4to, The benefit of a possessory judgment, is sometimes a good defence against maills and duties, but not against an infeftment of annualrent; though it will hinder and stop the tenants from being decerned in maills and duties, yet it will not stay the ground from being poinded. See the information of this cause beside me. See thir parties, *8th November,* 1679, [Dictionary, page 9069;] *item,* [*Boog* against *Muir,* 30*th July,* 1679.] *Vide infra,* [No. 579,] *Sir John Scot's* case, [*June,* 1677.]

Advocates' MS. No. 568, *folio* 284.

1677. *June* 13. BAILIE *against* GORDON.

ONE gets a wadset in 1643, from the Marquis of Huntly, of three chalder of feu-duties, payable to the said Marquis, (which is *feudifirma feudifirmarum,* discharged in the King's property, act in 1597,) redeemable on 4000 merks, and holden base of himself. (See this in the other MS. 15th November, 1677, page 4.) The wadset is granted to the mother in life-rent, and to her son in fee. The mother having married a second husband, and so, *jure mariti,* he having right to the life-rent, he buys also the right of the fee from her son the fiar, and gets a disposition thereof. Within two months after this, the son who was fiar, (notwithstanding the alienation he had made of it,) does fraudulently infeft his own wife in the right of that wadset, she not being *fraudis particeps.* Within a month after her right, he who had acquired the right of fee from the son, confirms it, and so makes it public, and cleds it with possession. After this, a competition arising betwixt him and the relict of the son,

She ALLEGED her right though posterior was preferable, because her husband's possession was her possession, and she could not *per rerum naturam,* possess otherwise, *vivo marito,* but *jure constituti, et fictione unitatis,* and in his right; and her right was a month anterior to his confirmation, and so she was first clad with possession. ANSWERED, her right could not be reputed clad by her husband's possession, since he had none, being merely fiar, and his mother (whose right the husband had) being liferenter. REPLIED, her husband's right of fee was clad with possession, by his mother's possession, through the reservation of the liferent to her, and consequently the wife's right (which was derived from her husband,) must be reputed as clad with her mother-in-law's possession.

Though this seemed very metaphysical, and made a *progressus in ficta possessione,* and was *fictio fictionis;* (which some reprobate; yet see Hotoman, *in Quæstionibus Illustribus,* and my summary of him;) yet the Lords inclined to have sustained it, to prefer the relict before the other anterior right.

Advocates' MS. No. 569, *folio* 284.

1677. *June* 13. ANENT INFERIOR JUDGES.

I THINK no inferior judge competent to actions of declarators, of commission, of

irritant clauses, or back-tacks in improper wadsets, &c. See the act in 1672, anent the regulations of the session.

I think it also a good reason of suspension and reduction of an inferior decreet, that the court was not kept at the usual place, and that no legal intimation of the charge was made. And thir two grounds were so far sustained, that the Lords turned the decreet into a libel; (it being in absence, holding tenants as confessed upon exorbitant quantities;) and reponed the tenants to their oaths, as to their true verity, in the case of *Kennan* contra *Carlylle*, &c. See the information of it beside me. See Dury, 23*d January*, 1624, *Meldrum* and *Meldrum*. See Craigie's Collection *verbo Escheats*.

Advocates' MS. No. 570, *folio* 284.

1677. *June* 14*th*. The EARL of NORTHESK *against* The EARL of SOUTHESK.

IN the competition for the church of betwixt Mr Lammy, presented thereto by the Earl of Southesk, alleging himself to be patron, and Mr Couts, presented by Northesk, also laying claim to the patronage; and the complaint of the riot made to the Secret Council, by Couts, against Lammy: (*Vide infra*, No. 656, Patronage of Ellon:) The Secret Council referred the competition and debate, anent the right of patronage, to the judge-ordinary; and recommended to the Session, to discuss it summarily, without libel, inrolling, or any other delay,—which of the two should preach and officiate in the meantime at the church controverted; or if none of them but another, referred it to the discretion of the Archbishop of St Andrew's. And as for the riot, which was little or none at all, they kept it before themselves. As for the point of right, it was

ALLEGED for the Earl of Northesk, that this kirk was made up of two by union, whereof his authors and predecessors were patrons to one, and Southesk patrons to the other; so that now they had the presentations *per vices*, of this one kirk, conform to the express decision of the 3d act, Parliament 1617; and that he was infeft in the said patronage *alternatis vicibus*, and that Southesk had presented last; and though that was enough to give him this *vice* without saying more, yet he produced also a writ under the last Earl of Southesk's hand, declaring the next turn to present was Northesk's.

To this last Southesk ANSWERED, it was a personal obligement, and so could not bind him a singular successor.

REPLIED, 1*mo*, He was successor *titulo lucrativo*, by accepting a disposition after that paper. 2*do*, They were in no strait nor need to make use of it.

The Lords preferred Northesk, and found he had best right to this *vice*, and discharged Lammy ever to lay claim to it hereafter.

There was another point not debated, that it would have debarred Couts, and that was on the *jus devolutum*. Both pretended patrons had omitted to present for six months; the Bishop of Brichen, within whose diocess it lay, had presented another, who, if he had appeared and laid claim, would have undoubtedly had the best right; but it seems Couts has prevailed with him to desist.

Advocates' MS. No. 572, *folio* 284.