No. 22. ten roods of land, to be possessed for the annual-rent of the said sum, so long as the same should remain unpaid, the representatives of the said Mr. Hugh were pursued for £6, as the inlake whereof the rent of the land did come short of the annual-rent of the said sum, and for public burdens; who did allege, that the said right being a proper wadset, and the said lands being possessed by the creditor, the debtor was not liable either for annual-rent or public burdens.

The Lords found, That the bond being of the nature foresaid, and containing a proper wadset, so that if the duties of the lands had exceeded the annual-rent, the superplus would have belonged to the creditor entirely, and not been imputed in payment of the principal, the debtor was not liable either for inlake or public burdens; and though, in the beginning of the bond, the debtor was obliged to pay annual-rent, yet the payment of the same was qualified, and to be understood according to the whole tract of the bond, viz. that the duties should be allowed for payment of the annual-rent, and that the creditor should possess and have the use and *antichresis* of the land and rents thereof for his annual-rent, which is clearly a proper wadset.

Reporter, *Newbyth.* Clerk, *Mr. John Hay.*

Dirleton, No. 268. *p.* 129.

1679. *February* 20. BRUCE *against* BOGIE.

No. 23.
Offer of caution by act 1661.

Sir William Bruce having acquired right to the barony of Kinross-shire, did, *in anno* 1676, make an offer by an instrument to Robert Bogie, proper wadsetter of a part of the said barony, for 10,000 merks, " offering him security for his principal sum and annual-rent, and requiring him to cede the possession conform to the act of Parliament 1661, betwixt debtor and creditor, and protesting, that if he did not cede the same, that he should be countable for the superplus of the rent more than his annual-rent," and now pursues him to count and reckon. The defender alleged, Absolvitor, 1*mo*, Because the instrument of offer bears " no production of Sir William's right to the reversion," and he being a singular successor, never acknowledged by the defender, he was not obliged to cede his possession, and consequently was not countable; 2*do*, By the said act of Parliament it is declared, " that where the wadsetter is in natural possession by labouring the ground, that he shall not be obliged to remove, but upon warning before Whitsunday," and this requisition being at Michaelmas, he could not cede his possession, being natural by labourage at that time, so that part of the act to count being only consequent where the wadsetter refuses to cede his possession upon an offer conform to the act of Parliament, this offer not being conform, he is not countable. The pursuer answered, That the act of Parliament requires no production of rights, but only " if the debtor, or any deriving right from him, offer,"

&c. and here the pursuer's disposition, containing or importing an assignation to the reversion of the barony, is prior to this offer; likeas the defender knew his right, and had treated with him for the wadset. The defender replied, That though the act of Parliament bears not expressly "the production of rights derived from the debtor," yet it is necessary by the common law, or otherwise a wadsetter behoved to cede his possession at the requisition of any man pretending right; and though the defender had notice of the pursuer's right by hearsay, and had treated with him on that supposition, *non relevat*, seeing he never saw it, before the offer, nor had he any sasine then registered, nor assignation to the reversion registered. No. 23.

The Lords sustained both the defences, and assoilzied.

Stair, *v.* 2. *p.* 699.

1681. *December* 20. AIRDOCH *against* WILLIAM PATON.

No. 24.
Wadsetters may acquire the right of reversion without communication.

Dr. Paton having a wadset of the lands of Panholls from one Grahame, redeemable upon payment of 14,000 merks, and, in case of not-redemption at Whitsunday 1657, the wadset was to expire upon the Doctor's paying in 5500 merks to Grahame, which was declared to be the full worth of the reversion. *In anno* 1659, he disponed the lands irredeemably in trust to Airdoch, his brother-in-law. The act debtor and creditor 1661, prorogated the legal of wadsets for the space of five years. After Airdoch's death, his son and his tutors, before they denuded of the trust, acquired the right of Grahame's reversion, who had used an order *debito tempore*, and insisted in the redemption of the wadset.

Alleged for Dr. Paton's heir: That it was *contra bonam fidem* to acquire the reversion in prejudice of the exuberant trust granted to Airdoch his uncle; and the Lords found, that a gift of forfeiture acquired by the pursuer could only be effectual to him for what he paid for it in respect of the trust; and *a pari* no more can be required for the reversion; *2do*, *Esto* there had been no trust, the warrandice could only subsist for damage and interest, which can only be extended to what was paid for the reversion, and that Paton was willing to allow to Airdoch; *3tio*, The contract with Grahame containing a liquidation of the reversion, as the full price thereof, the failzie to redeem at Whitsunday 1657 was not purgeable; for this was not the case of *pactum legis commissoriæ*, but a vendition of the reversion for a further sum than the wadset was granted for. As to my Lord Tullibardine's case, there was a wadset *ab initio*; and the paying in a further price for the reversion was in a posterior deed, wherefore the Lords found the not-redemption purgeable; whereas here the liquidation of the reversion in the first contract, made it debord from a regular wadset, and resolve in a vendition, with a conventional retraction.