No 82. affirming, the Lords would have examined the notary or any other persons or evidences for astructing the verity of the sasine.

Stair, *v.* 1. *p.* 580.

1669. *June* 19. Scot *against* Langton.

No 83.
The oaths of a superior and of the witnesses inserted in a gift of liferent, taken to ascertain that the gift was antedated and simulate.

John Graham of Gillesby having wadset certain lands to James Langtoun, he did thereafter (with consent of Earl Annandale, superior) eik 1200 merks to the reversion, and the Earl ratified the former wadset; and Graham, with his consent, of new disponed again the lands for the sums in the first wadset and eik, and added some other clauses; the first wadset was before the act between debtor and creditor, and by virtue thereof the wadsetter was in possession; the second wadset was after the said act; the superior consented only to the second wadset, and of the same date gave a gift of Graham's liferent to Robert Scot, whereupon Robert, having obtained general declarator, pursues now special declarator for the mails and duties of the wadset lands, as falling under the liferent of Graham, the granter of the wadset. It was *alleged* for Langtoun the wadsetter, That he ought to be preferred to the donatar, not only for the first wadset, which was constituted before the rebellion, but for the second wadset, comprehending the eik, because the superior by his consent to the second wadset, without any reservation, had communicated all right in his person, and consequently the liferent escheat of Graham, the granter of the wadset, in the same manner as if he had given the wadsetter a gift thereof, and so no gift, not being anterior to the other, could prejudge the wadsetter. It was *answered* for Scot the donatar, That the allegeance is no way relevant to exclude his gift, unless the wadsetter could allege a deed denuding the superior anterior to the pursuer's gift; but here the superior's consent is not anterior, but of the same day's date, and may be posterior, and therefore the gift, which is the *habilis modus*, must be preferred unto the superior's consent to the wadset, which is but indirect, and consequential to infer the right of liferent; at least both must be conjoined, and have equal right, as done *simul et semel*. It was *answered* for the wadsetter, That the superior's gift must not be preferred to the consent, though of the same date, because he was then in possession of the wadset lands, and needed no declarator; and the gift is but imperfect, until a general declarator, which is the intimation thereof, no declarator being requisite to the consent of the superior to the wadsetter, and so is preferable.

The Lords preferred the wadsetter.

It was further *alleged* for the donatar, That the wadsetter must restrict himself to his annualrent, and be countable to him for the surplus, seeing now he makes an offer to find the wadsetter caution, and so he must either quit his

possession, or restrict conform to the act betwixt debtor and creditor. The wadsetter *answered*, That his second wadset bearing not only a ratification of the first wadset in all points, but a disposition of the same lands, falls not within that clause of the said act of Parliament, which regulates only wadsets prior to that act; and the new disposition makes the old wadset as extinct and innovate. The donatar *answered*, That there being a *jus quæsitum*, conform to the act, as to the former wadset, the posterior ratification cannot derogate therefrom, or take it away, unless it had been expressed, and *in meritis causæ*, it was alleged that the wadsetter had near the double of his annualrent. No 83.

THE LORDS preferred the donatar as to the surplus, more than the annualrent of the first wadset, and ordained the wadsetter to restrict.

The wadsetter further *alleged*, That the gift was antedated and simulate to the rebel's behoof, and so accresced to the wadsetter; which the LORDS sustained, and found the simulation probable by the oath of the superior, and the witnesses inserted in the gift.

Stair, v. 1. *p.* 620.

1670. *January* 25. ANDREW HADDEN *against* NICOL CAMPBELL.

No 84.
The Lords *ex officio* ordained communers, notaries, and witnesses to be examined as to the reading of a writ to the granter, and the warrant to subscribe it.

ANDREW HADDEN having charged Nicol Campbell, upon a bond subscribed by him as cautioner for Samuel Meikle goldsmith, Nicol Campbell suspends, and raises reduction on this ground, that he being an illiterate man, and could not subscribe, he was induced to be cautioner for Samuel Meikle, but on these express terms, that he should only be cautioner for 1200 merks, and accordingly he gave orders to the two notaries, to subscribe for him as cautioner for 1200 merks, the said Andrew Hadden the creditor being then present at the warrant and subscription; and yet a far greater sum is filled up in the bond, which he offers to prove by the two notaries, the witnesses inserted, and the communers. The charger *answered*, That he oppones his bond, being a clear liquid bond in writ, which cannot be taken away by witnesses. The suspender *answered*, That albeit regularly writ cannot be taken away by witnesses, yet fraud or circumvention, or the terms of agreement and communing in contracts, are always probable by the oaths of the communers, writer, and the witnesses inserted.

THE LORDS would not receive the reason to be proved in the ordinary way by witnesses, but *ex officio* ordained the communers, notaries, and witnesses, to be examined, that they might consider the clearness and pregnancy of their testimonies, whether this writ was read to the suspender when he gave warrant to subscribe, and what was read for the sum, and on what terms he gave warrant to subscribe.

Fol. Dic. v. 2. *p.* 222. *Stair, v.* 1. *p.* 662.