No. 32. should have been sent and shewn; 2*do*, The defender did not desire to know the cautioner's name; and he hath no prejudice by the delay, having possessed since. And as to any superplus rent above the annual-rent, the defender is *in lucro captando*, and the pursuer *in damno evitando*.

The Lords sustained the requisition to restrict; which is contrary to former decisions.

Harcarse, No. 1031. *p.* 293.

*** The following, although of a later date, is the same case.

1694. *July* 18.

ELIZABETH RAMSAY and Mr. ASHTON, in Northumberland, her Husband, *against* CLAPPERTON of Wylie-cleugh.

No. 33. Same subject.

The question was, *à quo tempore* Wylie-cleugh was to count for the superplus mails and duties of the wadset-lands more than paid the annual-rent of his wadset sum? It was contended, it behoved to be from the date of the offer of caution conform to the 62d act of Parl. 1661, between debtor and creditor, obliging them either to cede the possession, or else to impute the superplus fruits *in sortem*. It was objected against the instrument produced, that it did not bear the production of the factory and procuratory. Answered, it was not required nor called for; in which case it was sufficient, that the instrument bore *quod de ejus potestate liquido notario constabat*. The Lords repelled this objection. The second was, that though offered caution, yet it was only in general, and did not condescend upon any particular person; nor did it bear that any bond with a cautioner was offered, and so it was null. Answered, they offered to supply it now by finding caution beyond exception. The Lords found the instrument was not in the terms of the act of Parliament, and therefore could not oblige Wylie-cleugh to count for the superplus rents above his annual-rent from the date of it. Yet it was remembered, that in a case of the Earl of Marishal against his wadsetters, it was sustained that there was a general offer of caution, and a condescendence allowed *ex intervallo*; but this was not so conform to the act of Parliament.

Fountainhall, v. 1. *p.* 633.

1697. *January* 22. MARISHALL *against* CARGILL.

No. 34. Same subject.

The Lords considered a petition given in by the Earl of Marishal against Cargill of Auchtidonald, with the answers thereto. It was craved, he being a wadsetter, and near paid by the superplus duties more than satisfied his annual-rent; that, during the dependence of the count and reckoning, he might either cede his possession, and accept of sufficient caution from the Earl for what shall be found due to him upon the event of the counting, or else, if he chuse rather to continue

his possession than accept of caution, that then he may find caution himself to refund what he shall be found to have intromitted with more than pays his wadset; and which was craved on this specality, that he was *obæratus*, and all that super-intromission would be utterly lost to the Earl. The Lords at first allowed trial and probation to be taken anent his solvency; and though upon report, it appeared his condition was very bad; yet the Lords considered, that the 62d act of Parliament 1661 was a correctory law, and gave the reversers a favour, which they behoved to take as it stood; and seeing it did not oblige wadsetters, though insolvent, to find caution, they could not extend it, and therefore refused the desire of the Earl's bill. No. 34.

Fountainhall, v. 1. *p.* 759.

1707. *March.*

THOMAS NICOL writer in Edinburgh, *against* JOHN PARK of Fulfoordlies.

No. 35.
Does a clause irritant in an improper wadset take any effect before declarator?

Thomas Hamilton, son to Alexander Hamilton, of Ballencrieff, having wadset to Mr. John Paip, the lands of Nether-moninet for the sum of 3,000 merks, affected with a back-tack for payment of 180 merks of yearly tack-duty; with this provision, that in case two terms payment of the tack-duty run in the third together unpaid, the back-tack should expire and become null by exception without declarator, and the granter of the wadset be obliged to enter the wadsetter to the possession of the lands immediately after the said failzie, to be possessed by him as his own heritage in all time thereafter, during the not redemption;—the said Mr. John Paip disponed the wadset to Robert Paip his brother, and he to Robert Douglas, from whom the Lord Newton adjudged the lands, and disponed his adjudication to Park of Fulfoordlies. Thomas Nicol having right to the reversion of the wadset, pursues a reduction thereof, against the present Laird of Fulfoordlies, as being satisfied and paid by intromission with the rents of the lands and otherwise.

Alleged for the defender: That he could not be obliged to count and reckon for the bygone rents; because, albeit the wadset was affected with a back-tack, yet that back-tack was qualified with a clause irritant; whereby the wadsetter was empowered to possess without declarator the lands as his proper heritage till redemption, and the irritancy being *de facto* incurred, and the defender's authors having attained possession without declarator, by the granter of the wadsets voluntary ceding the same; the right became a proper wadset, so as the wadsetter could not be liable to count till the pursuer had used an order of redemption in the terms of the act of Parliament 1661. 2*do*, In a pursuit for removing, and mails and duties before the Sheriff of Berwick, against the defender's father, he was assoilzied upon his adjudication and other rights; and so being *bona fide possessor* by virtue of that decreet of absolvitor, he could not be countable for bygones.