY.

I REPORTED Dame Marion Maxwel, Lady Rosyth, against Drummond of Invermay, for an alimnt of twenty chalders of victual, conform to the provision of her contract of marriage, during the dependance of the process anent the extent of her jointure-lands.

The Lords found Invermay could not be personally liable for the same, unless he had intromitted; but granted warrant to the lady to uplift the rents from the tenants of these roums wherein she stood infeft, not exceeding twenty chalders of victual, during the dependance of the other process.

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1699. *January 10.* SARAH JOHNSTON *against* The EARL of ANNANDALE.

SARAH Johnston, having right to 2500 merks of a wadset granted by the Earl of Annandale's father to Lockerby, pursues a transferring of the said contract against this Earl *passivè*, as representing the granter; and it being called summarily, it was OBJECTED,—It must abide the course of the roll. ANSWERED,—By an Act of Sederunt in July 1688, transferrings are exemed from the roll. REPLIED,—These are transferrings of depending processes, but not of registrate writs, as this is. DUPLIED,—The Act makes no distinction; *et ubi lex non distinguit, nec nos.*

The Lords considered such transferrings, or registration, were now little in observance; therefore ordered trial to be taken what has been the custom when such actions were insisted in,—whether they went to a roll; the ordinary process now in such cases being a summons on the passive titles.

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1699. *January 10.* LADY SEMPLE *against* COLONEL CUNINGHAM.

THE Lady Semple pursued reduction and improbation of a mutual tailyie, by way of indentures, past betwixt the deceased Brigadier Richard Cunningham, her last husband, and Colonel Cunningham, his brother; in which action, she not insisting when it was called, protestation was granted for not insisting. Thereafter a bill was given in for the lady, craving it might be stopped, and she allowed to insist. Which being ordered to be seen by the Colonel, he was content to stop his protestation, but craved a commission to London and Dublin to examine witnesses on his brother's subscription. For preventing whereof the

lady takes up her bill, and declares she will make no opposition against his taking out the protestation ; and so, that instance perishing, there is no depending process whereon he can crave a commission.

ANSWERED,—There was *litis pendentia* when he sought it, and her withdrawing her bill and process ought not to prejudge him.

The Lords found, in strict law, she might renounce that process ; but when he insisted in his counter-action, and that it were seen and returned, then they would consider how far they might issue forth the commission craved ; but till then it had no foundation, the former dependence of her action having been at an end.

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1699. *January 11.* LIVISTON of PANTASKIN *against* The EARL of LITHGOW and CALANDER.

RANKEILOR reported Michael Liviston of Pantaskin, against the Earl of Lithgow and Calander, anent the right of winning coals in the muir of Falkirk. Pantaskin founded his right on this ground, That, by his predecessor's charter from the Earl of Calander, superior, in 1644, he had these lands feued to him, *cum carbonibus et carbonariis* ; and he offered to prove this part of the muir, where he had put down his sinks, was part and pertinent of these lands.

ANSWERED,—By an old contract in 1695, between the then Lord Liviston and Pantaskin's author, the muir was divided betwixt them by fixed meiths and marks, with an express reservation of the coal to the Lord Liviston ; and so, being *separatum tenementum*, it cannot be part and pertinent.

REPLIED,—This being only a personal contract, whereunto neither party can connect a progress, it is now prescribed, and nothing followed on it ; and nothing but a charter and seasine can prove it to be a separate tenement.

DUPLIED,—'Tis at least a predial servitude, conform to which, their possessions in the muir having been ever since regulated, it must yet be the rule ; and offers to prove Calander's predecessors have been in use to win coals in this very ground.

The Lords, before answer, ordained both parties to produce their writs, to instruct the progress, and to prove what deeds of possession, as to working the coal, and the acts of interruption ; that it might appear whether this controverted muir was a separate tenement, or a part and pertinent of Pantaskin.

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1699. *January 13.* SIR WILLIAM MURRAY of NEWTON *against* LORD EDMONSTON.

My Lord Edmonston having entered into a minute with Sir William Murray of Newton, and Charles Murray of Hadden, his brother, for the lands of Newton, for payment of 29,000 merks ; Sir William makes a second disposition of the same, and raises a reduction of Edmonston's right, that he was circumvented