

1666. February 21. LORD BORTHWICK *against* His WADSETTERS.

No. 16.

Wadsetters are not accountable for any profits that arise from surplus rents, before the date of the offer of caution.

The Lord Borthwick pursues an account and reckoning against several wadsetters, who had wadsets from him in the year 1660, to count and reckon for the surplus of the wadset, more than their annual-rent since the act of Parliament between debtor and creditor, upon that clause thereof, appointing wadsetters, who have proper wadsets before the year 1650, or since before the act to count, and be liable for the surplus more than their due annual-rent. It was alleged for the defenders, That the pursuers had in the wadsets expressly renounced the usurper's act in favour of debtors, and all such acts made or to be made; and by the said act between debtor and creditor, there is an exception, where persons have renounced such acts. It was answered, that that exception is inserted in the act before this clause, in relation to wadsets, and does not relate to it, but unto the former provisions of suspending the sums, which was also the tenor of the usurper's act; and therefore the exception of the renouncing such acts, cannot extend to the case of accounting for wadsets, which could not be thought upon, the time of the wadset, and of the renunciation; this clause being according to common law, to hinder usury, which might have been indirectly taken by proper wadsets, though these, by the custom, use not to be quarrelled.

The Lords repelled the defence, in respect of the reply, and found the exception not to extend to the case of wadsets.

It was further alleged for the defenders, that they were not liable to count for the surplus, for all years bygone since the act of Parliament, nor at all, except in the case that they had been required to quit the possession of the wadset, and security had been offered them for their money, and they had chosen rather to retain the wadset, and to count for the surplus; for as to all years preceding, they were *bona fide* possessors, and had ground to presume that the pursuer did acquiesce in the wadset, as only proportionable to the annual-rent, and it were unjust and of evil consequence, that if the granter of the wadset should forbear to offer security for 20 years upon his offer, then the wadsetter should be obliged to count from the act of Parliament. It was answered, That there was no inconveniency, seeing the wadsetter might, if he pleased, quit the possession, and then was not countable at all; but if he would retain the possession, he could not refuse to count for all bygones since the act of Parliament.

The Lords having considered the clause of the act of Parliament, found the defenders only liable from the time of the offer of caution, and requiring the possession, and not from the date of the act of Parliament, seeing the clause bears, they shall have by the wadset, which looks to be future only; and seeing the wadsetters might have builded or planted for their own accommodation, and therefore might rather retain the possession than other security.

*Stair, v. 1. p. 361.*