his possession than accept of caution, that then he may find caution himself to refund what he shall be found to have intromitted with more than pays his wadset; and which was craved on this specality, that he was *obæratus*, and all that super-intromission would be utterly lost to the Earl. The Lords at first allowed trial and probation to be taken anent his solvency; and though upon report, it appeared his condition was very bad; yet the Lords considered, that the 62d act of Parliament 1661 was a correctory law, and gave the reversers a favour, which they behoved to take as it stood; and seeing it did not oblige wadsetters, though insolvent, to find caution, they could not extend it, and therefore refused the desire of the Earl's bill. No. 34.

Fountainhall, v. 1. *p.* 759.

1707. *March.*

THOMAS NICOL writer in Edinburgh, *against* JOHN PARK of Fulfoordlies.

No. 35.
Does a clause irritant in an improper wadset take any effect before declarator?

Thomas Hamilton, son to Alexander Hamilton, of Ballencrieff, having wadset to Mr. John Paip, the lands of Nether-moninet for the sum of 3,000 merks, affected with a back-tack for payment of 180 merks of yearly tack-duty; with this provision, that in case two terms payment of the tack-duty run in the third together unpaid, the back-tack should expire and become null by exception without declarator, and the granter of the wadset be obliged to enter the wadsetter to the possession of the lands immediately after the said failzie, to be possessed by him as his own heritage in all time thereafter, during the not redemption;—the said Mr. John Paip disponed the wadset to Robert Paip his brother, and he to Robert Douglas, from whom the Lord Newton adjudged the lands, and disponed his adjudication to Park of Fulfoordlies. Thomas Nicol having right to the reversion of the wadset, pursues a reduction thereof, against the present Laird of Fulfoordlies, as being satisfied and paid by intromission with the rents of the lands and otherwise.

Alleged for the defender: That he could not be obliged to count and reckon for the bygone rents; because, albeit the wadset was affected with a back-tack, yet that back-tack was qualified with a clause irritant; whereby the wadsetter was empowered to possess without declarator the lands as his proper heritage till redemption, and the irritancy being *de facto* incurred, and the defender's authors having attained possession without declarator, by the granter of the wadsets voluntary ceding the same; the right became a proper wadset, so as the wadsetter could not be liable to count till the pursuer had used an order of redemption in the terms of the act of Parliament 1661. 2*do*, In a pursuit for removing, and mails and duties before the Sheriff of Berwick, against the defender's father, he was assoilzied upon his adjudication and other rights; and so being *bona fide possessor* by virtue of that decreet of absolvitor, he could not be countable for bygones.

No. 35. Answered for the pursuer: This being an improper wadset, the irritant clause takes no effect till declarator: And a declarator was absolutely necessary in this case; because, before the wadsetter entered to possess, the granter of the wadset was denuded of the reversion in favours of the pursuer's author, who was not obliged to know the irritant clause till declared. Besides, the clause for entering the wadsetter to possession in case of the irritancy incurred, was not designed to give him the rents unaccountable, in so far as they exceeded the principal sum, but only for security in payment. Nay further, the right is transmitted to Douglas, Fulfoordlie's immediate author, with the express quality that he should be accountable. And the act of Parliament 1661 takes only place in wadsets proper *ab initio*, where the wadsetter takes the hazard of public burdens, of all which the pursuer is bound expressly to relieve the defender. 2*do*, The decreet before the Sheriff has been collusive, the pursuer having produced no mandate: And it is in the power of any person who intends to be assoilzied, to cause execute an inferior Judge's precept against himself, and procure a decreet of absolvitor, where none is to oppose it. Again, the decreet absolvitor in a removing before the Sheriff is not incompatible with this process of reduction and declarator, and count and reckoning. As to the pretence of *bona fides*, that is chiefly sustained in favours of one who possesses *pro suo*, by some colourable title of property, which cannot be alleged by the defender, whose title of possession was originally an improper wadset, conveyed and adjudged as such: And every person being presumed to know the nature of his own right, there can be no *bona fides* in the case.

The Lords repelled the defences in respect of the answers; and ordained the defender to count and reckon, reserving to him all his defences in the counting as accords.

Forbes, p. 143.

1710. *December* 26. EARL LEVEN *against* MORISON.

No. 36. The Lords considered there were two cases pre-supposed in that clause of the act 62 of Parliament 1661, which bears, "that ward-setters who are in the natural possession shall not be bound to remove even after security is afforded until they be also warned in ordinary form, 40 days before Whitsunday;" — the one case, where the wadsetter, willing to yield possession, accepts of the offer of security; there his acceptance puts him upon the footing of a tenant, to remove whom warning is necessary; the other case, where the wadsetter refuses the offer, choosing rather to continue in possession; here warning would be to no purpose: And therefore they found a wadsetter, who, by refusing the offer of security, declared his intention of retaining possession, liable to account, though he was not warned.

Forbes.

*** This case is No. 373. p. 12506. *voce* PROOF.