tute determining it to be usurious) should annul a paction, for the relief of a debtor, when the debtor can complain of no hardship thereby, but on the contrary, must acknowledge himself eased of greater severities, which by law he would be subject to. This much the pursuer has to say upon the head of equity, which must justify him, though he had not the forementioned act to speak in his favours; which at the time of lending the money, and making of bonds, allows the annual to be added to the principal, and of consequence, the whole to bear annual-rent after the term of payment; which is precisely the present case. No. 28.

"The Lords repelled the objection."

*Rem. Dec. v.* 1. *No.* 11. *p.* 21.

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1718. *July* 18.

JOHN DOUL, Writer in EDINBURGH, *against* The CREDITORS of YOUNG of Winterfield.

No. 29.
The characteristics of proper and improper wadsets.

In the year 1653, John Hepburn of Wauchton, for the sum of 24,500 merks, received from Walter Young, dispones to him, under reversion, the lands of Winterfield, with all provisions accustomed in proper wadsets; and after assignation to the mails and duties, subjoins the following clause: "And the said John Hepburn of Wauchton binds and obliges him and his foresaids to make the foresaid acres and lands called Winterfield, to be worth yearly twelve chalders good and sufficient bear; and what shall not be duly paid yearly by the tenants thereof to the said Walter Young, &c. the said John Hepburn shall make the same up out of the first and readiest of the best bear he has paid him out of any part of the rest of his lands, and shall deliver the same to the said Walter, &c. yearly, at the ordinary time, for paying the farms and duties in the country, or else shall pay the ordinary price yearly for ilk boll that shall happen not to be delivered: And for the better effectuating thereof, it is hereby agreed, that the said John Hepburn, notwithstanding of the said Walter Young's being in possession of the said land, and uplifting of the farms and duties thereof, shall have power to output and input tenants at his pleasure, and the said Walter Young shall concur with him thereanent." John Doul, writer in Edinburgh, having acquired right to the reversion of these lands, intented reduction and declarator of extinction of the wadset, upon this medium, that the reverser here undergoing the hazard of the rents, the wadset is thereby in its nature improper; and the sum for which it was granted, being satisfied and paid by intromission with the rents of the lands, the wadset-right is extinguished.

The defenders observed, That the wadset does not provide, that the reverser shall make the rents of the lands worth the annual-rent of 24,500 merks, but only that the lands shall be worth yearly twelve chalders, and that the reverser shall make up to the wadsetter what the tenants are deficient in paying of that quantity: Now, if it was possible that twelve chalders of victual should, by lowering the

No. 29. prices of grain, or the heightening of annual-rent, be less worth than the annual-rent of 24,500 merks, the wadsetter ran a risk of having yearly less than the interest of his money; whence they concluded the wadset to be proper from this principle, "That towards constituting a wadset improper, the wadsetter must be secure of the interest of his money, against all chances and dangers whatsoever." And for illustrating this, it was pleaded, That what frees a proper wadsetter from account, is his taking the hazard of the rents of the wadset-lands for payment of the interest of his money; that the contract is in effect a bargain of hazard, and that it is but just, that the wadsetter who ran the risk of having less than the interest of his money, should have the chance of getting more, if good fortune or industry did heighten the value of the rents: Whereas, on the other hand, what subjects an improper wadsetter to account, is the paction, in whatever form conceived, that the reverser shall make the interest of his money in all events forthcoming to him; by which, as the wadsetter runs no hazard of loss, he ought to have no chance for gain. This was further urged from the words of the act 62. Parl. 1661, and the course of decisions: By that act, towards bringing a wadsetter to account, whose rents exceeded the annual-rent of the money lent, it is necessarily required, that he have taken an obligation of the reverser, to relieve him of any hazard of the fruits, tenants, war or troubles: By which it is evident that the wadsetter's undergoing the least chance, his being even insecure against famine or pestilence, is in the eye of the law sufficient to save him from account; because of the principle that the undergoing any hazard on the one part, ought to entitle the wadsetter to profitable chances on the other. That the Lords of Session, in their decisions, have always had this understanding of the nature of improper wadsets, is evident from the perpetual tract of their judgments since the year 1661; and particularly, that observed by Dirleton, 24th January 1677, Home against Stewart, No. 17. p. 16414. where it was found, that the wadsetter was not liable to count and reckon for the duties and superplus of the wadset exceeding the annual-rent, in respect the wadset was a proper wadset; "And the wadsetter was not free of all hazards of the fruits, tenants, war and vastation," though the wadset bore a special provision, "That the reverser was to relieve the wadsetter of levies of horse, feu-duties, and Ministers stipends." The same was found, Cunningham against Dowie, No. 21. p. 16417. observed by Newton; though the wadset bore, that the reverser was to relieve the wadsetter of all public burdens; and though there could be no hazard of fruits or tenants, because the wadset consisted of some grass at the ports of Kinghorn: And the reason of the decision is in these words, "That there were other hazards, viz. plague and war, which the wadsetter was liable to, and had no relief from the granter of the wadset." All which is to show that, what the Lords have considered in the question, "If a wadset is proper or improper," was only, whether the wadsetter was secure of the annual-rent of his money, free of all hazards; and the least hazard upon the wadsetter's side, was understood sufficient to make the wadset proper.

