1666. *February* 21. OGILVIE *against* ———.

No. 17.

The like case (as the above) was decided betwixt Ogilvie and ———, where this was farther represented, that the summons could not be sustained, unless the offer had been made by way of instrument before the summons; yet the Lords sustained the offer instantly made to have effect *ab hoc tempore*, but not from the citation. It was also further alleged for the defender, that there was now no caution offered. It was answered for the pursuer, that there needed no caution, if the wadsetter chused to retain the possession, because the wadset itself was sufficient security. It was answered, That they were not obliged to declare their option, till caution was first offered by the granter of the wadset, and the statute behoved to be strictly observed. It was answered, That there was here no detriment to the wadsetter, and the granter of the wadset might be so poor as not to be able to find caution.

The Lords found, in respect of the act of Parliament, that caution behoved to be offered, and would not exceed the terms thereof.

Stair, v. 1. *p.* 623.

1666. *December* 8. URQUHART *against* CHEYNE.

No. 18.
Whether proper or improper?

Sir Thomas Urquhart of Cromarty having disponed to Mr. William Lumisden a tenement of land and salmon-fishing, for surety of 4000 merks borrowed from Lumisden, the above-mentioned Sir Alexander Urquhart, having right by comprising to the said lands and fishing, and reversion of the said wadset, pursued a count and reckoning against Walter Cheyne, having right to the said wadset, and to hear and see it found, that the sum due upon the wadset was satisfied and paid by the said Walter and his author's intromissions. It was alleged, That the wadset being a proper wadset without a back-tack, the defender was not liable to count; and though he were, he was not liable to count but since the date of the right, and for his own intromission. It was replied, That it was a right granted for security, and that by the contract of wadset, and the eik to the reversion thereafter, the right was redeemable upon payment of the principal and annual-rents that should be unsatisfied; whereas, in proper wadsets, there is an *antichresis*, and the rents of the land belong to the wadsetter in lieu of the annual-rents, whereto the debtor is not liable.

The Lords found, That though the right was not clear and express, that the wadsetter should have right for security, and until he be satisfied by intromission or otherwise, yet the reversion being in the terms foresaid, it was *actum*, and intended, that the said wadset should not be a proper wadset, but only for surety, as said is.—See No. 38. p. 13507. *voce* REDUCTION.

Dirleton, No. 57. *p.* 24.

*** This case is reported by Stair:

No 18.

In anno 1636, Sir Thomas Urquhart of Cromarty gave a security of a house and some lands, and a salmon-fishing, near Bamff, for 4000 merks; and, *in anno* 1637, there were 700 merks eiked, and a back-bond relating to the first wadset renounced, and a full possession granted on both: There is a clause of redemption and requisition upon payment of the principal sums, and annual-rents resting for the time. Sir Alexander Urquhart pursues Skene, as now having right to the wadset, for count and reckoning; who alleged, Absolvitor, because this being a proper wadset, wherein he had the full possession, hazard of the profits was not countable, especially seeing the chief part of the wadset was a fishing, which was most uncertain; and though *de facto* he happened to get much more than his annual-rent, yet it is no usurary wadset, seeing he might have lost all. The pursuer replied, That by the said clauses of redemption and requisition, he was not only obliged for the principal sums, but for the bygone annual-rents resting unpaid; so that the wadsetter had no hazard; and therefore it is no proper wadset, and he is countable. The defender answered, That the clause was only adjected *ex stylo*, for it did not bear that what annual-rent should be resting over and above intromission should be consigned, but the whole resting annual-rents; or at least it had been adjected, in respect of the back-bond, restricting the first wadset, or in case the wadsetter had been excluded from possession.

The Lords found the defender countable, in respect of the said clauses; but there occurred to themselves this question, Whether the superplus more than the annual-rent should compense, and abate the principal sum at the time of the intromission, or only now? whereanent the Lords were of different opinions: Many thought, that when the meaning of the parties was not full and express, that should be followed which is most ordinary amongst provident persons; hardly could it be thought that any would take a wadset upon these terms to draw out the principal sum, with excresce yearly; but the Lords reserved that point to be considered, while it appeared whether there was any excresce above the annual-rent.

Stair, v. 1. *p.* 408.

1667. *February.* ANDREW KER *against* CHILDREN of WOLMET.

No. 19.
Nature of the back-tack duty.

Umquhile Wolmet having set a tack of his coal to his children for their provision, and named Andrew Ker of Moriston and Torsonce overseers, the said Andrew intromitted with the coal for some years. The children pursued him before the late Judges for payment of the profit of the coal; in which pursuit he did allege, that he could not count or pay to the children the whole profit of the coal, but so much thereof as was free over and above the back-tack duty, due both out