Weir, the son, who was author of the wadset, certification was craved *contra non producta;* it being without a warrant, either upon precept of *clare constat* or upon precept from the father. The title whereupon Auchterfardell did pursue, was a disposition granted to him by John Ker, as having right from John Weir, the goodsire, and father to John Weir, first granter of the wadset, for 1050 merks, as having died last vested and seased in the said lands, his son, who was the granter of the wadset, never having been infeft.

It was ALLEGED for Raploch, That no certification could be granted, because he had produced a sufficient title to the said wadset lands, in so far as he had produced, not only the extract of his author's seasine but the register itself; which, being clad with possession since the year of God 1609, was a sufficient title in law, without any other adminicle: and besides, having referred to the pursuer's oath, the having of the wadset made by the son, which was relative to a former wadset, granted by old John Weir, redeemable by payment of 400 merks, which was renounced, and the new wadset taken from the son, as heir to his father, the pursuer had confessed the having of it. Likeas the pursuer deriving right to the one half of the wadset by progress, did thereby acknowledge the truth and verity of the said right, by virtue whereof he and his authors had been in possession past the years of prescription.

It was REPLIED, That an extract of a seasine could be no valid title, a principal seasine being only the assertion of a notary; and the warrant thereof not being produced, certification could not be refused; which being granted, then the pursuer's title, flowing from the oy or heir, served and retoured to the goodsire, who was last infeft, the defender's right ought to be reduced, as flowing *a non habente potestatem;* his father being the person who died last vested and seased. And as to any acknowledgment of the right of wadset, whereby the pursuers and his authors had bruiked, it could not be respected to take away the title and benefit of this pursuit; because, finding his title not good, he was *in bona fide* to acquire a better right from the oy, who was infeft as heir to the goodsire.

The Lords, having seriously considered this case, did find, that albeit certification were granted for non-production of the warrant of the son's seasine, yet, the extract being *in anno* 1609, and possession conform, without interruption by the space of 60 years and above; the defender being but singular successor, it was not imaginable that they could forge any such precept of *clare constat;* they find, that the defender's title could not be reduced, being clad with so many years' possession: but declared, that Auchterfardell his right of wadset of the half of the lands should not be prejudged by taking any new right.

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1675. *July* 6. ALEXANDER BINNING *against* WILLIAM BROTHERSTANES.

IN an action of removing, at the instance of the said Alexander, as being infeft in a tenement of land in Edinburgh, as heir of tailyie to his deceased sister, Margaret Binning; who was spouse to the said William Brotherstanes;—It was ALLEGED, That the defender being infeft in the said tenement, upon his wife's resignation by contract of marriage, and the pursuer having only a tack, re-

decmable upon payment of a thousand pound, made by the defender to the pursuer; whereupon he did grant a renunciation thereof, the said tenement of land, falling now to the pursuer by virtue of the tailyie, the tack ought to revive; seeing the renunciation thereof, in law ought to be interpreted in favours of the defender and his wife, who paid the sum contained in the redemption; considering, that now the pursuer hath succeeded as heir of the tailyie, and that the tack was only granted to him for security of the said sum, as being due by his sister, the only heir of the first marriage, who was then only fiar of the land: and, by contract of marriage made by her and her father, the same was disponed to the defender, as her portion, in contemplation whereof he did provide her to a jointure, and to the conquest during the marriage.

It was ANSWERED, That, by the renunciation, the tack was *funditus* taken away and extinguished; and the defender, who subscribed the same, and took burden for his wife, can never found any defence thereupon; the renunciation being simple, without any provision or condition, that, in case of succession by the tailyie, it should revive and become effectual.

The Lords having considered the renunciation, that it was not only simple, but likewise did bear an obligement to remove, did repel the defence founded thereupon; but did reserve to the defender any action competent to him, which could only be personal, for repayment of the thousand pounds, paid to the pursuer upon the redemption of the tack.

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1675. *July* 7. TROTTER *against* CRAW.

BY contract of marriage betwixt ———— Craw, and Trotter, his wife; there being a special provision, that, in case there should be no children of the marriage, the half of five thousand merks, to which she was provided in liferent, should return to her and her heirs; her husband being dead, she did thereupon pursue his heir, for payment of the half of the foresaid sum.

It was ALLEGED, That the pursuit could not be sustained upon that provision, because it could only be interpreted to take effect in case she had died before her husband, without heirs of the marriage.

It was REPLIED, That the provision not being in these terms, but simply failing heirs of the marriage, the same being now dissolved, the pursuer ought to have the benefit thereof, being now an impossibility that there can be any heirs.

The Lords did sustain the pursuit, and repelled the defence, in respect of the conception of the return of the provision, which was simply failing of heirs: but, in respect that she was liferenter of the whole five thousand merks, whereof the half was only her tocher, they did decern the heir to be only liable in payment after her decease, to any should represent her, or to her assignees.

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1675. *July* 9. CAPTAIN HAY *against* CROMBIE.

IN a competition betwixt the said parties, for preference,—it was ALLEGED for