

yearly given to her, in place of the 500 merks decerned, 1200 merks yearly in all time coming, during her lifetime; for which sum they ordained the lady to have right sicklike as if that sum had been decerned by the sentence; and also, they ordained to be paid to her, for the space of a year which was expired since her husband's decease, 1000 pounds, by and attour 500 merks which she had gotten paid to her before. And this the Lords ordained to stand, as if it had been expressly decerned by the arbiters in their sentence.

*Act.* Stuart and Baird. *Alt.* Nicolson and Nairn. Hay, *Clerk.*

Page 676.

1633. February 26. The LAIRD of CONHEATH *against* The LAIRD of EARLSTON.

MAXWEL of Conheath being made assignee to certain goods, by Katharin Glendinning, owner thereof, which were intromitted with by Gordon of Earlston, and for which he was pursued by the assignee; and he dying, *pendente lite*, the action was transferred in the heir of Earlston; who compearing, alleged that the cedent was at the horn before the making of the assignation, and he has obtained the gift of her escheat and declarator thereon; which, albeit it be after the assignation, yet the horning is anterior to the assignation; after which horning she could do nothing in prejudice of the fisk, which might derogate to the escheat. This exception was found relevant, and admitted to the defender's probation; whereby the donator was preferred to the assignee made before the escheat was gifted, seeing the cedent was at the horn when the assignation was made by her, at which time she could do no deed to prejudge the fisk. The act of litiscontestation in this cause is dated December 6, 1631, and it was decreet-ed February 23, 1633.

*Act.* Cunninghame. *Alt.* Nicolson and Mowat. Scot, *Clerk.* *Vid.* 2d February 1632, Lindsay; 6th December 1631, betwixt these parties.

Page 678.

1633. July 20. LADY ROTHMAY *against* JANET OGILVIE and GEORGE ABERNETHY.

THE Lady Rothmay, as infest in the lands of ——— in conjunct-fee, pursues Janet Ogilvie and George Abernethy her son, for the duty of the said lands divers years bypast; who alleging, that she bruiked by tolerance and right from her said son, who was apparent heir to Ogilvie his father, which father had a right of heritable infestment of wadset of these lands from the pursuer's husband's authors, before the right made to her umquhile husband; by virtue whereof her husband was in possession: and the lady replying that the defender, *viz.* the relict of the obtainer of the wadset, had taken tacks from the pursuer's husband, wherein she had obliged her to pay the duty now acclaimed; and albeit that tack was expired before the years now acclaimed, yet, seeing she bruiked *per tacitam relocationem*, she ought still

to pay the duty which she has not only paid during all the years of the tack, but divers years after the expiring thereof; and before the years acclaimed she paid the same duty; and her son, who was apparent heir to his father in the right of the wadset: And it being duplied, that, by the express condition of the tack, it was provided, that, after the expiring thereof, none of the parties' rights should be prejudged; so that thereby the heir's right of wadset must convalesce; and the payment made by the apparent heir of the wadsetter, after the expiring of the tack, cannot astrict this defender the relict, who left the room whereof the apparent heir became in possession by right of his father's wadset; and who, if any possession she now has, it is as having tolerance of another son, the apparent heir to his father; that son being deceased who was in possession and is alleged to have paid a year's duty to the pursuer after the expiring of the tack; whose deed cannot now prejudice this apparent heir, who succeeds to his father's wadset, and not to his deceased brother who was never infeft; and consequently cannot prejudice the mother bruiking by her son's tolerance, after she had left the room; which interrupts tacit relocation; specially there being a more sovereign right standing in the person of her son thereby to bruik, which takes away all tacit relocation: and it being provided in that tack, that both parties should return, after the ish of the tack, to their several rights, as said is; by the which clause the wadset revives, and the pursuer can never convene them, as bruiking *per tacitam relocationem*. Notwithstanding whereof the exception and duply were repelled, and the defenders were found, as bruiking *per tacitam relocationem*, still debtors in payment of the said duty acclaimed; for the tacit relocation was not found interrupted by her son's intervening possession; seeing she had acquired the possession again, after her son's decease, who, while he lived, paid the same duty; and so she, entering thereby, became debtor of the same duty as possessor *per tacitam relocationem*; wherein she must be reputed to have continued, seeing she never renounced her possession which she had by the prior tack, as she ought to have done.

*Act.* ———. *Alt.* Nicolson and Baird. Hay, Clerk.

Page 687.

---

1633. July 20. BLACK *against* The LAIRD of PITMEDDEN.

ONE Black, a compriser, charges Pitmedden to enter him to the comprised lands; and he craving a year's duty; the compriser answering that he had possessed the lands comprised, himself, a whole year since the time of the charge given by him to the superior to receive him, which he was content to allow to him for the year's duty now acclaimed for his entry; and the other answering that the year's duty ought not to be allowed for the year due to him in law, for his entering of the compriser, because he had an undoubted heritable right to the lands, by virtue whereof he intromitted; and if this compriser may evict that year's rent of the lands from him, by virtue of the comprising, he shall refund the same; but there is no reason that, upon that pretext, he should quit his lands, and receive a compriser, unless he pay the ordinary usual duty, done by all comprisers to the superior for receiving of a vassal in lands comprised; and