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Answered for the pursuer, There is no foundation in law or equity for the position, that if the wadsetter runs the smallest hazard, he is not liable to account: Were it not highly iniquitous, where the reverser is taken bound to relieve the wadsetter of fruits, tenants, war, trouble, &c. that the wadsetter shall save himself from accounting for his exhorbitant gains, because he has cunningly undertaken some trifling hazard of public burdens, feu-duties, or such like? The law does certainly not indulge such contracts: And whatever difficulty there might be of old, to reduce such *ad arbitrium boni viri*, there is none now, since the act of Parliament above mentioned; which has set an example to the Judges from the analogy of that statute, to make all wadsets accountable, in whatever form conceived, where there is any considerable inequality. Where indeed the wadsetter undertakes the hazard of the fruits, which is of all hazards the most considerable, he ought to have his chance of making more of them than the precise annual-rent of his money; and where such hazard is undertaken, the wadsetter will not easily be made accountable upon the head of inequality, because of that hazard: And therefore, in general, it may be laid down. "that what frees a wadsetter from accounting, is principally his taking the hazard of the fruits and subjecting himself to all chances that may hinder these fruits from being effectual, and coming to his hand; in a word, his being stated as a temporary proprietor of the lands, *cum pacto de retrovendendo;* or, which is much the same, having a right of hypothec, *cum pacto antichretico;* where he has the hazard of losing the fruits by chances, and increasing them by industry." The defenders argue from the act 1661, "That the wadsetter's undergoing the least chance, famine or pestilence, is sufficient to save him from accounting." But the act intends nothing like this: The hazards there mentioned, are all such hazards as prevent the fruits or rents being paid, and coming to the use of the wadsetter; the relief against such hazards, is the relief which the law has looked upon, as that which makes an improper wadset in the nature of the thing, or makes it just that the wadsetter should account: But as to the rising or falling of the price of victual, no law ever took notice of that, as having any influence in the question concerning a wadsetter's being accountable. Next, it is to be observed, that the defenders seem to take it for granted, that if a reverser were not bound to relieve the wadsetter of all the hazards mentioned in that act of Parliament jointly, the wadsetter could not be accountable. But that will not be allowed: The contrary will rather follow from the act, that if the reverser be obliged to relieve the wadsetter of any of those hazards which concern the fruits, the wadsetter is accountable: For those hazards are not jointly mentioned in the act of Parliament, but separately; to point forth, that a relief from any of these was not consistent with the nature of a truly proper wadset. As to the decisions mentioned; that observed by Dirleton is directly against the defenders: For it shows, that what the Lords looked upon as the main characteristic of a proper wadset, was the not freeing the wadsetter from the hazard of fruits; and *è contra*, where the wadsetter is free of the hazard of fruits, and the rental to be made good, that must be an improper wadset. And upon this head it may be observed, that it is a mistake to imagine, that a proper wadset

No. 29. must be liable to all kinds of burdens: It is even consistent with the nature of property, and of a feudal holding, that the proprietor be relieved of certain burdens that might affect the property, such as feu-duties and Ministers' stipends; and therefore much more consistent with the nature of a proper wadset: On the other hand, where a relief is stipulated inconsistent with the nature of property, it will in most cases be found inconsistent with the nature of a proper wadset; and of that kind, the upholding the rental, securing against the hazards of the fruits, out-putting and inputing tenants, certainly are. The other decision from Newton, makes also against the defenders, because there was no relief from the hazards of fruits, tenants, &c. And the reasoning in that decision was plainly weak on the part of the reverser, when he pretended there was no hazard as to the fruits, in respect of the situation of the ground being near the ports of Kinghorn. That is not at all what the law regards, whether there be hazard from the situation of the ground; but whether there be a paction to relieve of hazards: There was no such paction in this case; and even in probability, a tenant might turn bankrupt there, as well as in any other place.

It was contended in the second place, for the defenders, that the wadsetter, if he be accountable, ought only to charge himself with what he received more than twelve chalders; since the reverser could only be liable for the deficient bolls of the twelve chalders, but not for what the price should be defective of the interest. To which it was answered, that neither can this hold: The reverser's being bound to uphold the rent, makes the wadset improper; and that being once established, the counting must be according to the common rules observed in such cases; the wadsetter must be paid of his yearly interest, and then hold count for the remainder.

"The Lords found, that Waughton the reverser being obliged to pay the twelve chalders of victual yearly, free of cess and all other burdens; the wadset is thereby improper.

*Rem. Dec. v.* 1. *No.* 12. *p.* 23.

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1727. *February.* M'LELLAN *against* BARCLAY.

No. 30.

In the year 1704, while annual-rent was at at six *per cent.* M'Lellan, for the sum of 4500 merks, sold some lands to Barclay, and of the same date took from him a tack of the same for 10 years, for £.120 of money rent, and 18 bolls victual, or 10 merks *per* boll, in the option of the tacksman, out of which tack-duty he was to advance the whole teind, being £.40 yearly, and half of the cess. There was a clause adjected of a reversion competent to the seller, during the years of the tack, upon re-payment of the foresaid sum of 4500 merks. It was objected against the contract, That it appeared to be but a covered loan, and that a tack-duty being made certain to the creditor exceeding the ordinary annual-rent, the bargain was usurious, and the disposition and tack null.

The Lords repelled the objection.—See APPENDIX.

*Fol. Dic. v.* 2. *p.* 500.