third objection was founded on a clause of the 62d act 1661, bearing, that where the wadsetter is in the natural possession, before he be obliged to cede, he must be warned 40 days before a term; which formality being omitted, makes the offer null. *Answered*, The design of the clause is utterly mistaken, and detorted to a wrong sense; for there be two cases presupposed in the act of Parliament; one where he accepts the offer of security for his annualrents, and is willing to yield up his possession to the reverser; and his acceptance turns him to the case of a tenant, and so he must necessarily be warned ere he can be removed. The second is, where the wadsetter refuses the offer, and chuses rather to stay and continue, though it make him accountable for the superplus rents, to extinguish and moulder away his principal sum yearly *pro tanto*; and, in that case, (which is Bognie's plain circumstances, refusing to accept the offer,) there is no need of warning. THE LORDS, accordingly, found he was not in the case where the act required warning. But some were stumbled at a decision *in terminis* contrary, *viz.* 20th February 1679, Sir William Bruce *contra* Bogie, *voce* WADSET. But it was observed, there were two defences there proponed; one upon the want of the warning, and another on the not production of Sir William's title to the reversion; which last was undoubtedly relevant to cast the offer; and the practique does not mark that they were *separatim* relevant, so the Lords might only mean to sustain them jointly.—*See* WADSET.

Fountainhall, v. 2. p. 614.

No 373.

1715. *June* 29.

GLASS of Bogany *against* The CHILDREN of STEUART of Ascog.

THE Laird of Ardinbo being debtor by bond to Bogany, he assigns the bond to Ascog, the last of December 1677. Ascog grants back-bond, acknowledgeing the assignment, but that, notwithstanding thereof, Bogany might pursue the intromitters with Ardinbo's moveables, and, particularly, the donatar to his escheat; and, upon getting payment of his proportion of the moveables, might discharge as much of the sums assigned as might compence the same; which should be understood to be no contravention of the warrandice in the assignation; and, in respect the bond was delivered up, Ascog obliges himself to make the same forthcoming to Bogany upon demand, for the ends foresaid; and failing thereof, to hold count for the same: Bogany thereafter being in hopes to get payment, did, under form of instrument, in April 1678, require Ascog to deliver the bond; whereupon now Bogany intents process against Ascog's Representatives, concluding payment of the whole sums in the bond.

No 374.
An instrument of requisition not sustained as probative, uinless admiculated.

Among other things, it was *answered* for Ascog's Children; That, at such a distance of time, the instrument founded on cannot be sustained as probative, unless the notary and witnesses were alive to support the same; for the instrument being only *assertio notarii*, it were of dangerous consequence to sustain it

No 374. after so long a time; and though law gives faith to the instruments of notaries acting in certain cases, where law has determined they should be probative, yet that can never be extended to their actings in such cases as the present; for that were to extend their faith beyond what law and practice allow them. Holograph writs carry a much stronger proof of their verity than instruments of notaries; and yet law has cut them off by 20 years prescription; and this instrument is within a few years of the long prescription.

Replied for the pursuer; That, in some particular cases, our law gives such instruments entire faith; as is observed by the Lord Stair, Lib. 4. Tit. 42. § 9., where he takes notice of the particular cases in which they are probative of themselves, and brings in the present case among the rest, in these words; "In other cases, when men will not do acts which they are obliged to do, &c. instruments taken thereupon by notaries, having witnesses inserted and required, are probative, which no other witnesses could prove."

Duplied for the defenders; That the plain meaning of the Lord Stair's words is, that these facts, which ordinary witnesses could not be admitted to prove, may, in the cases mentioned, be proved by instrumentary witnesses; which is so far from proving that the bare assertion of a notary is sufficient, that it proves the contrary, *viz.* that though these instruments were recent, they must be supported by the testimony, and not the subscription of the witnesses.

The Lords found the instrument not probative of itself, unless it were adminiculated by some document or other probation.

Act. *Hall.* Alt. *Coult.* Clerk, *Mackenzie.*

Fol. Dic. v. 2. *p.* 243. *Bruce, v.* 1. *No* 111. *p.* 137.

*** See in the case Malvenius against Bailie, No 1. p. 583. *voce* Apprentice, the offer back of an apprentice, who had eloped, under form of instrument, was not found proved by the instrument itself, but the witnesses and notary were examined thereupon.

SECT. III.

Instrument of Sasine.

Kell *against* Morison and Thomson.

No 375. In an action of removing pursued by Janet Kell against Alexander Morison, and Janet Thomson his spouse, the Lords found the said Janet's sasine null, because it was given by her husband, *propriis manibus*, without a warrant, notwithstanding it was *alleged*, That the said sasine was given to her *tanquam spousæ futuræ et sic intuitu matrimonii*, and that she had been in possession of a great part of the lands contained in the sasine, except the lands thairfrae.—See No 385. *Fol. Dic. v.* 2. *p.* 245. *Kerse, MS. fol.* 77.