No 372.

1680. *June* 30. EDWARD RUTHVEN *against* The EARL of CALLANDER.

THE LORDS found, Though a minor's curators cannot sell heritage, without a decreet of vendition, yet they may require the money of a wadset, and renounce it; and, if a decreet be needful, the decreet of suspension of Session is sufficient. They also repelled this objection against the instrument of requisition, that Callander offered to prove, by the procuratory and witnesses, only 24,000 merks of the sum was required, and not the whole, unless he would consign L. 40 Scots, and offer to improve it; because, the notary's common instruments be not probative till the witnesses inserted be examined; yet instruments of premonition, requisition, resignation, and sasine, are probative of themselves; because, they depend on procuratories and precepts, and are the foundations and parts of securities of estates.

Fol. Dic. v. 2. *p.* 242. *Fountainhall, MS.*

1710. *February* 10.

The EARL of LEVEN, and other CREDITORS of FRENDRAUGHT, *against* THEODORE MORISON of Bognie.

No 373.
A reverser having made offer of a bond to the wadsetter, and caution to pay him his annual rents, on his ceding possession, in terms of the act 62d, Parl. 1661, and taking instrument thereon, the instrument, though but the assertion of a notary, was found to be probative of the offer, though the bond itself was not produced.

THE lands of Bognie being wadset in the proper form by the deceased Viscount of Frendraught, *in anno* 1635, for 10,000 merks, to ——— Morison of Bognie, who got infeftment and possession; in the year 1647, David Gregory of Kinnardie apprised the whole estate of Frendraught, comprehending Bognie, and in the 1673, disponed his apprising, then expired, containing the reversion of Bognie, in favour of the deceased George Morison of Bognie, who was infeft upon a charter under the Great Seal; and, in May 1674, granted a back-bond, bearing, that most part of the price given to Gregory for the apprising was the Viscountess of Frendraught's money; and, therefore, obliging him, as a trustee, to denude of the said apprising, in favour of the Viscount and Viscountess, in liferent, and the heirs of the marriage in fee; which failing, to the heirs and assignees of the Viscount; excepting and reserving always as much of the said lands as would pay the sums of money that he had advanced, or should advance for redeeming the estate of Frendraught, or whatever other debt shall be due to him by the Viscount before the date of the disposition, to be granted by him in manner foresaid. *In anno* 1680, Robert Dunbar of Burgie adjudged the estate of Frendraught, and also Bognie's back-bond, and, in March 1683, offered security to him for the annualrents of the principal sum in his wadset; and craved that he might cede the possession of the wadset lands, or be countable for the superplus rent, conform to the act of Parliament 1661: Whereupon he raised a declarator, and count and reckoning; now car-

ried on by the Earl of Leven, as having right to Burgie's adjudication, and transferred *passive* against Theodore Morison, now of Bognie, as representing his father. No 373.

Alleged for the defender; No respect can be had to the offer of security; because, the reversion of the defender's wadset was carried away from the Viscount's Representatives or Creditors, by Gregory's expired apprising, before the leading of Burgie's adjudication, and vested in the person of the defender by Gregory's disposition.

Replied for the pursuer; Burgie, by adjudging the back-bond, (which is *pactum de retro vendendo,*) had right to the reversion; and had the same interest to make the offer, in the terms of the act 1661, as the Viscount himself.

Duplied for the defender; Albeit the apprising in his father's person was redeemable by the back-bond, it remains with him and his heir to all effects, until the sums resting to him be fully paid; as an apprising within the legal carries effectually, till redeemed, all right of reversion competent to the debtor: So that Burgie, by his adjudication, had only right to the reversion of Bognie's apprising, competent by the back-bond, whereof the terms must be observed. For the back-bond did not convey the reversion of Bognie's wadset, but only declared how Gregory's apprising, that conveyed it to the defender, should be redeemed.

Triplied for the pursuers; Although they cannot redeem till they pay the whole debt due to the defender, they have right to the reversion, to make him countable, after the offer of security for the annualrents; 19th June 1669, Scot *contra* Langtoun, No 32. p. 5100.

