

him a greater tocher ; upon which account he might also omit or conceal his debts ; or they are desperate sums, or sums owing by bonds bearing annualrent, and so heritable *quoad relictam*, &c.

Advocates' MS. No. 274, folio 116.

1671. *December 1.* CRICHTONE *against* CARRUTHERS of Hoilmaynes.

IN this cause the Lords found,—where a man had got a tack of lands, and the same was delivered blank in the ish or endurance of the tack, only the receiver of the tack grants a back-bond of the date of the tack, declaring that the tack was set for nineteen years. Thereafter he fills up eighty years in the tack, and assigns it for onerous causes to a third party. Which third person, after the elapsing of the nineteen years, is warned to remove. He defended upon his tack for years yet to run. REPLIED,—His author, by back-bond of the date of the tack, (and so is *pars contractus et pactum incontinenti adjectum*,) confesses he had got it blank, and that it was to endure but nineteen years. DUPLIED,—The back-bond is nothing to him ; who, seeing a simple tack relative to no back-bond set for eighty years, he was in *bona fide* to take a right thereto, and had paid a sum of money therefore ; and that the pursuer justly suffered, in trusting his cedent with a blank tack.

The Lords found the back-bond could not meet the singular successor, but that the tack behoved to stand good for all the years filled up in it *quoad* him ; unless the pursuer will say that the assignee was *particeps fraudis*, and knew then of the back-bond.

The advocate fought mightily against this interlocutor ; but in my humble opinion it was *bene judicatum*.

Vide Dury, 21st December 1621, L. Barnbarro. Vide supra, 25th February 1671, numero 154.

Advocates' MS. No. 275, folio 116.

1671. *December 1.* HOME and PRINGLE *against* ———.

THIS is a pursuit at a relict's instance, for removing from some lands whereof she was liferentrix.

ALLEGED,—I cannot remove, because having lent a sum of money to the pursuer's husband, he had granted him an heritable right to the said land, to be bruiked by him aye and while the sum lent were repaid to him.

REPLIED,—That right was null, and notwithstanding thereof he must remove ; because, though it bore these words, “ sets, wadsets, dispones, and annalyies,” and though it bore an yearly duty to be paid to this pursuer as a tack-duty, yet in effect it is neither a wadset nor a tack. A tack it was not, because it wanted a definite ish. A wadset it could not be, because it bore no precept of seasine or ob-

ligement to infest; which, though it had carried, yet it could never have defended, because no seisine was ever taken thereon.

DUPLIED,—This relict can never be heard to quarrel the right alleged on, because she has homologated the same, in so far as she received the tack-duty of sundry years bygone, and so has acknowledged the tack. *2do*, It is a formal enough tack; and for the pretence that it wants an ish, the same ought to be repelled, because it has a most expressive ish, viz. when the sum shall be paid; and offered to adduce sundry practiques where this was sustained, and namely, one *in terminis* out of Dury, on the *25th of January 1625*, betwixt *Ronald* and *Strang*.

TRIPLIED,—The pretended homologation is ridiculous, seeing it imports a deed of one's own; and none can homologate the deed of another unless he represent that other; now there was no deed of the relict's here that she could homologate, the tack being set by her husband, (if so be it be one,) and she being no party therein. As to that part of the duply alleging the tack to be valid, and to have an ish, because it bears aye and while the money be repaid, and the practiques for the same, Triplies, They have contrary practiques more pregnant; for, *first*, they have five to one; *2do*, They have a late one, viz. in 1664. As for Dury, he is clear in the *12th of July 1621*, *Laird of Muckhall*.

The Lords did not determine this point about the validity of the tack, because they found the writ a wadset, and so null *quoad* the relict, because not made real by infestment.

Ex multitudine authorum quod melius et æquius est non est judicandum, cum possit unius et deterioris sententia alias omnes superare; Justinianus, *in constitut. de conceptione Digest*. Yet in Italy, where they judge by the opinion of the doctors, he who brings maniest, providing they be classic, wins the cause.

Advocates' MS. No. 276, folio 117.

1671. *December 1.*

THE Sheriff of Stirling having granted a precept for arresting a sum in the hands of _____, who dwelt within the bounds, and this precept being executed against him, personally apprehended, but within another sheriffdom, it was much questioned if the arrestment was validly executed, seeing it was *extra districtum seu territorium*, and so should have been done by letters of supplement; for an execution at the dwelling-house, in this case suffices not. I think it was illegally done.

Advocates' MS. No. 277, folio 117.

1671. *December 5.* MR. ARCHIBALD STEWART *against* WIELAND.

MR. ARCHIBALD STEWART, son to the Countess of Murray, alleging and suspecting one Wieland, a servant of his mother's, to be an ill instrument betwixt