tenement of land, when he had right, both to the annualrent of 700 merks, and to the comprising, and that infeftment followed before Dollas's right, that Nisbet ought to be preferred; albeit they conceived, that the first right of annualrent of 700 merks was not extinguished by the supervenient right of property founded upon the comprising, the legal whereof was not expired; but the said annualrent of 700 merks might be a ground to defend against any other party who could pretend right to the lands in question flowing from the heritor.

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1671. *November* 21. MARY MENZIES *against* JOHN CORBIT.

IN a double poinding, raised at the instance of the tenants of the lands of Wreaths, against the said Mary Menzies and John Corbit, It was ALLEGED for the said Mary, That she ought to be preferred; because she was infeft upon her contract of marriage, in her liferent of the said lands, long prior to the said John.

It was ANSWERED for the said John Corbit, That he ought to be preferred, notwithstanding that his infeftment was posterior; because her infeftment, in implement of her contract of marriage, was affected with a provision, that, until her tocher should be paid, she nor her bairns should have no benefit of that contract of marriage, nor the infeftment following thereupon, until payment of the tocher; and, therefore, she ought to instruct payment thereof before she can have right to the maills and duties of the lands in question.

It was REPLIED for the liferentrix, That she ought to be preferred notwithstanding; because she, not being bound to pay her tocher by the contract, but only her brother, who was party-contractor, her husband ought to have done diligence; and *sibi imputet* that he was not paid.

The Lords did prefer the liferentrix; unless they would allege that the said Mary's husband had done diligence, and that the same could not be effectual because of prior rights; notwithstanding that the provision of the liferent was a conditional obligement, and could not take effect until the condition was purified; so that the husband was not obliged to do diligence, and was *in tuto* by the said provision. But the contrary was found: which was hard.

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1671. *November* 28. BAILIE BOYD *against* BAILIE JUSTICE.

BAILIE Boyd, pursuing for maills and duties of the lands of Crichton, as being infeft upon a comprising of the said lands from the heirs of Dr Scott, who had a wadset thereof, and by virtue thereof had been in possession;—it was ALLEGED for Bailie Justice, That he was infeft in the said lands upon a compris-

ing led against Ludovick Keir, granter of the wadset to Dr Scott, and so ought to be preferred; because Dr Scott's wadset was extinguished, in so far as his wadset, being affected with a back-tack, for payment of the annualrent of the sums lent upon the wadset, bearing an irritant clause, without any declarator obtained thereupon, he did enter to the possession of the whole lands, and did intromit with the rents thereof, which did amount to as much as the whole sums due upon the wadset, both principal and annualrents; which was offered to be proven.

The Lords did prefer Bailie Boyd *in hoc judicio possessorio;* and found, That an annualrenter or a wadsetter, with a back-tack, being in possession, that, until a decreet be obtained against him, finding that they are debtors, by intromission, with as much as will satisfy the principal sums, and thereby their right extinguished by compensation,—that a singular successor, by disposition or comprising, may, by virtue of their right, possess; and that an allegeance of further intromission, being after they were denuded of the lands, will not meet a singular successor; but, if the wadsetter himself, who had been in possession, had been compearing, it is thought the allegeance could not have been sustained against him.

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1671. *November* 30. ISABEL COLINE, Relict of GILBERT GRAY, late Provost of Aberdeen, *against* JOHN GRAY, his Apparent Heir.

GILBERT Gray, being obliged to employ 25,000 merks upon land or annualrent, to himself and her in liferent, and the children of the marriage in fee; the said Isabel did pursue her husband's heirs to employ 5000 merks of the foresaid principal sum, in respect that she was only infeft in lands which were wadset to him, redeemable upon payment of 20,000 merks.

It was ALLEGED for the defender, That the lands wherein she was infeft were worth of yearly rent as much as would amount to the annualrent of 25,000 merks, which were given her in satisfaction of her contract of marriage; and if there were any thing deficient, they would make up the same.

It was REPLIED, That the wadset lands, bearing a reversion of 20,000 merks, could only be an implement of the contract *pro tanto;* and, albeit the rents were more worth than the annualrent, yet, it being a wadset, and she liable to the hazard of evil tenants, and other burdens, could be no further satisfied thereby but as to the implement of 20,000 merks.

The Lords, having considered the relict's infeftment, that it did not flow from the granter of the wadset, but from her husband, as having right, not only to the lands, but likewise as having right to an apprising, and to a tack of the teinds of the lands, which fell not under the wadset; did find, That the rent of the lands, being equivalent to the annualrent of 25,000 merks, to which she was provided, she could crave no further; but, if the right had flowed from her husband as a wadsetter, only for 20,000 merks, the case had been more difficult: But yet it seems, in reason, that she, being in possession of as much as she was