

productas; Raplock produceth the first John Weir's infeftment, and the transumpt of the sasine of John Weir, the son, his author, out of the notary's prothecal, and thereupon alleged, that there could be no certification, because he had produced sufficiently to exclude the pursuer's right, and to elide his reason, instructing that John Weir, the son, his author, was infeft, in so far as albeit he did not produce the warrant of the sasine, being a precept of *clare constat*, yet he offered him to prove, that John Weir, the son, by himself, or the wadsetter deriving right from him, had possessed the lands in question peaceably by the space of forty years before intenting of the cause, and so was secured by the general act of prescription, bearing, "That whosoever possesseth by sasines, one or more standing together by the space of forty years without interruption hath sufficient right, without production of the warrants of the sasine." The pursuer answered, *1mo*, That albeit in reductions a clear and full production exclusive of the pursuer may exclude certification, yet where there must be a probation of forty years' possession, the same ought not to be received against the production, but reserved to be made use of against the reason of reduction; *2do*, This process being both a reduction and improbation, a transumpt is not sufficient, but the principal sasine must be produced; *3tio*, The oye's retour bears, "John Weir, the goodsire, to have died seven years after the date of this sasine," and, in fortification thereof, the truth is offered to be proved, so that the sasine is false. It was replied, That seeing the defender produced a sufficient right exclusive of the pursuer, he cannot admit certification, but may use his right either against the certification or the reason, as he pleases; neither is there any moment in producing a principal sasine in an improbation, more than an extract, seeing all depends upon the subscription of the notary only, and his prothecal is more authentic than his extract, which is offered to be produced in fortification of the transumpt; and as to the alleged falsehood in fortification of the sasine, it is offered to be proved, that John Weir, the goodsire, died before the date of the sasine.

The Lords found, That the defender might stop the certification upon his production, providing he declare that his defence shall be peremptory, so that if he succumb, he can allege no further; and in relation to the truth or falsehood of the sasine, the Lords would prefer neither party to the sole probation, and to make choice of their own witnesses, but admitted to either party to adduce witnesses for probation of the death of the goodsire.

Stair, v. 2. p. 141.

1675. June 17.

HECKFORD *against* KER.

Mr. Hugh Ker having granted bond to ——— Heckfords, for the sum of 1000 merks, and being obliged thereby to pay the said sum, with annual-rent, at Martinmas thereafter, and, for the creditors' surety, having wadset, by the said bond,

No. 22.

A proper
wadset.

No. 22. ten roods of land, to be possessed for the annual-rent of the said sum, so long as the same should remain unpaid, the representatives of the said Mr. Hugh were pursued for £6, as the inlake whereof the rent of the land did come short of the annual-rent of the said sum, and for public burdens; who did allege, that the said right being a proper wadset, and the said lands being possessed by the creditor, the debtor was not liable either for annual-rent or public burdens.

The Lords found, That the bond being of the nature foresaid, and containing a proper wadset, so that if the duties of the lands had exceeded the annual-rent, the superplus would have belonged to the creditor entirely, and not been imputed in payment of the principal, the debtor was not liable either for inlake or public burdens; and though, in the beginning of the bond, the debtor was obliged to pay annual-rent, yet the payment of the same was qualified, and to be understood according to the whole tract of the bond, viz. that the duties should be allowed for payment of the annual-rent, and that the creditor should possess and have the use and *antichresis* of the land and rents thereof for his annual-rent, which is clearly a proper wadset.

Reporter, *Newbyth.*

Clerk, *Mr. John Hay.*

Dirleton, No. 268. p. 129.

1679. *February 20.* BRUCE *against* BOGIE.

No. 23.
Offer of cau-
tion by act
1661.

Sir William Bruce having acquired right to the barony of Kinross-shire, did, *in anno* 1676, make an offer by an instrument to Robert Bogie, proper wadsetter of a part of the said barony, for 10,000 merks, “ offering him security for his principal sum and annual-rent, and requiring him to cede the possession conform to the act of Parliament 1661, betwixt debtor and creditor, and protesting, that if he did not cede the same, that he should be countable for the superplus of the rent more than his annual-rent,” and now pursues him to count and reckon. The defender alleged, *Absolvitor, 1mo*, Because the instrument of offer bears “ no production of Sir William’s right to the reversion,” and he being a singular successor, never acknowledged by the defender, he was not obliged to cede his possession, and consequently was not countable; *2do*, By the said act of Parliament it is declared, “ that where the wadsetter is in natural possession by labouring the ground, that he shall not be obliged to remove, but upon warning before Whitsunday,” and this requisition being at Michaelmas, he could not cede his possession, being natural by labourage at that time, so that part of the act to count being only consequent where the wadsetter refuses to cede his possession upon an offer conform to the act of Parliament, this offer not being conform, he is not countable. The pursuer answered, That the act of Parliament requires no production of rights, but only “ if the debtor, or any deriving right from him, offer,”