

ceed all that was due these two last months; they ought to be assoilyied from payment thereof.

It was REPLIED, That the quantities to be melted being delivered and received, and the said Hoyles, employed, satisfied of his fees, nothing could be retained for any alleged damage as to the quantities, to burden the two last months' payment now craved.

The Lords found, that payment being made without any protestation or instruments taken, and that the money was delivered as monthly payments, and not to an account, nothing could be retained for damage suffered, to affect the two last months' payment; especially the party employed being now dead.

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1671. November 15. GEORGE DOLLAS, Writer, against NISBET.

IN a double poinding, pursued at the tenant's instance, of a tenement of land; compearance being made for Nisbet, as being infeft in an annualrent of 100 merks, by William Monteith, who was common author both to Dollas and Nisbet, and thereupon craved a poinding of the ground:—Dollas did compear, and produced an infeftment of property of the said tenement, upon a comprising, as likewise an infeftment of an annualrent of 700 merks, prior both to the comprising, and to the said infeftment of annualrent granted to Nisbet; and thereupon craved to be preferred.

It was ALLEGED for Nisbet,—That Monteith, having the right of the comprising disposed to him, the right of annualrent was extinguished by the right of property supervenient; *quia res sua nemini servit*; and, for the right of property founded upon the comprising, it could not defend against Nisbet's annualrent; because the disposition of the comprising to Monteith, the common author, flowed from Nisbet's author, and was affected with the burden of the said annualrent of 100 merks, wherein Nisbet's author was infeft; the said annualrent being reserved out of the disposition of the comprising.

It was ANSWERED for Dollas,—That the right of the annualrent was not extinguished by Monteith's acquiring of the right of property; seeing Monteith was but a singular successor, and might acquire several rights, either of annualrents or comprising, whereby he might defend himself against any third party; and the infeftment of annualrent being granted by him to Nisbet, only by virtue of the said reservation, contained in the disposition made to him of the comprising, that did operate no more but that it gave him *jus non repugnantiae*: so that, notwithstanding of the comprising, he might bruik the annualrent of 100 merks, but could not defend against the prior right of the annualrent of 700 merks, seeing the common author did not dispoise the said right of annualrent of 100 merks, for all right that he then had in his person, or should acquire.

The Lords did not proceed to give their interlocutor, it being intimated to them, the time of the advising, that parties were agreed; but having considered Nisbet's author's right, that it was not a simple reservation out of the right of comprising, but by an express obligation to infeft in an annualrent out of the

tenement of land, when he had right, both to the annualrent of 700 merks, and to the comprising, and that infestment 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 pouding, 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 infest 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 infestment was posterior; because her infestment, 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 infestment following thereupon, until payment of the tocher; and, therefore, she ought to instruct payment thereof before she can have right to the mails 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 obligation, 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 mails and duties of the lands of Crichton, as being infest 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 infest in the said lands upon a compris-