

(DUE *ex pacto*.)

1662. December 11.

GEORGE LOGGIE *against* PETER LOGGIE.

GEORGE LOGGIE having borrowed 800 merks from Peter Loggie, his brother, gave a wadset therefor. The said George being an old man, without hope of children, the reversion was only granted to George, and the heirs of his own body, and his liferent of the wadset lands was reserved, without mentioning of any back-tack duty, or annualrent. George having used an order and consigned the 800 merks, obtained declarator.—Peter suspends, and *alleges* no redemption ought to have been, till the annualrent were consigned with the principal.—The charger *answered*, That the contract of wadset bore no annualrent.—The suspender *replied*, That albeit it did not, yet he having lent his money in these terms, in hopes of succession, and his brother having now married a young wife, he ought not to take advantage of him, seeing the annualrent is due, in equity, for the profit of the money.

THE LORDS, in respect of the tenor of the contract of wadset, found the letters orderly proceeded, without any annualrent, and that in this case it could not be due, without it had been so pactioned and agreed.

Fol. Dic. v. 1. p. 38. Stair, v. 1. p. 149.

1699. July 12.

MR ALEXANDER CARNEGIE *against* KINFAUNS.

IN the contract of marriage between Mr Alexander Carnegie, second son to the Earl of Northesk, and Anna Blair, heiress of Kinfauns, his father engages for L. 40,000 of patrimony with his son. Kinfauns disposes his estate to his daughter, and the heir-male of the marriage, with this quality, that if Alexander survive and enter into a second marriage, it shall be lawful for him to burden the estate of Kinfauns with 20,000 merks in favours of a second wife, and the heirs of that marriage; which case existed, and the said 20,000 merks being affected by his relict and her son, it was first debated, that the faculty was extinct, never being specifically exercised;—this the LORDS repelled 23d June 1698*, and found the entering into a second marriage a sufficient exercise and equipollent. Then Crawford of Monorgan, Alexander Peter, the Earl of Northesk, and other creditors of the father's, craved preference to the son, because this being *in bonis* of their debtor, was both affectable, and actually affected by them, and he could have discharged it in whole or in part; and so being *fiar*, his son can have it in no other way but as heir to him, and must, *eo nomine*, be subject to their debts, and they preferred *quoad* this interest.—*Replied*, This faculty was never purchased nor acquired by their debtor's means, but was given in contemplation of the L. 40,000 the Earl of Northesk, his father, contracted with him, and though he might accept or repudiate, (which is the nature of every faculty,) yet

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* See The case alluded to, between the same parties, Fount. v. 2. p. 5. *voce* FACULTY.

No 20.

No back-tack-duty or annualrent having been mentioned in a wadset. In the particular circumstances of the case, declarator of redemption allowed, without payment of annualrent.

No 21.

A party, by a reserved faculty in his contract of marriage, is allowed to provide to a second wife in liferent, and the children in fee, a certain sum, without mention of annualrent. Annualrent found due from the dissolution of the second marriage by the husband's death.