1682. *March.* JOHN DUNLOP *against* PORTERFIELD of Duchal.

No. 27.
Effect of an unregistered eik.

Magbyhill having granted a wadset for 8000 merks, with an obligation to pay in and be accountable for the superplus over the current annual-rents, thereafter an eik of 2500 merks was made to the reversion, but was not registered; and the wadsetter being pursued by an adjudger, after the eik, for extinction of the wadset by intromission with the said superplus,

The Lords found, That the unregistered eik was null *quoad* the adjudger; but that it was *titulus coloratus bonæ fidei ad percipiendos fructus*, not only till the adjudication or citation in this process, but even till sentence therein. Although the reason being a nullity *in jure*, the defender had not *probabilem causam litigandi*. But the process had not depended long, and was to the behoof of the debtor's apparent heir. And it was alleged for the pursuer, That although *titulus bona fidei* may hinder to *repetere fructus consumptos*, yet the defender having also a valid title in his person, viz. the 8000 merks, the superplus ought to be imputed to the extinction of so much thereof yearly.

Harcarse, No. 1024. *p.* 292.

1683. *March* 22. EARL MARSHAL *against* WADSETTERS.

No. 28.

Found, That in order to restrict the rents of the wadset to the annual-rent, security needs only to be offered for the annual-rent, and not for the *sors*, seeing the infeftment continues a security for that.

Harcarse, No. 1025. *p.* 292.

*** This case is reported by P. Falconer:

In the action of count and reckoning pursued by the Earl of Marshal against his wadsetters, for superplus duties, wherein the Earl's title was as donatar to the single and life-rent escheat of his brother, who had intented process, in the year 1665, against the wadsetters, as also as having right to the reversion by virtue of several comprisings; it was alleged for the defenders, That they could not be liable since the time of intenting the late Earl's process, in respect the deceased Earl never made to the defenders offer of surety for their annual-rent, in the terms of the act of Parliament anent debtor and creditor; *2do*, That albeit the pursuer did offer security *in anno* 1679, yet the same was not sufficient whereupon the defenders could rely, and quit their possessions; *3tio*, That they could not be liable to the pursuer to count, unless he would come in the place of the late Earl, and be liable in the requisition, because the said act of debtor and creditor bears, in case of the offer of security, that the wadsetter shall be liable to count during the not

No. 28.

requisition or redemption, which supposes the pursuer for the superplus duty to be always liable in case of requisition. It was replied for the Earl, That the defenders ought at least to be liable since the date of the offer of security, in respect there was no objection against the caution then offered, and the pursuer being a singular successor in the reversion, ought not to be liable in the requisition. The Lords found the defenders liable since the date of the offer of caution, in case the Earl, either upon requisition or premonition, should redeem from the said wadsetters within five years after the date of the interlocutor; but in case he did not redeem within the space foresaid, then they were obliged to allow him the superplus duty when redeemed.

P. Falconer, No. 63. *p.* 41.

*** The following is the same case.

1683, *February,* & 1685, *March.*
EARL MARSHAL *against* WADSETTERS.

No. 29.
Import of the clause in the act of Parliament allowing offer of caution.

The late Earl Marshal having, in the year 1661, offered caution, and required his proper wadsetters to restrict, this Earl of Marshal, as having right to the propety and reversion, raised a process to have the wadsetters declared liable for the superplus.

Alleged for the defenders: The clause in the act of Parliament allowing the offer of caution during the not-requisition, imports, That the craver of the benefit of restriction should be liable to the requisition; and this pursuer not being liable thereto, for that he is a singular successor, cannot crave the benefit of the restriction, unless he subject himself to the requisition.

The Lords found the defender's allegeance relevant.—This decision seems to be irregular, the clause in the act importing no more but the condition of the wadset the time of the requisition, viz. that it were not loosed; for in the case of requisition there was no place for restriction, the party's mind being then to receive his money, and not to let it lie in wadset. Thereafter, March, 1683, the Lords allowed the Earl to be liable for the requisition after five years, from the date of the interlocutor; then it was stopped; and in March, 1685, upon a debate in presence, the Lords found just the contrary.

Harcarse, No. 1027. *p.* 292.

1685. *March.* SIR GEORGE LOCKHART *against* LAIRD of WALSTOUN.

No. 30.

It being alleged against a declarator of redemption of a wadset, That there was a posterior infeftment of annual-rent for other sums, and the bond bore a provision, That the annual-rent should not be redeemable until the whole sums due