1672. *February* 9. Anent Heirs Portioners.

It was likewise questioned at this time, whether women being heirs portioners will be liable, each of them *in solidum,* for their predecessor's debt, or if they can be convened only each for their own parts, so that the debt will divide amongst them all. It is uncontroverted but the creditor must call them all; so that if there be two or more, he will not get one of them decerned to pay the whole, unless he has also summoned the rest. [It is otherways amongst more executors. Each will be decerned *in solidum,* if so be, I can prove that each of them has intromitted with as much as the sum acclaimed by me comes to. So Dury, *July* 13, 1625, *M'Mitchell. Vide* Craig, page 257.] But the scruple lies here; whether they all being called, he will get each of them decerned to pay *in solidum;* which seems hard, seeing not any one, but all of them, represents the defunct *adæquate.* And it appears by Hope, *folio* 114, *in observationibus patris ad Titulum de Hæredibus et hæreditatibus,* and Dury, who sets down the same practique more at large, at the *7th of February* 1632, *Home* against *Home,* that the Lords were not altogether so clear in this point, yet inclined to cause them all settle *pro indiviso;* (seeing the creditor is not obliged to acknowledge any division made by the sisters amongst themselves; see another reason, in *L.* 27, *parag. ultimo, D. de Peculio;*) and not to burden any one with the payment of the haill, suppose she had succeeded to far more than the debt acclaimed extended to, unless the other sister or sisters should prove bankrupt and insolvents for their proportions, in which case they thought it just to give recourse against that sister who, though she had paid her own part already, yet still brooked some of the defunct's lands and goods, and so long must ever be liable to his debts. This was only attempted *in transenna* but not fully decided. And I find it to be most consonant to the common law, *ubi plures hæredes tenentur creditoribus hæreditariis, non in solidum sed tantum pro partibus hæreditariis; L. 2, par. ult. L.* 3, *D; L.* 6, *et L.* 23, *C. familiæ erciscundæ; L.* 25 *et* 26 *C. de Pactis, et lege* 2 *C. de hæreditariis actionibus; lege* 2 *C. de annonis et tributis:* only, if one of them turned poor, they refused regress against the rest, for recovery of his part; *L.* 33 *et L.* 34 *D. de Legatis,* 2*do. Sic Perezius ad Tit. C. Familiæ erciscundæ, No.* 6. It was otherways *inter confidejussores ante litem contestatam insolvendo factos; L.* 51, *par.* 4 *D. de fidejussoribus,* 17.

Advocates' MS. No. 326, *folio* 130.

1672. *February* 18. Patrick Smith of Bracko *against* Rosse of Balnagoun.

This defender's goodsire having wadset some lands to umquhile Sir John Sinclar of Stevinson, upon the reversion of 25,000 merks, he thereafter disponed the reversion of the wadset lands to Sir John Sinclair of Dunnibaith, (from whose heirs of line Bracko derives right,) with absolute warrandice. After the disponing of which reversion, old Balnagoun dispones the same wadset lands irredeemably to Mr. Thomas M'Keinzie, with all reversions, discharging and renouncing the same. This seeming to be a clear contravention of the warrandice, being double aliena-

tions of the same thing, Bracko has intented summons against Balnagoun, as representing his goodsire on the passive titles, for recourse of warrandice, and for payment of the sums paid by Dunybaith for the said reversion, &c.

Against which pursuit it was ALLEGED, That there was no breach of the warrandice incurred, (always denying the passive titles,) because the disposition of the reversion made by Balnagoun to Dunybaith was not a simple and absolute disposition, but clogged with a back-bond, whereby Dunybaith obliged himself to relieve (redeem) that wadset of Steinson's, and then to grant a reversion in favours of Balnagoun, for redemption of the same lands, upon payment of 36,000 merks : and so Dunybaith's own right by the said backbond being only a redeemable right, Balnagoun might very safely, without incurring any warrandice, dispone the lands irredeemably to Mr. Thomas M'Keinzie; wherein Dunybaith's backbond and reversion is not only expressly narrated, but M'Kenzie is assigned thereto. Which backbond, Dunybaith thereafter *viis et modis* destroyed. Whereon being pursued, and the tenor of it referred to his oath, being conscious to himself of the trust, he would not compear, and so was holden as confest thereon.

Then Bracko insisted for the sum of 11,000 merks, which was farther contained in Dunybaith's backbond than was in Stevinson's wadset, to the reversion whereof he was assigned: Stevinson's wadset bearing only 25,000 merks, and Dunybaith's retrocession or backbond bearing 36,000 merks : together with the annualrent of the said 11,000 merks since the year 1643. To this it was ANSWERED, That Dunybaith, by his backbond, being obliged first to redeem Stevinson's wadset and then to return the lands back to Balnagoun upon his payment of 36,000 merks, unless he has redeemed Stevenson's wadset, or can produce the same, that from it it may be apparent what sums were truly due by (on) that wadset, he could claim nothing ; and if the haill 36,000 merks be found due by that wadset, then he would have right to nothing : till which be produced the superplus cannot be known nor the damage liquidated, in case warrandice were inferred ; and the disposition to Mr. Thomas M'Keinzie, bearing Stevinson's wadset to be for 25,000 merks, is not sufficient, the same only being narratory ; *et non creditur referenti nisi constet de relato.* To this it was REPLIED, That Dunybaith would have redeemed Stevinson's wadset had he not been excluded by the irredeemable disposition of the lands, and discharge of the reversion, given by old Balnagoun to Mr. Thomas M'Keinzie, which Mr. Thomas redeemed the lands from Stevinson and those who came in his right. TRIPLIED, They redeemed not the same by order of law, but by voluntary transactions with the party having right, and so there is no warrandice inferred, because his right would ever have been preferred to M'Keinzie's, (suppose we were not in the case of a backbond, as we are ;) which was no ground in law whereon Dunybaith's right was either weakened or prejudged ; so that his not redemption was in his own default, no action being ever moved against him at M'Keinzie's instance for taking away his right, nor was he disturbed therein by order of law.

The Lords found the posterior alienation made by old Balnagoun to M'Keinzie was not a sufficient foundation for an action of contravention of warrandice, unless by a preceding sentence Bracko could show a distress declared, and that he was legally debarred. *

* But in Stair's printed Decisions, at this place, the Lords altered this, and sustained it as a sufficient distress. See it there.

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. [16*th January,* 1672.] See *Vinnius lib.* 1 *Quæstio. cap.* 15. *Vide* the Books of Sederunt and the compend thereof, at the 20*th* of *December* 1599, act anent the *Laird of Bathayok.*