Against the which interlocutor the pursuer reclaimed, and produced a clear practique in the contrary, marked both by Dury and Hadington on the *6th of March* 1623, *Robert Hamilton of Newhouse* against *Mr. David Sharp, parson of Kilbryde*, where a man having set a tack of teinds, and obliging himself not to contravene, yet setting a second tack to another, it is in the first tacksman's option either to pursue his author for contravening his bond, or the second tacksman for spuilyie; and the allegeance that he was not debarred by law, and that there was no sentence finding him distressed, that it was his own fault, seeing notwithstanding of any posterior tacks he might have possessed, (all which is the very triply made for this defender, and which by interlocutor was found relevant,) is repelled as irrelevant.

The 105th act of Parliament in 1540 is very severe against all such as make double alienations, and declares them infamous and punishable in their persons and goods at the King's will: but I suppose *quoad* the extremity of it, it is gone in desuetude. *Vide omnino legem* 3 *C. de evictionibus;* and *Perezius on that title, No.* 19.

Advocates' MS. No. 327, *folio* 130

1672. *February* 13. Anent DEEDS by MINORS.

THERE is a great difference between deeds done by a minor having curators, without their consent, and deeds done by a minor wanting curators: * for deeds of the last kind must be revoked, and reduction thereof raised within the profitable years, else they stand unquarrellable: they cannot be annulled unless lesion be likewise conjoined and proven: the exception of minority against such deeds is not receivable by way of reply or exception, but only in an action; such deeds are not *ipso jure* pure null, but valid ay and while they be lawfully taken away: an oath given by such a minor, swearing that he shall never come in the contrary thereof, (and a wife granting bond without her husband, and swearing the same, will be in the very same condition,) will so corroborate the deed that he will never be permitted to impugn the same: and finally of this case the authentic *Sacramenta puberum in Tit. C. Si adversus venditionem* must be understood; whereon the D D. and commentators teach that *contractus in se validi tantum confirmantur juramento apposito, non vero contractus de jure invalidi.* Whereas a deed done by a minor having curators, without their consent, is an act absolutely null of the law, needs no revocation, no reduction, may be quarrelled at any time thereafter *etiam quadriennio elapso*, imports lesion without any other probation, may be objected at any part of the process *via exceptionis vel replicæ*, the party only proving that they had curators the time of the said deed; yea, to sum up all, it is so far null that an oath *(quoad semper est servandum nisi vergat in æternæ salutis dispendium vel in alterius prejudicium redundet,)* ties him not to the ob-

* All thir differences result from the common law. *Vide L.* 3 *C. de in integrum restitutione Minorum ;* it is a constitution of Maximinian and Diocletian. *Vide* Craig, *pag.* 83. *Vide supra, No.* 302. [*16th January,* 1672.] See *Vinnius lib.* 1 *Quæstio. cap.* 15. *Vide* the Books of Sederunt and the compend thereof, at the *20th* of *December* 1599, act anent the *Laird of Bathayok.*

servance of any contract made by him without consent of his said curators, but restores him against the same; because the said deeds being *ipso jure* null, there is no act whereto the oath can be accessory; *quod non est nequit confirmari; non entis nulla dantur accidentia, nullæ qualitates.* *Sic* Hadington, 15*th December* 1609, *Constable of Dundy.* *Sic* Perezius, *in Paratitlis ad supra-d. Tit. C. Si adversus venditionem,* who shows that the canons order all oaths given by minors, without distinction, to be sacred and inviolable, *cap.* 28 *ext. de jure jurando,* but that the French law rejects all such oaths *ob lubricitatem ætatis, in qua æque facile est iis jurare ac contrahere,* and restores minors against them whether they be adjected *contractui valido vel invalido; nam quæ contra legem fiunt, nulla stipulatione, nullo mandato, imo nullo sacramento firmitatem capere debent; L.* 5. *in fine C. de legibus.* *Vide L. septimam, p.* 16. *D. de Pactis, ibique* Gothofredum. Gudelinus, *De jure novissimo, libro* 3*tio, cap.* 14, shows this also to be the law of both *Gallia Celtica et Belgica.* *Vide infra,* Provost Currie's case, 10*th January* 1680.

Advocates' MS. No. 328, *folio* 131.

1672. *February.* Anent PROBATION by WITNESSES.

ABOUT this time one being pursued to pay the sum of L.40, conform to his bond; he offered to prove payment by witnesses, which he alleged to be lawful for him to do, the sum being within L.100. To this it was ANSWERED, That the payment of L.100 might be proven *per testes,* where the debt was not constituted by writ; but wherever any sum, though never so small, was due by writ, the same can never be taken away except by writ or oath of party. The Lords refused to admit witnesses against writ, though it was *in re tam modica.* And truly this is agreeable to former practiques. See Dury, 15*th July* 1624, *Nisbet* and *Short,* with the quotation on the margin, out of Antonius Faber. See Hadington, 15*th November* 1622, *Macgill* and *Forrest; infra November* 1673, [*Syme* against *Inglis,*] *numero* 429. See Dury 4*th July* 1632, *Dalrymple* against *Closeburne.*

The Lords also refused to admit the probation of a promise of L.20 only to witnesses, but ordained it though never so mean to be proven *scripto vel juramento.* Yet see the contrary in Dury, 25*th February* 1636, *Laird of Ernock.*

Advocates' MS. No. 329, *folio* 131.

1672. *January* 18, and *February.* MR. THOMAS RAMSAY, minister at Mordington, *against* JO. RENTON of Lammerton.

Jan. 18.—MR. THOMAS RAMSAY, minister at Mordington, having recovered decreet in 1656, before the sheriff of Berwick, against Jo. Renton of Lammerton, for pay-