

dained him to lie in prison till he paid it, and until the Lords gave further order. They likewise reprimanded the advocate who appeared for him, in presence of the faculty called in; and intimated to them to be more cautious and ingenuous in their pleadings, and not to countenance their clients in what they saw dirty and dishonest.

*Vol. II. Page 357.*

1710. *January 5.*---A protest for remeid of law was given in by Thomas Logie, merchant in Edinburgh, against Lilius and Margaret Whiteheads, for repelling his defences, and for imprisoning him, founding on the Act of Parliament 1701; and craving 3000 merks, and five merks for each day of twenty-one he lay in the tolbooth, in terms of that Act; and appealing to the British Parliament, or to any court of chancery or equity they shall erect for hearing such cases.

The Lords thought the style very singular and extraordinary; and some were for imprisoning him, and causing him reform it; but others looked upon him as below their making him their party, and so slighted it. *Injuria sprete exolescunt.*

*Vol. II. Page 551.*

---

1707. *March 12.* THOMAS NICOL *against* PARK of FOULFORDLIES.

HAMILTON of Bancrief, as heritor of Nethermoninet in the Merse, grants a wadset out of it to Mr John Paip in 1652, redeemable for 3000 merks, containing a back-bond and irritancy, in case two years' annualrent should run in the third unpaid. Mr James Cheyn of Tillibin acquires the right of reversion, and by progress it comes to Thomas Nicol. The wadset, after several transmissions, is at last acquired by Park of Foulfordlies. Nicol raises against him a reduction, improbation, and declarator, That, he being accountable for the superplus duties of the land more than paid him the annualrent of his money, his superintromission must be ascribed *in sortem*, to extinguish his principal sum; and that, after count and reckoning, any part of it that remained unpaid he was willing to pay.

ALLEGED for Foulfordlies the wadsetter,---That he cannot be liable to count for the superplus rents of the lands more than the annualrent of his money, because he was *bona fide* possessor; in so far as, *1mo*, He was pursued at the instance of this same Thomas Nicol, before the Sheriff of Berwick, to remove, and was assoilyied, which was sufficient to found and sustain his *bona fides*. *2do*, Though it was originally an improper wadset, yet it bore a clause, That, if the non-payment of three terms' annualrent ran together unpaid, the back-tack should expire, and be null, *ipso jure*, by way of exception, without need of a declarator, and he should enter to the possession of the whole lands; but, *ita est*, the irritancy was *ipso facto* incurred, and the reverser, who granted the wadset, thereupon ceded the possession; which is a sufficient colourable title for him to lucrate the bygone rents, without being accountable. *3tio*, The irritancy of the back-tack being incurred, it brought it precisely to the case of a proper wadset, which, by the 62d Act Parliament 1661, is made unaccountable, unless they offer caution, and you refuse to cede your possession.

ANSWERED for Nicol, the pursuer, to the *first*,---The sheriff's decret can never be the foundation of your *bona fides*, but rather evinces a collusive design;

for the absolution proceeded because there was no title produced for the pursuer to the lands; and he being minor, it cannot prejudice him that his tutor's factor used a warning, seeing, in the removing, he produced nothing to instruct that his pupil had any right to the land. To the *second*, There are no clauses more odious in law than *pacta legis commissoriae in pignoribus*; and they can never take effect till there be a decret of declarator obtained thereupon, where I would have got a competent time to purge the irritancy; and his ceding the possession signifies nothing, for he was, long before, denuded of the reversion. To the *third*, To transfuse a wadset under a back-tack to a proper wadset, is to change and alter the nature of rights *toto cælo* different, and you have acknowledged yourself to be subject to account: in the transmission of the rights it is expressly provided that you shall relieve the disponent of the surplus rents.

The Lords repelled the defences, and found no *bona fides* in the case; and ordained him to account for the excresce, allowing all his deductions as accords. My Lord President thought, in those cases where the rent did but in a small matter exceed the annual rent of the wadset sum, it was hard to expose the wadsetter to a tedious account; but here the excresce was more than £40 by year, and the reverser had paid all the public burdens. *Vol. II. Page 358.*

---

1707. *March 18.* FRANCIS MOLLYSON *against* CLARKE, YOUNG, and SPENCE.

FRANCIS Mollyson, merchant in Brechin, being their commissioner to the Parliament, the foresaid three persons, his creditors, arrested his fees in the magistrates of Brechin's hands. He gives in a bill to the Lords, complaining of these arrestments as illegal and unwarrantable; seeing, as the Members of Parliament their persons cannot be attached by caption or imprisonment, so neither can their fees or salaries be arrested, being of an alimentary nature, and as much privileged as the officers of state their dues, which, by an Act of Sederunt in 1613, were declared not arrestable: and all he has allowed him is only half-a-crown a-day, which, considering chamber-rent, horse-hires, diet, and other incident charges, will be but a scrimp aliment to a moderate man attending the Parliament; and therefore craved, since they were unduly laid on, that they might be loosed without either caution or consignment.

ANSWERED,—The Parliament being yet current, he had not yet served out, nor earned his fees: Neither is every thing, without which a man cannot conveniently live, to be reputed a privileged aliment. And, as to the exemption of Parliament members from caption, there is no law in the case, nor any breach of privilege, if done. All that can be pled is, The Parliament may require their man, and set him at liberty to attend them, if they please; but otherwise he may legally be detained. In England their privilege is greater; for it extends to their goods and servants, but has never been so understood here. *Stair, lib. 3, tit. 1, page 375*, shows that servants' fees are not arrestable, in the case of *Mr Beg against Davidson*, preceptor of Heriot's Hospital.

The Lords, by the Chancellor's vote, found the commissioners to Parliament their salaries not arrestable; and therefore loosed them without caution or consignment: though it was remembered that, in 1690, the Lords having loosed an arrestment, without caution or consignment, in favours of Hay of Park, they did