1674. *January.*

IN the same month of January, 1674, the Lords, in sundry causes before them, found the following points:—

I. That *minor non tenetur placitare,* in a reduction of his father's rights; but if an improbation be raised, the defence of minority will not hinder the production but it must be satisfied, or the examining of writer and witnesses *ex officio,* to lie *in retentis;* lest the direct manner of improbation perish *medio tempore;* (where the improbation is truly levelled at some suspected falsehood, and is not raised and cumulate, of course, with the reduction, only to make the certification stronger, in case of not production;) only the debating the reasons, or advising the said probation, must stop and lie over till majority: and some deny this privilege to minority *in causa falsi.*

II. That an annualrenter can never attain to the natural possession of the lands, but only to the civil and legal, by decreets of poinding of the ground; so that where a man has two rights in his person, both a comprising and an infeftment of annualrent, his possession will be ascribed rather to the extinguishing the first than the last; the first being a more sovereign right and of the property, the annualrent being only a servitude. See Dury, 27th February, 1630, Patersone *against* Scarlet; and the cases there.

III. FOUND, That an infeftment of annualrent makes not the haver vassal in the lands, (being only a servitude, as said is;) and, therefore, by his death no casualties of ward or marriage do fall, though nonentry will, *quod valet seipsum;* yet a wadset is otherwise, being a temporary infeftment of the property.

IV. FOUND, That disponing or selling of lands is a *gestio pro hærede;* see Dury, 21st December, 1626, Irving; but it is doubted by some, if the renouncing a reversion, legal or conventional, for a sum of money be a gestion or not. *Vide* l. 13. p. 6. D. *de Hæreditatis Petitione.**

V. A pursuer finding himself at the horn, and that he may be debarred, he assigns the action to another for eviting it; *quæritur,* if it may meet the assignee. Either it is *lite pendente,* or before: if *lite pendente,* then *nihil est innovandum;* besides, *alienatio fit hic quodammodo in potentiorem, et judicii mutandi causa. 2do,* It is either before or after the horning was produced against the cedent; if after, he seems to be *in dolo;* yet in either case, the horning being personal, *non egreditur personam.*

VI. A tack in our law maintains against a singular successor, and is, in so far, declared to be a real right; act. 18, Parliament 1449: though the Roman law owned it as a mere personal contract, as truly it is no more, *l.* 9, *C. Locati.* And yet our law may be thus far defended from the principles of the common law, teaching, *quod nemo in alium plus juris transferre potest quam ipse habet, l.* 54, *D. de Regulis Juris; ergo,* the seller conveys no other right to the buyer than what he had; and as the buyer could not have quarrelled the tacks set by himself, so neither can his successor, who gets the thing *cum suo onere et causa.* See Philibert Bugnion, in his *abregèe des loix unisitees en France, page* 44; *Bartolus ad l.* 1, *par. quod ait* 3, *D. de Superficiebus.* Yet with us, a bond of borrowed mo-

* See Dury, 27th January, 1636, Straiton; 10th February, 1642, Johnston.

ney, bearing an assignation to the maills and duties of lands or houses within burgh, aye and while the sum be paid, or a location of land declared to resolve and expire upon the payment, is not regarded as a tack to affect and carry the real right of these lands against one that is a singular successor to the granter; because it wants the formalities of a tack, viz. a certain tack duty, and a definite issue; because it is only personal, and no such real right as a tack is.* And this has been often so found and decided; Dury, 13th July, 1621, Laird of Muckhall, and the cases there. January, 1674, in the case of Peacock *against* Bailie Lauder; and was, in the same year, 1674, so advised by Sir George Lockhart, in a process pursued before the bailies of Edinburgh, by Mr Jo. Forrest, minister at Tilliecoutry *against* Alexander Brownley, tailor in Edinburgh. And yet this same argument and ground of law will militate against back-tacks in wadsets; which is clearly a tack set by the creditor to his debtor *rei propriæ, in eventum* of the payment of the principal; see l. 6. p. *ult.* D. *de Precario;* l. 45. D. *de Regul. Juris, ibique Brouchorstius,* where you have what comes nearest to our back-tacks. If it be alleged, there is a difference, because the back-tack is engrossed and incorporated in the body of the real right, and so makes a part of it; yet, it may be answered, many clauses *in gremio* of real rights, yet are merely personal obligements, and have no force *rem vel fundum afficere* if it pass to singular successors, since they cannot be so easily known, unless they be not only in the disposition, but also in the procuratory of resignation, charter, and seasine following thereon.—See some excellent clauses of tailyies, *apud me;* see M'Keinzie's Pleading, Creditors of Annandale and Stormont; see other papers beside me. Yet Sir Jo. Cunynghame thought our practique, in rejecting tacks set aye and while a sum be paid, to be an error deserving amendment; and that the first decision, it is like, has been obtained by moyen: otherwise we must condemn back-tacks also.

Advocates' MS. No. 436, *folio* 230.

1673 and 1674. General DALZEEL *against* The TENANTS of Caldwell.

1673. *June.*—GENERAL DALZEEL, as donatar to the forfaulture of the Laird of Caldwell, pursues a removing against some of the tenants of these lands; for whom it is alleged, that they bruik by virtue of tacks set by the Laird of Caldwell, before his committing the treason and being in arms at Pentland, for which he was forfaulted; and whereof there are sundry years yet to run, and so cannot remove.

REPLIED,—That by the forfaulture, founded on the vassal's treason and rebellion, the fee was opened, and the lands returned as free and unaffected as when they were first given out, unless it were rights consented to or confirmed by the superior, which tacks were not. That tacks could have no more privilege than base infeftments unconfirmed, which, though clad with never so long possession, could never defend against a donatar. That tacks cannot sustain against a superior, neither in wards, nonentries, recognitions, disclamations, liferent escheats, nor these other ca-

* In February, 1676, the Lords found, in a case between James Johnston and James Syme, a tack so conceived null, *ope exceptionis*, without necessity of a reduction, or calling the setter. See Dury, 20th March, 1630, Murray *against* M'Keinzie; 18th January, 1633, Earl of Marshall. See Craig, *paginis* 203 and 207. And this they did, though he was twenty years in possession by virtue of his tack.