

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 decret 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 decret is to be extracted, to be conform to the interlocutors, unless the defender will *instante* prove his allegiance that the pursuer is heir of tailie, 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 domini*, 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 annailyed 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, *Imo*, 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,

7th July 1681. And a sub-feudation of this nature would be lawful. *2do*, Littledean, the superior, by a bond was obliged to receive and confirm Haitly, the ward-vassal's creditor, in thir lands. *3tio*, He has homologated the wadset by acquiring it, and bruiking the lands by it.

ANSWERED to the first,—In a wadset, the property is alienated without the superior's consent, and the ward-vassal retains nothing but a tack as a tenant, which is merely personal, and no real right, (except allenary in the case of transmission of the lands to a singular successor, by the 18th Act of Parl. 1449;) and if the back-tack were declared, recognition would certainly be incurred then. To the second,—His bond was only to confirm the particular creditors therein mentioned, whereof Sir Alexander Don was none; and, *esto* he was surrogated in Mr Alexander Strang's place, and with his money paid Strang, yet our law knows no such substitution without a formal conveyance and disposition, else the prior right extinguishes. To the third,—He acquired the wadset not so much in contemplation of the ward-lands, (which he could bruik *alio titulo*,) as of some blench lands also contained in the wadset.

Yet the infeftment being granted out of both blench and ward-lands, was not sustained to secure against a recognition, in *Cromarty's case*, *supra*, 23d Feb. 1683.

The Lords having advised the debate and writs, they repel the defence founded on the back-tack set by the wadsetter to the vassal, reverser; and find the recognition inferred by the wadset's being over the major part of the feu, however small the wadset sum be: and also repel the defence founded on the superior's obligation to confirm Strang's wadset, the same being only personal to Strang, and not for Sir Alexander Don's wadset: but sustain the third defence of homologation, and find the same proven by the qualification of taking a disposition of the lands from the wadsetter, (though blank in the receiver's name,) and by producing the same, and debating thereon in this process; and therefore assoilyied from the recognition. *Vol. I. Page 460.*

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1687. June 29. JOHN WARDLAW of ABDEN *against* SIR HENRY WARDLAW of PITREVIE.

THE reduction, *ex capite fraudis et circumventionis*, at John Wardlaw of Abden's instance, against Sir Henry Wardlaw of Pitrevie, was debated; *viz.* that old Pitrevie, to whom the defender is served heir, being the pursuer's tutor and curator, he took no care of his education, but sent him to London under George Wardlaw, a most unfit governor, where he was trepanned by Sir William Ballantine, &c. to marry a common whore; and then George (under the pretence that it was better his cousin Pitrevie should succeed to him, than his spurious issue,) procured from him an absolute disposition to all his estate, in land and money, worth 100,000 merks, giving him only 4000 merks by year; and to show that it was a premeditated contrivance, the lands are bounded, and the sums and dates of the bonds are all particularly inserted in this disposition, though it was done at London. And then he sent him to Holland, and pro-