THE LORDS found, that Burgie had sufficient title and interest to make offer to Bognie of security for payment of the annualrent of the sum contained in his wadset, in the terms of the act of Parliament 1661; to the effect to make Bognie accountable for the superplus rent of the wadset lands, over and above the annualrent of the sum due to him by the wadset; but that the defender's superintromissions shall not be imputed for extinguishing the wadset, but other sums due to him in the first place. But, 22d February instant, the LORDS allowed the defender to be heard upon any objections he had against the legality of Burgie's offer, and adjudication.

1710. *December* 21.—IN the count and reckoning, at the Earl of Leven's instance against Theodore Morison of Bognie, mentioned 10th February 1710, for extinguishing the wadset right of Bognie; the LORDS found, that Robert Dunbar of Burgie, the Earl's cedent, having adjudged the reversion, had a sufficient title to offer security to Bognie in the year 1683, conform to the act 62d, Parliament 1st, Charles II.

The defender now *objected* against the legality of the offer; *1mo*, The instrument of offer bears not, that Burgie's adjudication was read in Bognie's presence, but only that it was produced; and, without hearing it read, he was not bound

No 373. to know that it carried the reversion of his wadset lands, nor obliged to notice the offer; 2*do*, The instrument being only the assertion of a notary, is not sufficient to prove, that the bond of cautionry therein mentioned was offered, unless the bond were now produced for instructing thereof; as in all cases where an offer of money or writs is made, these ought to be produced in the declarator to follow thereupon, that the Lords may determine upon any defects therein; 3*tio*, Bognie, being in the natural possession of the wadset lands, was neither obliged to cede his possession, nor to account for the rents; in respect he was not, after offer of security, legally warned 40 days before the term to remove, conform to a clause in the end of the act 1661, and the decision February 20. 1679, Bruce *contra* Bogie, *voce* WADSET.

Answered for the pursuer; 1*mo*, There was no necessity to read the adjudication, unless Bognie had desired it to be read, which is not pretended; 2*do*, Seeing it appears from the instrument, that the security offered by Burgie was refused, not upon the account of insufficiency, but upon some other pretences, he was not obliged to keep the bond of cautionry, nor is he bound to produce it now: For the act of Parliament making it optional to the wadsetter to take security, and quit possession, or to retain possession, and be accountable; and Bognie having determined his election by refusing security, and retaining possession, the bond was not to be kept as a security for his annualrent, who had chosen rather to possess for his security; whereas, money consigned in order to redemption, coming in place of the right redeemed, must be effectual to the creditor. Instruments of sasine, premonition, and intimation, being required by law, as essential documents to make such deeds public, are probative of the facts therein contained; though instruments taken by persons according to their arbitrement upon matters of fact, or occurrences, do sometimes require an astructing probation; 3*tio*, The meaning of the clause in the act of Parliament is only this, that when the wadsetter, in the natural possession, is willing to accept the offered security, and to remove, (in which case only, the reverser can insist to remove him,) he cannot be removed unless he be legally warned after the offer of security. But the defender cannot subsume, in the terms of that clause, that he was willing to accept the security offered, and remove; for he flatly refused to remove, pretending he possessed by a better right. Nor is the decision betwixt Bruce and Bogie to the purpose; seeing there the Lords found both defences relevant, not *separatim*, but jointly.

