INNOVATION.

1625. *June* 30. GOOD-MAN of Raploch *against* His TENANTS. No 1.

THE good-man of Raploch seeking a decreet of poinding of the ground of the lands of Letham, by virtue of an infeftment of annualrent which he had acquired out of the said lands; the tenants *excepted*, That he could not pursue by virtue of his wadset, because he had since taken an infeftment of the property of the same lands under the redemption of 2700 merks, in which sum was contained the former, whereupon he had obtained the wadset. The LORDS found, That the acceptation of a new right did exclude him from making use of the former, as long as the last was not quarrelled; but if he were put from it, that he might have recourse to his former right of wadset.

Fol. Dic. v. 1. *p.* 477. *Spottiswood*, (DOMINIUM.) *p.* 83.

*** See Durie's report of this case, No 5. p. 1267, *voce* BASE INFEFTMENT.

1675. *February* 5. MARION BINNY *against* GILBERT SCOT.

No 2.
A party had three sons. The eldest son, after his father's death, renewed a bond due by the father. The eldest son having died, the second son retired the bond, and himself granted a new one. He died in a state of apparency. The third son succeed-

The deceased William Scot of Bonnington having three sons, William the eldest, and Robert, and Gilbert; the said William, by his contract of marriage, had the lands and estate of Bonnington disponed to him by his father Mr James Scot, but was not infeft therein; and after his decease, his brother Robert having succeeded to him, did renew a bond granted by the said William in favours of Robert Riddel; and having retired the said William's bond, did grant a new bond for the sum therein contained; and the said Robert having also deceased before he was infeft in the estate or served heir to the said William; and the said Gilbert the third son having succeeded, a pursuit was intented at the instance of the relict and executrix of the creditor against the said Gilbert, as representing the said William and Robert his brothers; at least, to hear and see it found and declared, that the said bond granted by Robert, was granted by him in contemplation and lieu of the said

No 2. ing to the estate, refused to pay this last bond, as not representing the granter of it. Found liable.

William's debt and bond; and that it ought to affect any estate that did belong to the said William; and in special, the benefit of the said contract of marriage, and disposition therein made in favour of the said William.

It was *alleged* for the defender, That he did not represent Robert nor William upon any passive titles; and though he should represent William, neither he nor the estate would be liable to the said debt, in respect the same was extinct, and innovated by a new bond granted by the said Robert, whom neither he did nor would represent. And the said bond being granted only by Robert, could not affect any thing belonging to William; and he was not concerned to debate upon what account the said bond was given by Robert.

THE LORDS did incline to sustain the declarator, upon that head that the said innovation was only to the effect the creditor might be the better secured and satisfied, the said Robert being apparent heir for the time; and who, if he had lived, would have perfected his right, and obtained himself served heir to William; but being prevented by death, so that the said bond was altogether ineffectual, the pursuer had *condictionem causa data, causa non secuta*, to be reponed against the said innovation; and the defender was *in dolo pessimo* to question the same, seeing *nemo debet locupletari cum aliena jactura*; and he ought not to have William's estate without payment of his debt. And some of the LORDS did urge and instance the case after mentioned, viz. If the younger of the two brothers, the elder having gone abroad, and thought to be dead, should obtain himself served as heir to his father; and the creditors of the father, conceiving that he had right, should renew their bonds, and give back those that they had from the father, and thereafter the elder brother should return, and should be served heir to his father, whether in that case the creditors might have action against the elder brother and estate, notwithstanding of the said innovation?

But because the case was new, and not without difficulty, the LORDS, before answer, thought fit to try what way it could be made appear that the said bond was in lieu of a bond granted by William.

Reporter, *Newbyth.* Clerk, *Gibson.*

Dirleton, No 240. *p.* 115.

*** This case is reported by Gosford:

MARION BINNING, as executrix to her deceased husband Robert Liddell, and as having right by disposition from her said husband, did pursue Gilbert Scot, for payment of 1200 merks contained in a bond granted by Robert Scot, his immediate elder brother, as being given in place and satisfaction of a bond of 600 merks, principal and annualrents, due by a prior bond granted by William Scot, elder brother to the said Robert, who had a disposition made to him of the lands of Bonnington, by his father Mr James Scot; at least to hear and see it found and declared, that she might apprise or adjudge the disposition in satisfaction of the said debt; and likewise did pursue him for payment of the sum of L. 400 of

merchant ware, abuilziements furnished to himself.—It was *alleged* for the defender, That he could not be liable for any of these bonds, because he did not represent his brother Robert, and could not be made liable upon any of the passive titles, being served heir to his father, Mr James Scot, who had died vested and seised in the lands and estate of Bonnington; and for that conclusion, that it be declared that the estate might be comprised or adjudged for the first bond of 1200 merks granted by William, it could be nowise sustained; because that bond was innovated and extinct by the new bond granted by Robert, who had never any right to the lands by infeftment or disposition; and as to the bond of L. 400 granted by Robert himself, the defender could nowise be liable, not representing him by any of the passive titles.—It was *replied* as to the first bond of 1200 merks, it not being extinguished, but only retired by granting a new bond, wherein the annualrents were accumulated with the principal sum, the creditor had still a good right to comprise or adjudge any right that stood in William's person, who was the first debtor; and for the second, Robert being apparent heir to William, who had a disposition of the lands, the pursuer's husband was *in bona fide* to contract with him, and furnish him necessaries upon his bond, whereof he ought not to be prejudged, because he died before he was served heir or infeft.——The Lords did find, That it being proved that the bond of 1200 merks granted to Robert was only retired, and never satisfied otherwise, it ought not to be reputed as an extinguished debt, or as innovated, that being of a dangerous consequence; seeing it is the ordinary custom of creditors to take bonds from apparent heirs without considering whether they are infeft or not; and if it were otherwise sustained, to be an innovation to extinguish the debt, then, if the apparent heir should immediately die, they would be altogether secluded from comprising or adjudging any rights standing in the person of the first debtor, which were against all law and reason. As for the second bond granted by Robert only, who had never any right to the lands, the Lords thought, that unless the defender Gilbert could be made to represent him, he could not be personally liable for his debt, and no declarator of apprising or adjudging could be sustained, but of such a real right as stood in the person of Robert; and could not be extended to any disposition or right that stood in the person of William, who was never debtor for that sum.

Gosford, MS. No 745. p. 458.

No 2.

1678. *November* 28. Gordon of Carnburrow *against* Gordon of Edinglassie.

No 3.

The Lords found, where a creditor takes a wadset after a comprising, (though only in corroboration) yet it is in satisfaction, and restricts to these wadset lands; and the only difference is, he may recur to the comprising if his wadset be reduced, and the comprising may expire *quoad* the wadset lands.

Fol. Dic. v. 1. p. 477. Fountainhall, MS.