1671. *June* 16. LORD LOVAT *against* LORD M'DONALD.

No. 20.
Formalities of the offer of security for the annual-rent of the wadset sum.

The Lord Lovat having intented action against M'Donald, upon the act of Parliament anent debtor and creditor, for payment of the superplus of a wadset, granted of a part of Lovat's lands, for the sum of 5000 merks, which they alleged were worth 2000 merks of yearly rent, and that since the year 1662, in respect that M'Donald was required, and instruments taken, to accept of security for payment of his annual-rent. It was alleged, That the requisition was only at the defender's dwelling-house, he himself being out of the country, and that letters of supplement ought to have been raised, and intimation made upon 60 days; 2*do*, A simple requisition was not sufficient, and the defender could only be liable from the date of the summons raised thereupon, which was not until five years thereafter. It was replied, That the act of Parliament did not ordain requisitions to be made of that kind, but in respect of the exorbitancy of the wadset, it was sufficient to require at the dwelling-house, and that thereupon summons being raised *quocunque tempore*, the defender was liable for the superplus rents after the requisition. The Lords did not sustain the requisition, the defender proving that he was out of the country, which being proved, they did find him only liable from the date of the citation before the Lords; but he failing to prove, or admitting to the pursuer's probation, that he was in the country, they proving the same, they found him liable from the date of the requisition. But in respect the instrument of requisition was quarrelled upon that ground, that there was neither a procuratory given nor produced, the Lords did ordain, that the procuratory should be produced, and that the notary should declare, that he knew the verity thereof, and that it was good and sufficient; as likewise that the security afforded should be condescended on and produced, and found to be such as the wadsetter could not refuse, otherwise they declared that they would not sustain the requisition.

Gosford MS. No. 352. p. 170.

1673. *January* 7. KENNEDY *against* HAMILTON.

No. 21.
What requisite to vest a wadset-right?

John Weir having granted a wadset of the lands of Cumberhead, John Weir, his son, did redeem the same, and took on a new wadset, and the wadsetter possessed, and by progress came to Kennedy of Auchtifardel, who took a new right from John Weir, the oye, as heir served to John Weir, his goodsire, and Hamilton, younger, of Raploch, purchased a right to the reversion by progress from John Weir, younger. Acuhtifardel upon his right pursues reduction and improbation against Raploch, upon this reason, that any right he had was *a non habente potestatem*, John Weir the son never being infeft, and insisting for certification *contra non*

productæ; 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, 1*mo*, 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; 2*do*, This process being both a reduction and improbation, a transumpt is not sufficient, but the principal sasine must be produced; 3*tio*, 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. No. 21.

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. *ft.* 141.

1675. *June* 17. HECKFORD *against* KER.

No. 22.
A proper wadset.

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,