No. 45.

Answered for the pursuer: The forms of redemption prescribed in contracts of wadset were introduced in favour of the reverser, that he might not be under a necessity of following out his rights in courts of law. Appearing to be attended with little expense, they were generally practised for many years; and it was only where they had proved ineffectual for obtaining restitution that the reverser thought of using judicial measures.

But it has been since found, on account of the many troublesome formalities requisite in that method of procedure, that the remedy by action of declarator is much the surest, as well as the least expensive one. And since, by stipulating an opportunity of voluntary redemption, the reverser cannot be understood to have renounced any right formerly competent to him, nothing surely hinders him from taking, in such a case, the same measures which would have been proper if a special order of redemption had not been mentioned. 18th February 1762, Campbell and Others *contra* Stewarts. (Not reported.)

The production of a missive letter from the defender, whereby he agreed to renounce his security, rendered a determination of the point of law unnecessary. The Judges, however, expressed their opinion, that the proceedings on the part of the pursuer were regular and competent.

"The Lords repelled the defences, and decerned in the declarator."

Lord Reporter, *Alva*. Act. *M. Ross*. Alt. *Hume*. Clerk, *Home*.

C. *Fac. Coll. No.* 267. *p.* 414.

1790. *February* 9.

The TRUSTEES of FRASER of LOVAT, *against* ALEXANDER CHISHOLM.

No. 46.
Feu-duties may be the subject of a proper wadset, even where they are due by the wadsetter himself.

The family of Lovat were superiors of certain lands held by the predecessor of Mr. Chisholm. In the year 1637, the former, on receiving the sum of 8000 merks, sold and disponed to the latter the feu-duties arising out of these lands, which amounted to 663 merks, redeemable upon payment of the first-mentioned sum. This conveyance contained a precept of sasine, and infeftment followed.

At this time the rate of interest authorised by law was 8 *per cent*. so that the feu-duties to be retained exceeded what could have been demanded for the use of the money lent out in the ordinary way. The creditor was also authorised to seek repayment of the sums advanced, if at any time the rate of interest should be increased.

The debtor farther became bound "to warrant all and hail the foresaid sum of 663 merks, to be yearly uplifted and retained in and by all things, and to be safe and free from all and sundry perils, dangers, accidents, claggs, claims, and inconveniencies whatever, as well named as not named, present, bygone, and to come, against all mortals, as law will, whereby the said annual-rent, or any part thereof, may be evicted, or the grantee debarred from the uptaking and detaining thereof."

No. 46.

By different statutes in 1646, 1661, and 1713, the rate of interest was lowered to 6 and a half, to 6, and at least to *5 per cent*. But owing to various circumstances, it was not till the year 1788 that an action was brought by the trustees of Mr. Fraser of Lovat for ascertaining the nature of the above-recited agreement.

The chief question was, whether the right of the defender, Mr. Chisholm, was to be considered as a proper wadset. For the pursuers, it was

Pleaded: In a proper wadset, the creditor is allowed to apply to his own use the whole produce of the lands conveyed to him, without any obligation to account, although the sums he thus receives may considerably exceed the legal interest of the money lent; and this may be considered as an equitable agreement, where the creditor's expectation of repayment is made entirely to rest on the uncertain value of landed property. Here the situation of matters is widely different. It is not the lands, either in property or superiority, which are here conveyed, but certain and determinate feu-duties, exceeding the legal interest of the money, even when this was at its utmost height, and exigible from the creditor himself. Besides, he has not stipulated that these feu-duties should at all times remain undiminished, but also, that on an augmentation of the legal rate of interest, he should be allowed to demand payment of the sums advanced by him. If such a right as this can be considered as authorised by law, it must be viewed as an improper wadset, extinguishable, and, in fact, long ago extinguished, by possession. Bankt. B. 2. Tit. 10. § 19, 20; Ersk. B. 2. Tit. 8. § 26, 28; 18th July 1718, Doull against the Creditors of Winterfield, No. 29. p. 16423.