THE LORDS found, that the instrument of offer bearing, that Burgie's decreet of adjudication was produced, needed not to bear, that it was read, unless it had been required to be read; and, therefore, repelled the first objection; 2*do*, Found, that the instrument of offer narrating, that Burgie had offered bond and caution to the wadsetter, bearing the tenure of the bond, and the persons bound therein, and Bognie not having accepted thereof, but continued in possession of the wadset lands, the said instrument doth sufficiently instruct the same, albeit the bond offered be not now produced; and so repelled the second

objection; 3*tio*, Found, that the clause in the act of Parliament 1661, viz. where the wadsetter is in the natural possession of the wadset lands, by dwelling thereon, or labouring the same with his own plough and goods, or otherways having the same plenished with his goods, in that case, he shall not be holden to remove from his possession, but at the ordinary term of removing, and that he be lawfully warned 40 days before, and after sufficient security shall be made to him, in manner above specified, before the said warning, is only to be understood in the case, when, after the offer is made and accepted by the wadsetter, he, the wadsetter, who is in the natural possession, becomes a tenant, and cannot be removed till legally warned; and, therefore, repelled also the third objection. No 373.

1713. *February* 10.—In the count and reckoning, at the instance of the Earl of Leven against Morison of Bognie, mentioned 21st December 1710, the defender *alleged*, That Burgie's adjudication, to which the Earl had right, is null, and so could not be a sufficient warrant for making the offer to Bognie of sufficient caution, in the terms of the act of Parliament 1661, in order to restrict him to his annualrents, and oblige him to hold count for the superplus.

Replied for the pursuer; The intention of the act of Parliament being not so much to state and fix the title of the person who might make this offer, as the security of the wadsetter, it appoints his possession to be ceded in favour of the debtor, or any deriving right from him. And seeing solutio fieri potest a quolibet, etiam creditori invito, the sufficiency of the security is more to be regarded, than who made the offer; 2*da*, Bognie being obliged in all events to account, it is *jus tertii* to him, who will be effectually secured, to quarrel the adjudication, seeing the common debtor acquiesceth; 3*tio*, Suppose Burgie had been only a personal creditor, he was entitled to make the offer, that the debtor's effects for his payment might be enlarged; as any creditor, though personal, has an interest to remove fraudulent alienations, upon the act of Parliament 1621, and to pursue reduction of a disposition *ex capite lecti*; 25th November 1669, Creditors of Coupar and Balmerino *contra* Lady Coupar, No 25. p. 3203.; or to redeem an apprising that stands in his way; so it is more the interest of a posterior creditor to redeem an exorbitant wadset. This is further clear from the extension that hath been made of another clause in the statute, viz. the benefit allowed to a posterior appriser to redeem a prior expired apprising in the person of an apparent heir, hath been extended not only to annualrenters; 9th January 1677, Hay *contra* Gregory, No 56. p. 5313.; but to any creditor; M'Kenzie's Observations on the act 1661; seeing they may apprise, *ergo a pari*, any true creditor that may adjudge may make the offer.

Duplied for the defender; The security mentioned in the act must be given or offered by the debtor, or others deriving right from him, to the reversion; and a personal creditor is neither debtor to the wadsetter, nor hath right to the reversion, not having affected the subject with a real right, whereby he could

No 373. have access to the mails and duties, in case the wadset were satisfied; 2*do*, None can make the offer but he who can require the wadsetter to cede the possession in his favour; yea, properly ceding the possession is first required, and the offer of security for the annualrents is but the condition upon which the possession can be demanded. Now, a personal creditor could not claim the possession, nor could the wadsetter safely cede it to him; 3*tio*, It is more reasonable to allow a personal creditor to redeem an apprising coming in the person of an apparent heir, which can only be done within 10 years, than to allow such to alter the state of proper wadsets, which have a perpetual reversion.

The Lords found, that an adjudication, intrinsically null, was no sufficient title for using the offer of caution, in the terms of the act of Parliament 1661.

Fol. Dic. v. 2. *p.* 243. *Forbes, p.* 396. 462. & 659.

