

of marriage, he declares the tocher shall be repaid, if there exist no bairns of the marriage; the Lords, upon this, found his intention has been to pay back the tocher in that sole case of not existence of children, and therefore sustained the declarator.

*Advocates' MS. No. 367, folio 148.*

1672. *July.* MARGARET GRAY and DAVID SCOT her Spouse, *against* JOHN GRAY and his CREDITORS.

ABOUT the same time, in a reduction, pursued at the instance of Margaret Gray and David Scot her spouse, against John Gray, father to the said Margaret, and the said John his creditors, the following case happened: Michell Gibsone dispones some tenements of lands to Catharine Gibsone his daughter, and to Jo. Gray her husband, his son-in-law, in liferent, and to the bairns of the marriage procreated betwixt them; which failyieing, to the said Jo. Gray the husband, his heirs and assignees. Catharine dies, leaving only one daughter behind her, called Margaret Gray; who is taken away while she is scarce twelve years old, by David Scot, servant to Walter Pringle, advocate, and married on him without her father's consent; who immediately serves his wife heir, in the foresaid tenements, to her goodsire Michell Gibsone, and intents a reduction of the disposition made to the father, as done *in lecto*.

Against which it was ALLEGED, that such actions are only competent to the heir of the granter, and that only when they are to his prejudice; but *ita est*, this pursuer, the time of the granting the disposition quarrelled, was neither heir nor apparent heir to her goodsire the disponer, her mother being on life; neither was the deed to the heir's prejudice, but rather in her favours, it reserving her liferent thereof; neither did ever the heir quarrel it, or show any dissatisfaction at it either by word or writ, in her lifetime.

The Lords FOUND the pursuer had interest to reduce, albeit she was neither heir nor apparent heir the time of the granting the said right, but immediate heir by progress. As also the reason being proven, they did reduce the disposition in so far as by the termination the father was constituted fiar; but sustained it *quoad* his liferent, because *in omni eventu* he would have had right to that; for *esto* there had not been a disposition, but he had served his wife heir to her father in these tenements, he would then have had right to the liferent by the courtesy of Scotland, she being heretrix. See the information beside me. *Vide supra*, 11th December, 1669, *Shaw and Handyside* against *Calderwood*.

*Advocates' MS. No. 369, folio 149.*

1672. *July.* GEORGE SUITTY *against* ROBERT BELL.

IN the same month of July 1672, in an action pursued before the Bailies of Edinburgh, by George Suitty against Robert Bell, (but which was truly managed

by Robert Burnet against him,) for removing from a writing chamber, conform to a warning forty days before Whitsunday, by chalking the doors, as use is within burgh : it was ALLEGED for the defender, *1mo*, No process, because the pursuer is not sufficiently authorised to pursue ; in so far as George Suity, merchant, the alleged tutor, with whose concurrence this action is intended, has given no warrant, and declares he knows nothing of it. *2do*, *Esto* he did own it, his concurrence is not sufficient, because it is offered to be proven the pursuer is past his years of pupillarity, and so ought to choose curators. *3tio*, *Esto* he had curators, the warning is null, because it is offered to be proven by the said tutor his oath, that he never gave warrant for warning of him ; without which, or a warning from one having power, the defender is not obliged to remove.

To which it was ANSWERED, for the first and second, he will choose his procurator *curator* to him *ad hanc litem*. And which the bailies sustained *eo ordine*. To the third, the pursuer condescends upon William Shaw, by whose warrant the warning was used, and who had power so to do as factor, and who used to set the chamber and uplift the mail. This answer the bailies found relevant.

Whereupon we were put to reply, *1mo*, That a factor has only power to lift rents, but no power to warn tenants, except it be expressly given him. *2do*, Any warning used by William Shaw's direction ought not to be regarded, because passed from, in so far as, after the same, he declared he was satisfied the defender should stay and continue his possession ; and, in regard he had taken arles from Robert Burnet, as having set the chamber to him, he went, forty days preceding Whitsunday, *rebus integris*, and offered the same back again, upon all which instruments were taken : and it is certain, any indirect act interpreting the master's, or those having his commission, their will, that the possessor warned sit still, infers tacit relocation, and imports a discharge of the warning ; tacit relocation being inferred from deeds oft times containing no such express declaration of the master's will as this alleged one does ; *nam dispositum in uno ex correlativis debet et obtinere in altero, cum eorum eadem sit natura*. And as by an immemorial custom within this burgh, it has been permitted to tenants, who have taken houses any time before law-sunday, to give them over without any hazard ; so, beyond all controversy, in common justice and equity, this privilege ought to be equal to the master as well as the tenant.

