from Fredret to Gight, likewise *à se*, not confirmed; and so both null: and Fredret's right to Gight is burdened with his relief of Gight's cautionary.

The pursuer REPLIED, That his reason of reduction stands most relevant; and there is no respect to be had to Aboyn's right; because it is purchased during the dependence of the reduction *in re litigiosa:* And, as for the security now offered, it is abundantly sufficient:—1*mo*. Because the lands provided to Pittrichie have been bruiked by him and his predecessors fourscore years, by a wadset; and so the property is fully secured by prescription. *2do*. The infeftment upon the recognition holden of the king, carries the whole right of these lands; and, if the recognition should be quarrelled, the wadset would stand firm; and the superiority and reversion, belonging to Gight, is conveyed by the expired apprising, whereby the apprisers were infeft by the king: And their charter to Fredret, and Fredret's to Gight, having both infeftments, and to be holden of the king, with a charter by Gight to Pittrichie, or Aboyn, likewise to be holden of the king, may be all confirmed by one charter of confirmation; which may be presently passed in Exchequer.

The Lords found the oath and allegeance for Gight, relevant to repone him against the certification of the declarator of nullity; but adhered to their former interlocutor as to the maills and duties, before performance of the minute, that they belong to Pittrichie by virtue of his infeftment or recognition: and reponed him only on these terms,—disponing with absolute warrandice, and giving real warrandice for relief of Fredret's cautionary.

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1676. *July* 5. SAMUEL CHIESLY *against* EDGAR of WEDDERLY.

SAMUEL Chiesly having charged Edgar of Wedderly for payment of 800 merks, for which he became obliged for his brother, as apprentice-fee; he suspended, and raised reduction upon minority and lesion.

It was ANSWERED, No lesion; because the pursuer hath a natural obligation to aliment his brother-german. *2do*. He represents his father in a considerable estate, who was obliged to aliment his children; and which the Lords have often extended to heirs having a considerable estate, during the minority of the children, so long as they were unable to entertain themselves, and accordingly, modified 50 merks of aliment to the same apprentice: And, seeing his apprentice-fee hath liberated his brother of five years' aliment when he was older, the same ought to be sustained.

The Lords modified 100 merks yearly, for the five years' apprenticeship; but would allow no annualrent thereof, although in the indenture; but, in place of the same, 50 merks of expenses.

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1676. *July* 8. FRANCIS MONTGOMERY *against* The TENANTS of BAGLILLIE.

MR Francis Montgomery having pursued a number of tenants for maills and

duties, they compear and depone, That, before the years in question, being 1673 and 1674, they were in use of payment of bolls for each acre; but that they having given it over forty days before Whitsunday 1671, the chamberlain, who had power to set the land for the Countess of Levin, then minor, had given them down a firlot an acre: and likewise deponed, That the pursuer, having married the Countess, agreed to give them down a firlot an acre for the years in question.

Which oath becoming to be advised, it was ALLEGED for the pursuer, That the tenants having deponed upon the old use of payment before the years in question, the law presumes, without further probation, that the same duty is continued *per tacitam relocationem;* and the getting down thereof is an exception only probable by writ, or the pursuer's oath: but is not a quality to be proven by the tenant's own oath; which would be of great prejudice to all heritors, who, for the most part, have no written tacks; and, when they pursue their tenants for their rents, they might, by their oaths, upon pretence of downgiving, abate them at their pleasure.

