

No. 39.

The clause of redemption was upon payment of the principal sum, by-gone annual-rents, or back-tack duties ; and in like manner the requisition was to be of the sum, annual-rents or back-tack duties.

The wadsetter, as early as the year 1674, obtained a declarator of irritancy of the back-tack, and thereon entered to possess the subject, till that, *in anno* 1740, the heirs of the reverser pursued the wadsetter's heirs to account ; and the question came to be, Whether from the irritancy of the back-tack it was to be looked on as a proper wadset, or an improper one, which it was owned to have originally been.

The Lord Ordinary " sustained the defence upon the clause in the wadset-right, declaring the wadsetter, after declarator of the nullity of the back-tack, not accountable." And, 10th June, 1746, adhered to his former interlocutor, for the reasons therein recited, and that the decret of declarator therein mentioned had been the title of the defender's and his author's possession for the space of above 60 years, since the same was obtained, and before the commencement of this process."

Pleaded in a reclaiming bill: The wadset was improper, the interest of the money was to be paid as a back-tack duty, and in no case was the wadsetter's demand to be less ; the redemption could only be on payment of the principal and interest ; and therefore the provision, that the possession of the wadsetter, if the back-tack duty were not paid, should be unaccountable, could not be sustained, as he was not restricted to the profits.

Answered : The wadset was originally improper, and the clause of redemption which follows the dispositive, was conceived in the view of its continuing such ; whence it is observeable, the interest of the money and back-tack duty are mentioned as the same thing ; but as the reverser might fail in his payments, it was agreed it should in that case be lawful to the wadsetter to enter unaccountably to the possession, from which time his right changed its nature, and became proper ; this was evidently the meaning of the parties, and as it is no ways contrary to law, it ought to have its effect.

The Lords adhered.

Act. *A. Macdowall.*

Alt. *Brown.*

Clerk, *Forbes.*

*D. Falconer, No. 218. p. 301.*

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1754. *March 6.* CAMPBELL *against* STIRLING.

No. 40.

The subject of wadset, Whether proper or improper ? is discussed in this case, which is No. 8. p. 2439. *voce* COMMISSIONER of SUPPLY.