Answered: An agreement, whereby a creditor accepts of the security of lands, or of the produce of them, in lieu of the personal obligation of his debtor, cannot be considered as illegal or usurious. There is as little reason to consider the bargain here occurring as an improper wadset, as has some times been done, even where there was no authority for redemanding the sums lent, if it appeared that the creditor had guarded against the hazard of getting less than what had been originally advanced by him, with the interest arising on it. In the present case, the risk run by the creditor is unquestionable; the obligation of warrandice, though inaccurately expressed, relating only to the right of levying the feu-duties, without insuring the permanency of them, while the power of requisition is limited to the case of an alteration of the law respecting the rate of interest.

That the subject of this wadset was those feu-duties which at the time were due by the creditor himself, cannot be thought of any importance. This circumstance was merely of a temporary nature, as the lands might be sold, while the wadset was retained; and even while both continued in the same person, the lands might be so much diminished in their value, as not to yield an adequate security for the money lent, with the growing interest. It is equally unimportant, that the feu-duties alone were wadsetted, without any conveyance of the lands themselves, the one being as much the subject of infeudation as the other, Stair, B. 2. Tit. 10. § 9, 11.

The only difficulty seemed to arise from the manner in which the clause of warrandice was worded, some of the Judges considering it as insuring the extent of

the feu-duties, as well as the right of levying them. The majority, however, were of a different opinion.

No. 46.

The question being reported to the Court on informations,

The Lords found, "That the wadset entered into in 1637, between Hugh, then Lord Lovat, and his brother, on the one part, and Alexander Chisholm of Comar, on the other part, of the lands therein mentioned, was a *proper* wadset, which is redeemable only on payment of the wadset-sum entire."

A reclaiming petition was preferred for the pursuers, which was refused without answers.

Reporter, *Lord Eskgrove*. Act. *Blair, Honyman*. Alt. *Wight*. Clerk, *Gordon*.
C. *Fac. Coll. No.* 111. *p.* 207.

1791. *January*. Lord Alva *against* Colonel Erskine.

No. 47.

The Lords found there was no necessity now as formerly, to use a formal order of redemption or premonition, but that a simple declarator was sufficient.

Fol. Dic. v. 4. *p.* 398. *D. M. S.*

1794. *February* 25.

The Younger Children of Neil Macneil *against* The Representatives of Sir Archibald Campbell, and Others.

No. 48.
A reverser about to redeem a wadset, must premonish those who hold subaltern infeftments granted by the wadsetter.

The proprietor of the lands of Ardmeanish, in the year 1748, disponed them in wadset to Neil Macneil, redeemable on payment of £410 Sterling.

The wadsetter afterwards granted heritable bonds of provision to his younger children over the wadset lands, in which they were infeft.

The right of reversion having come by purchase into the hands of the late Sir Archibald Campbell, he, in the year 1779, used an order of redemption against John Cowan, then in the right of the wadset, who renounced it on receiving the wadset sum, and granted absolute warrandice to the reverser.

In the year 1785, the younger children of Neil Macneil, who had not been called by Sir Archibald when he used the order of redemption, brought an action of poinding of the ground. On the other hand, Sir Archibald, (who died during the dependence,) and the general disponee of John Cowan, brought a counter action of reduction-improbation, for setting aside their bonds, in which they had been long ago paid by the heir of Neil Macneil; and, in point of law, they

Pleaded: In consequence of the redemption of the wadset, the bonds, even although they had not been paid, no longer remain a burden on the lands. The spirit of our law is to facilitate the redemption of wadsets. See 1469, C. 27. and 1555, C. 37. Accordingly, the reverser is not bound to use an order of redemption against any but those in the actual right and possession of them; Stair, B. 2. Tit. 10. § 19.; 27th July, 1665, Hamilton, No. 14. p. 16522. And this order, when followed out by a declarator or renunciation, effects a complete extinction of