It came to no decision. But I find Sir George Lockhart and others positive that there is no such custom : at least *nunquam fuit iudicio contradictorio val-lata* ; but suppose it had been so, that it was irregular and dissonant to the principles of law, by which, after I have taken a house and given arles thereupon, I have made a perfect, complete, and consummate bargain, and from which neither party can resile except by consent, there being no more *locus pœnitentiæ*. If it be objected that tacks, and such like contracts and agreements, are not perfect till writ intervene thereupon, and the same be delivered, and, till then, either party may repent ; I answer, that is indeed true ; yet a verbal tack, entered into without any solemnity of writ, is sufficient and obligatory for a year amongst the parties, and they will not be permitted to resile therefrom during that space. And though this be justly called in question, yet it is a rooted opinion of a long time that tenants may do it ; and it has been oft practised, though never drawn in dispute, at least has never found a decision, and therefore would, I think, assoilyie any who use it, till by a law, or a solemn decision, it were found

unlawful, and which ought only to regulate *pro futuro*. *Vide supra*, No. 284, [*Duff against Forbes*, 5th December, 1671.] But the other must be much more dubious, if a landlord may give over his tenant, it having been less practised, and scarce laid claim to by any; yet, if the first stood on solid foundations, the same parity of reason would also seem to militate here; for, why should the master be in a worse condition than the tenant? Why should the law be more a step-mother to him, she being equally confident and indulgent of all who stand *in pari casu*?

In this action it fell incidentally to be talked, if a pursuer, finding himself delayed or otherwise lesed and injured in an inferior court, might advocate his cause to the Lords, as well as a defender. I never saw any of them attempted, and I think them scarce regular: for a pursuer, any time before liti-contestation, is master of his own process; and if he please not the measure of justice he is like to get there, he may take up his process and intent a new pursuit before the Lords, which is a more natural way than to bring it in by way of advocacy: though I cannot see it could be refused, if a pursuer should desire to advocate an action to the Lords, he declaring he passed from that instance he was pursuing before the inferior court. I hear the Lords have lately permitted a pursuer to advocate upon inequity done him. *Advocates' MS. No. 370, folio 149.*

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1672. *July.*

ABOUT the same time there arising a competition betwixt an executor creditor, and the landlord of the house wherein the defunct died, and who was owing him two terms' mail: the landlord claiming the household plenishing *jure hypothecæ*, which the law gives him in the utensils and domicils, the same was opposed by the executor creditor, because he offered him to prove that the greatest part of that household furniture which he had confirmed, and which the landlord acclaimed, though it was standing in the house, yet it never belonged to the last defunct, who stood personally obliged for the mail to the said landlord, she having taken the house off him; but it properly and truly belonged to her husband, who had died some two years before; *et jure quodam familiaritatis*, she had retained and continued the possession of those goods, which formerly she had conjunct with her husband; and that she never had any right to them established in her person any manner of way; but they solely appertained to her husband, who being debtor to him in a certain sum of money, he had confirmed the said goods, as executor creditor to the husband. It may be also urged, that *in generali rerum obligatione, præcipue tacita, nunquam continenter ea quæ verisimile est quemquam specialiter obligaturum non fuisse; l. 6 D. de pignoribus. Vide Harprecht ad par. 7. Inst. de actionibus, No. 18, et seq.* But it may be said, that in pointing of the ground, any goods, though not belonging to the debtor and heritor of the ground, if found thereon, may be taken and pointed; *ergo*, here the landlord may take any goods he finds in his house.

To which it was ANSWERED,—That the law was absolute, and distinguished not, *et ubi lex non distinguit, nec nos*; that it had positively adjudged a tacit hypothec