

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. *2do*, The decret 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 decret of absolvitor, where none is to oppose it. Again, the decret 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.