1687. *June 22.* The Earl of Cassillis *against* The Town of Maybole.

The Earl of Cassillis pursues the burgesses and inhabitants of the Town of Maybole, as his tenants or vassals, to relieve him proportionally of the poll-money, conform to the 3d Act of Parliament 1681, and the 34th Act 1685. Alleged,—Some of them did not hold immediately of the Earl, but of Kennedy of Danger, his val-vassor. *2do*, None of them were liable, because the Acts only impose that burden on those who are not separately valued themselves; but *ita est*, they are in the stent-roll, and pay to the collector of the cess of the shire of Air at the valuation of £141 yearly; and it expressly bears to be for Maybole, and its roods. Answered,—This is not for their trade and houses, but only for their acres.

The Lords, on Carse's report, find that the tenants of such vassals as are valued by themselves are not liable to the superior or over-lord for relief of his cess, on these Acts of Parliament: but, before answer to those vassals or their tenants who are valued in common, ordain the suspenders to condescend and instruct whether that article of the valuation be of the whole, and how the particular articles are subdivided, and in what manner the cess is paid by the Town; and if there be any persons therein free from payment of the cess.

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1687. *June 25.* Duff of Braco *against* Arthur Forbes.

Duff of Braco's right on the estate of Balveny is preferred to Arthur Forbess's; for though Braco was agent in the cause, yet it was pendent before the employing him. The Duke of Gordon has acquired in Braco's right.

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1686 *and* 1687. David Crighton *against* James Murray of Skirling.

1686. *March* 10.—David Crighton's action against James Murray of Skirling, being reported by Castlehill; the Lords sustained the pursuer's title to call for repetition *condictione indebiti*, though the right was his wife's, and she is dead, because of his contract of marriage produced; and reponed him against Skirling's decreet, in respect the translation to Mr James Ross was to the behoof of Skirling, now defender, and that it contained a discharge to two of the cautioners; and therefore it was unwarrantable to decern the pursuer and his wife for their parts of the sum: but find it relevant, *scripto vel juramento*, that the pursuer transacted the sum decerned for, and got an abatement thereof; which will import homologation against him. *Vide* 3d December 1686.

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1686. *December* 3.—In David Crichton's action against James Murray of Skirling, mentioned 10th March 1686, Skirling was allowed to prove that

David got an abatement by his transaction, *scripto vel juramento.* And he having produced some decreets for proving thereof, David gives in a bill, alleging the writs produced were made use of before the act was made, and had no contingency with the point admitted to probation, but were only thrown in to postpone and delay his decreet of repetition of the sum *indebite solutum;* and therefore craved it might be referred to Castlehill to consider the production, (he having made the act,) that, if they had no contingency to prove, then they might be rejected; seeing it would be long ere they could come in to be advised by the ordinary course of the roll.

The Lords remitted the consideration of the papers produced to Castlehill; who, on perusal, found a contingency. So the cause was enrolled to be advised. *Vide* 28th June 1687. *Vol. I. Page* 434.

1687. *June* 28.—David Crighton's repetition *condictione indebiti* against James Murray of Skirling, mentioned 3d December 1686, is advised; and the Lords, having considered the debate, and writs produced, and Castlehill's report, find the defence of transaction, and abatement of the sums paid by the pursuer to the defender, by virtue of Mr James Ross's decreet, not proven; and therefore decern against the defender for repetition of the haill sums paid by him to the defender, by virtue of the foresaid decreet, more than Alderston, one of the cautioners, his part, whom the pursuer represents. But, in regard, at Candlemas 1681, in the account betwixt *Dumfries and Newbyth,* it appears there was an abatement of the total sum made up of the sums contained in the decreet foresaid, and the annualrents thereof, and of extrinsic debts and their annualrents; that the said abatement may be constituted, ordain the clerk, at the sight of Lord Castlehill, to make up an account, charging the defender with the receipt of £3000, contained in the said decreet, and the annualrent thereof from Lammas 1649 to Candlemas 1681, and of the two extrinsic sums, and the annualrents thereof to the said time; and in so far as the sums to be made up exceed the £8802 truly received by the defender, to give him credit therefor, as the abatement then given, and for Alderston's part of the sums, and the extrinsic debts; and, in so far as these sums are less than the total charged upon the defender, to decern him in repetition of the same.

