

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.

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. I. p. 620.*

1670. January 25. ANDREW HADDEN against NICOL CAMPBELL.

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 comuners. The charger *answered*, That he opposes 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 comuners, 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 comuners, 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. I. p. 662.*