No 37.

1668. *January* 8. MARGARET FORBES *against* ——.

MARGARET FORBES having granted a tack of her liferent-lands to ——, bearing expressly for payment of such a sum of money, and bearing to endure for 19 years; she did receive a back-bond of that same date, bearing, that so soon as the sum was paid, the tack should become void. The tack coming to a singular successor, she pursues him for count and reckoning, and removing, and insists upon the tenor of the tack and back-bond. It was *alleged* for the defender, That the back-bond did not militate against him, being a singular successor, neither being registrated nor intimated to him before his right, in respect the tack is a real right, and no obligement or provision of the tacksman can prejudge a singular successor.

THE LORDS repelled the defence, and sustained process against the defender, in respect of the tack and back-bond.

*Fol. Dic. v.* 4. *p.* 65. *Stair, v.* 1. *p.* 500.

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1669. *February* 12. JOHN BROWN *against* ROBERT SIBBALD.

No 38.
A back-bond under a superior's hand declared, that the vassal should have liberty to renounce his feu-right when he pleased. This found effectual against a singular successor in the superiority, it being of the same date with the feu-contract, and relating to a matter intrinsic in the nature of the feu.

JOHN BROWN having taken a feu of some acres of land, at a great rent in victual and money, pursues Robert Sibbald (now his superior) to hear and see it found and declared, that he might renounce and be free of the feu-duty. The defender *alleged* absolvitor, because this feu was by a mutual contract, by which the vassal had bound him and his heirs to pay the feu-duty yearly, and which obligation he could not loose at his pleasure; for albeit feus which are proper and gratuitously given without any obligement on the vassal's part, but given by a charter, or disposition, as being presumed to be *in favorem* of the vassal, he might renounce the same, *nam cuivis licet favori pro se introducto renunciare;* but here the vassal being expressly obliged for the feu-duty, cannot take off his own obligation, this case being like unto that of a tack, which being by mutual contract, cannot be renounced, though by a tack only granted and subscribed by the setter it may. The pursuer *answered,* That he opponed the common opinion of all feudists, *de feudo refutando,* wherein there is no exception, whether the feudal contract be subscribed by both parties; for every contract must necessarily import the consent of both parties, and the acceptance of a vassal to a feu by way of disposition is all one with his express obligation in a mutual contract. 2*do,* Though such a contract could not be renounced, yet this pursuer may renounce, because by a back-bond by the superior, who granted the feu under his hand, he has liberty to renounce when he pleases. The defender *answered,* That this back-bond not being *in corpore juris,* nor any part of the investiture, it was personal against that superior who granted the same, but not against the defender, who is a singular successor. It was

No 38.

*answered*, That the mutual contract not being *de natura feudi*, but at most importing an obligement not to renounce the feu, any personal deed before this superior's right, under the hand of his author, is relevant against him, as well as his author.

THE LORDS found the allegeances upon the back-bond relevant against the superior, though singular successor, it being granted of the same date with the feudal contract, and relating to a matter extrinsic to the nature of the feu; and so suffered the pursuer to renounce the same.

*Fol. Dic. v. 2. p. 65. Stair, v. 1. p. 604.*

*** Gosford reports this case:

IN a declarator pursued at Sibbald's instance against Brown, who had acquired the right of superiority of some acres of land which were holden feu, to hear and see it found and declared, that he being willing to resign the right of the said lands, ought to be free of the feu-duty in all time coming; the LORDS sustained the declarator, in respect that the lands were *ab initio* given in feu for the full duty thereof, and that the feu-duty being 20 bolls of bear, and converted to 10 merks the boll, the vassal had a liberty when he pleased to pass from the conversion; notwithstanding it was alleged that *refutatio emphyteusis* could not be sustained in law, it being *perpetua locatio et non feudum*.

*Gosford, MS. No 114. p. 42.*

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1670. *July* 12. KENNEDY *against* CUNNINGHAM and WALLACE.

No 39.
A back-bond of trust found to qualify an apprising deduced by the trustee, and conveyed by him before infeftment to a singular sucessor, who was thereafter infeft, so as to found an exception to the debtor, that the apprising was extinguished by payment made to the entruster.

THERE being an apprising of the lands of Garleith, belonging to John Kennedy, at the instance of Edward Wallace; the said Edward by his back-bond declared that the apprising was to the behoof of William Wallace of Burnbank his brother, and obliges him to denude himself thereof in his favours; thereafter the said Edward assigns the comprising, and dispones the lands to Adam Cunningham, who stands infeft; and in a debate for the interest of this apprising, it was *alleged*, That Edward Wallace the appriser having by his back-bond declared, that the apprising was to William his brother's behoof, conform to his back-bond produced, the said William was satisfied by payment or intromission, so that the apprising is extinct. It was *answered* for Cunningham, That the allegeance is not relevant against him, who stands infeft as a singular successor, so that his real right cannot be taken away by any personal back-bond granted by his author, whereby he was not denuded; for though his author had granted assignation to the apprising, if it had not been intimated, a posterior assignation intimated, much more a disposition and infeftment, would be preferred