It was ANSWERED for the tenants, That they might simply have deponed, That the quantity of their rents, for the years in question, was so much as now they acknowledge; and might have denied the quantities libelled: but having been desirous to clear themselves, they have both deponed what the old use of payment was before these years, and what their duty was for these years: which is no extrinsic quality, but is a proper answer to the libel; which is not what their rents were *before* the years in question, but what they were *during* the years in question: And, albeit the pursuer might have libelled upon the worth of the lands, against naked possessors, which would have been relevant to have been proven by witnesses, and would have forced the tenants to except upon a tack, agreement, or use of payment, and prove the same; or if the pursuer had instructed by writ, the former rent by tack, decreet, or discharge, the same would have sufficiently instructed, that, by tacit relocation, the rent continued the same, and put the tenants to prove, by the master's oath or writ, the new agreement or downgiving. But having done neither, but simply referred the downgiving of the rents to the tenants' oaths, it is most proper for them to depone that formerly they were greater; but that, by a later agreement, for the years in question, they were less. And it would be of great inconvenience to poor tenants, who frequently have no tacks in writ, that, if they did acknowledge a former use of payment, they behoved to prove the abatement; when, most ordinary, singular successors insist for proving the quantities of rent by the tenants' oaths, who could know nothing of abatements, and would not suffer their authors' oaths to be taken upon any such agreements to their prejudice.

The Lords found, That any abatement given after warning-time, when the tenants had continued to possess *per tacitam relocationem,* was not a competent quality proveable by their oaths: but, if the agreement was before warning-time, the agreement was intrinsic, as a part of the verbal tack; and the tenants might depone thereupon, without further probation: But found, That the tenants here had not deponed upon the time of the agreement, which was the material point as to the manner of probation; and, therefore, suffered the pursuer yet to resile from their oaths, and prove, by witnesses, what the land was worth of yearly rent the years in question. In which case the tenants might

either admit it to his probation, or except upon an agreement, and refer it to the pursuer's oath.

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1676. *July* 13. The COUNTESS of BRAMFOORD *against* EDWARD RUTHVEN.

THE Countess of Bramfoord, having a provision granted to her, by her husband, of 2000 merks yearly, during her life, did thereupon arrest all sums of money in the hands of the Earl of Callander, due to the successors of the late Earl of Bramfoord, to be made forthcoming for her payment. Callander having suspended upon double poinding against the Countess and Edward Ruthven, to whom, by Act of Parliament, the estate of his grandfather, the Earl of Bramfoord, his goodsire, was established; whereby the Parliament declared, "That their meaning and intention in rescinding the forefaulture of the late Earl of Bramfoord, was to establish his estate in the person of Edward Baillie, his grandchild, procreated betwixt the Lord Forrester and the Earl's daughter, Lady Jean; whom they ordained to assume the name and arms of Ruthven, to preserve the Earl's memory; and who, accordingly, since has been designed Edward Ruthven: who ALLEGED, That the Countess could have no interest in this provision of annualrent; because, by the Act of Parliament whereby the Earl of Bramfoord's estate is conveyed to him, there is only reserved to the Countess the provision in her contract of marriage, or terce; and this bond is neither. *2do.* It could only take effect from the Act of Parliament. *3tio.* The Countess is satisfied in her own hand; in so far as she has intromitted with the rents and prices of the Earl's estate in Germany and Sweden, which, by the Act of Parliament, belongs to the said Edward:—

It was ANSWERED for the Countess, That her provision of 2000 merks yearly is effectual from her husband's death, and must affect his estate. And Edward Ruthven having a right, from the Parliament, to his estate, which is *nomen universitatis*, the meaning of the Parliament must be understood, according to equity and justice, that the Earl's estate is with the burden of his debt; which the Lords have accordingly sustained in the case of Patrick Ker, as being a creditor of the Earl's: and the Countess is a more favourable creditor, having no other provision but this bond, which bears to be in place of her terce; and so quadrates with the reservation of Parliament, which is in the Countess's favour, and does not exclude her from the common interest of a creditor, by which, and by the reservation, this bond stands valid. And, as to the allegeance of her satisfaction by the prices and profits of the Earl's estate abroad, it resolves, in effect, in a compensation, and is not liquid; and so not receivable. *2do.* Edward Ruthven can have no right, by the Act of Parliament of Scotland, to the price or profits of lands in other dominions; and so cannot compense therewith, nor discharge the same.

It was REPLIED for Edward Ruthven, That the Countess having, in her own hand, satisfaction by the Earl's estate, she cannot seek satisfaction or payment again out of his estate; for here there is none represents the Earl, but the estate is craved to be affected: and, therefore, if the Countess have so much of the