

* * * 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 usuary 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 compensate, 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 excesce yearly; but the Lords reserved that point to be considered, while it appeared whether there was any excesce 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

of land and coal, by virtue of the wadset granted to James Loch, who stood thereupon publicly infeft, and to which wadset Mr. Mark Ker, his own son, had right, to whom he paid the back-tack duty, and obtained his discharge. This being found relevant by the Judges, he produced holograph discharges granted by his son: The Judges found, that these holograph discharges did not prove payment made *debito tempore*, and therefore decerned without allowance of the back-tack duty. Andrew Ker pursues a reduction of this decree, as unjust, in so far as the back-tack duty was not allowed, as not paid *debito tempore*, whereas the back-tack being a real burden upon the whole profits *jure hypothecæ*, all intromitters with the profits were liable to the wadsetter, and so Andrew Ker, as intromitter, was liable to the wadsetter, and was not obliged to employ that part of the profit for annual-rent to the children, although he were obliged to employ their own means, and so might lawfully have paid the wadsetter, or kept it in his own hand for his own relief, and the wadsetter's discharge at any time was sufficient to free the children. It was answered, That there was no iniquity committed, because Andrew Ker could only be liable for the back-tack duty as tutor and overseer to the children; and even in that case he ought not to have paid without a distress, otherwise he prejudged the children of their relief against the heir, who is obliged to relieve them of the back-tack duty; and when ever he were distressed, he would not be obliged to pay any annual-rent to the wadsetter for the back-tack duties, which was the wadsetter's own annual-rent; so that till the time of the distress, the whole annual-rent should have been put out to the use of the children upon annual-rent; so that the back-tack duties can only be allowed from this time, but not yearly as they were due, otherwise the bairns lose the benefit of the annual-rent the mean time; but there being no distress, Andrew Ker could never be liable to the wadsetter. It was answered for the pursuer, That the wadsetter being his own son, there was no reason to put him to any action, especially seeing the defenders cannot allege, that in any such action they had a competent defence, or that the heir has any defence whereupon to exclude their relief; neither is there any reason that the children should have annual-rent for the back-tack duty till it was paid, because it was not theirs, nor might he safely put it out of his hands, albeit the wadsetter had been a stranger; and albeit he be now *functus officio* as overseer, the title that made him liable to the wadsetter was as intromitter, which is a perpetual obligation, the wadsetter, as all masters of the ground, having *jus hypothecæ* upon the profit for payment of tack-duty, for which all intromitters are liable.

The Lords reduced that part part of the Judge's decree, and found, that Moriston, as intromitter, was liable to the wadsetter, and might retain so much of the profits in his hands as would pay the back-tack duty, and was not obliged to give out for the children upon annual-rent; but if *de facto* he had given it out in his own name for annual-rent, found, that the children should have the benefit thereof.

Stair, v. 1. p. 452.