*** Fountainhall reports this case:

1710. *December* 26.—The deceased John Morison having taken a proper wadset of the lands of Bognie from Crichton, Viscount of Frendraught, Dunbar of Burgie, a creditor to Frendraught, adjudges the reversion from him; and, in 1683, makes an offer to Morison of a bond of caution, to pay him his annualrents, on his ceding the possession, in terms of the 62d act 1661. The Earl of Leven having acquired Burgie's right, pursues Theodore Morison, now of Bognie, to count and reckon for the superplus rents of the wadset lands, more than paid him the annualrent of his sum, with public burdens, reparations, &c. *Alleged* for Bognie, That the instrument of security offered to his father was null, upon three grounds; 1*mo*, That though the instrument bore the production of Burgie's adjudication, as his title to offer, yet it made no mention of its being read to Bognie, as it ought, without which, he could not know he had any right to the reversion; and, therefore, was not bound to notice the offer. *Answered*, If he had demanded the reading of it, and it had been refused, then there might have been some pretence for this objection; but he knew Bognie's right better than so.—The Lords considered, that procuratories, when produced, are not read, unless required, and much less their adjudication; and, therefore, repelled this nullity. The second was, The instrument bearing, that a bond of caution was offered, that being only the bare assertion of a notary, it cannot make faith, unless the bond itself were now produced, that he may object against it. And so in premonitions, and consignations, in orders of redemption, the money must be reproduced. See 21st February 1666, Lord Borthwick *contra* His Wadsetters, *voce* Wadset.—*Answered*, The instrument bears, that the bond of caution offered was subscribed by Campbell of Calder and Gordon of Gordonston, security beyond exception, and they would be reputed mad to let their bond now lie over their heads these 25 years; and such instruments need not be astructed by any farther probation. The Lords sustained the instrument, and found no necessity of producing the bond. The

third objection was founded on a clause of the 62d act 1661, bearing, that where the wadsetter is in the natural possession, before he be obliged to cede, he must be warned 40 days before a term; which formality being omitted, makes the offer null. *Answered*, The design of the clause is utterly mistaken, and detorted to a wrong sense; for there be two cases presupposed in the act of Parliament; one where he accepts the offer of security for his annualrents, and is willing to yield up his possession to the reverser; and his acceptance turns him to the case of a tenant, and so he must necessarily be warned ere he can be removed. The second is, where the wadsetter refuses the offer, and chuses rather to stay and continue, though it make him accountable for the superplus rents, to extinguish and moulder away his principal sum yearly *pro tanto*; and, in that case, (which is Bognie's plain circumstances, refusing to accept the offer,) there is no need of warning. THE LORDS, accordingly, found he was not in the case where the act required warning. But some were stumbled at a decision *in terminis* contrary, *viz.* 20th February 1679, Sir William Bruce *contra* Bogie, *voce* WADSET. But it was observed, there were two defences there proponed; one upon the want of the warning, and another on the not production of Sir William's title to the reversion; which last was undoubtedly relevant to cast the offer; and the practique does not mark that they were *separatim* relevant, so the Lords might only mean to sustain them jointly.—*See* WADSET.

Fountainhall, v. 2. p. 614.

No 373.

1715. *June* 29.

GLASS of Bogany *against* The CHILDREN of STEUART of Ascog.

THE Laird of Ardinbo being debtor by bond to Bogany, he assigns the bond to Ascog, the last of December 1677. Ascog grants back-bond, acknowledgeing the assignment, but that, notwithstanding thereof, Bogany might pursue the intromitters with Ardinbo's moveables, and, particularly, the donatar to his escheat; and, upon getting payment of his proportion of the moveables, might discharge as much of the sums assigned as might compence the same; which should be understood to be no contravention of the warrandice in the assignation; and, in respect the bond was delivered up, Ascog obliges himself to make the same forthcoming to Bogany upon demand, for the ends foresaid; and failing thereof, to hold count for the same: Bogany thereafter being in hopes to get payment, did, under form of instrument, in April 1678, require Ascog to deliver the bond; whereupon now Bogany intents process against Ascog's Representatives, concluding payment of the whole sums in the bond.

No 374.
An instrument of requisition not sustained as probative, uinless admiculated.

Among other things, it was *answered* for Ascog's Children; That, at such a distance of time, the instrument founded on cannot be sustained as probative, unless the notary and witnesses were alive to support the same; for the instrument being only *assertio notarii*, it were of dangerous consequence to sustain it