James Murray having given in a bill against this, and the Lords, on the 22d of July, having heard Castlehill report the points of the bill and answer; find the account produced under the pursuer's hand does not instruct the abatement or transaction, nor ought to be the rule of the account; and find, by the assignation granted by Skirling to Russel, and by Russel's translation to Mr James Ross, that Pitcairn of Forthar, one of the four cautioners, his part was discharged; and that therefore the defender, Skirling, or Mr James Ross his trustee, could not take decreet against the pursuer but for Alderston's fourth part, and for the third part of St Leonard's fourth part, being the fourth cautioner, who was insolvent; and that the defender ought to have credit for the annualrents of the annuals of the said fourth part, and the third part of St Leonard's part, from the date of the denunciation on the decreet in 1673 (conform to the 20th Act of Parliament 1621,) to Candlemas 1681, which is the time of the account and payment, which makes up the annualrents of the sums justly decerned, but not for annualrents of the annualrents of the sums which by this present decreet are ordained to be repeated and repaid; and therefore

approve of the calculation produced, and ordain the two partial payments made by Alderston and St Leonard's to be deduced, conform thereunto; and that the decreet be extracted for the balance.

This being also reclaimed against, the Lords, on the 26th of July, refused the desire of the bill, and adhered to their former deliverance, and ordained the calculation whereon the decreet is to be extracted, to be conform to the interlocutors, unless the defender will *instanter* prove his allegeance that the pursuer is heir of tailyie, or otherwise liable as intromitter with the goods and gear of the principal or cautioner. In obedience whereto James Murray having produced a disposition, granted by the said David to John Gibson, of a tenement, near the Court of Guard of Edinburgh, belonging to his father, one of the cautioners, bearing sums of money; the Lords, on the 29th of July, did not find that this gratuity inferred any passive title on David.

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1684 *and* 1687. ANDREW KER of LITTLEDEAN *against* ANDREW SIMPSON.

1684. *February* 14.—KER of Littledean's recognition against Simpson being reported by Boyne, the Lords ordained it to be heard in their own presence. The case was: a ward-vassal grants a wadset out of his whole ward-lands, for a sum of money far within the worth of the half of the lands affected, with a back-tack for payment of the annualrent; and the wadsetter is thereon infeft, but the granter is still in possession, and pays the back-tack duty punctually, and the back-tack is neither incurred nor declared. ALLEGED for Littledean,—That Simpson, his ward-vassal, had by this incurred recognition; because a wadset gives a right of property; and law does not consider for what sum it is redeemable, whether above or below the half of the land; but only if there be a real *alienatio et translatio dominii*, as is here, in giving the wadset over the whole ward-tenement. ANSWERED,—This wadset is but all one case, as if no more of the ward-lands were annailyied than what precisely would have paid the annualrents of the wadset sum, and the rest only given in warrandice of it; in which case there would fall no recognition; especially seeing the heritor is only in possession, and the wadsetter cannot attain it so long as the back tack-duty is paid him.

This point is new; but these casualties arising from *quasi*-delinquencies should not be extended. *Vide* this decided 29th June 1687. *Vol. I. Page* 270.

1687. *June* 29.—Andrew Ker of Littledean's declarator of recognition against Janet Law, relict of Andrew Sympson, mentioned 14th February 1684, having been debated on the 15th current, was decided this day. The defences were, 1*mo*, That the wadset granted to Sir Alexander Don (whereon the recognition is alleged to be inferred,) was only an improper wadset for 3200 merks, which is far within the half of the worth of the ward-lands, and consequently for a back-tack duty far within the half of the rents; and so the major part is not alienated, no more than in a total alienation for warrandice, or in liferent; and that it was so found in *Hay of Murie's case*, observed by Stair,