Appellant.—The facts are established which prove that Lindsay knew that the money was given to him by the appellant in loan, and not as a donation. But even had that not distinctly appeared, it must be held to be in loan, and not in donation. Donation is never presumed, and here it is not even alleged. The money was not given either to oblige Lindsay to pay a debt not directly exigible, nor to procure his vote. March 8. 1825.

Respondents.—It is not maintained that the money was a donation. The loan libelled has been disproved. Instead of the appellant having substantiated any obligation to repay this money, it has been proved that the appellant, when the money was advanced, came under an express obligation that Lindsay should be no more troubled with the debt.

The House of Lords 'ordered and adjudged, that the appeal 'be dismissed, and the interlocutors complained of be affirmed, 'with L.100 costs.'

Appellant's Authorities.—Stair, Inst. 1. 8. 2.; Bankton, Inst. 1. 9. 20.; Ersk. Inst. 3. 3. 92.; Mor. Dict. 1151.; Fount. Dec. vol. ii. p. 172. 644.; Ross *v.* Fidler, Nov. 24. 1809, (F. C.).

J. RICHARDSON—J. CAMPBELL,—Solicitors.

JAMES DUKE of ROXBURGHE, Appellant.—*Denman—Keay.* No. 7.

JAMES WAUCHOPE, W. S. Trustee, and Others, residuary Legatees of John Duke of Roxburghe, Respondents.—*Sol.-Gen. Hope—Sandford.*

Et e contra.

Tailzie—Bona Fides.—An heir of entail in possession having redeemed a wadset, (part of the entailed lands, and wadsetted under powers in the entail), by taking an unconditional discharge and renunciation, containing a procuratory of resignation ad remanentiam, which he, as superior, executed in his own hands; and having, on the supposition that he held it in fee simple, disponed the wadset to a trustee mortis causa; and the trustee having drawn the rents of the wadsetted lands for several years without objection, and paid the same to parties having right under the trust, by whom they were consumed;—Held, (affirming the judgment of the Court of Session), 1. That the wadset right was thereby extinguished, and did not remain a separate estate or right in the person of the reverser, which he could convey to his heir-at-law; and, 2. That both the trustee, and parties to whom the rents were paid, were protected by bona fides from repetition.

IN 1662 William Earl of Roxburghe, in virtue of powers under an entail executed by Earl Robert in 1648, granted a wadset right over the lands of Wester-Grange, and other parts March 9. 1825.

1ST DIVISION.
Lord Alloway.

March 9. 1825. of the entailed estate, in favour of William Davidson in Grubet, in security of the sum of 6650 merks, which had been owing to him by Earl Robert. By this wadset Earl William sold, annalzied, and disponed to the said William Davidson, 'all and 'haill these five husband-lands of Burnyards and Wester-'Grange,' &c. during the non-redemption, to be holden of the Earl and his heirs in feu-farm; and on the other hand, William Davidson obliged himself 'to make, seal, subscribe, and deliver '' to the said Earl, and his heirs-male and of tailzie succeeding 'to him in the said lands and earldom of Roxburghe, ane suffi-'cient letter of reversion for redemption of the said lands, teinds, 'and others above-written, containing thereintill the said sum of '6650 merks;' to be paid and delivered in manner therein mentioned. The contract also contained a clause, discharging all personal suit or execution against the Earl, his heirs and executors, or the heirs and executors of Earl Robert, for payment of the sum in the wadset, without 'prejudice always to the 'said William Davidson and his foresaids to make use of the 'samen contract provision of the said taillie and assignation, for 'securing to them of the lands, teinds, and others above-written, 'hereby wadset to them, by any manner of way agreeable to the 'laws and practice of this realm.'

Of the same date Earl William granted a bond of eik in favour of William Davidson, for the further sum of 3350 merks, being the amount of a separate debt due by Earl Robert and his son Harry Lord Ker. By this bond this sum was added to the redemption money, and the right of reversion suspended until this sum, and interest thereof, was paid, in addition to that already mentioned.

Under this right, followed by infeftment, Davidson and his heirs possessed until 1764, when John Duke of Roxburghe, the heir then in possession of the entailed estates, resolved to avail himself of the right of reversion, by paying to Cockburn, (who was infeft as trustee under a trust-disposition from Thomas Davidson, the heir of William, for behoof of his creditors), the original wadset sum, as well as the amount of the eik. With this view Duke John consulted Counsel as to the influence which the circumstance of being heir of tailzie could have on the transaction; and received in answer,—'Though 'the Duke, as heir of entail, may not be liable to the debts and 'deeds of Earl William, granted by the wadset 1662, and takes 'the reversion as heir of entail, he must take it cum suo onere, 'whereof this is one, that the wadsetter be relieved of the minis-

'ter's stipend. But it is proper that his Grace should know; March 9. 1825.
'that when he shall have redeemed this wadset, and taken a re-
'conveyance or renunciation of the same, in favour of himself
'and his heirs of tailzie, they will not be subjected to the fetters
'of the entail, or inalienably consolidated therewith, unless a new
'deed of entail of these is executed.'

The redemption was then effected in this manner:—Duke John took a renunciation, which, after reciting the original creation of the wadset, bore, 'And now seeing his Grace John 'Duke of Roxburghe, heir of tailzie by progress to the said de-'ceased William Earl of Roxburghe, granter of the wadset and 'bond of eik above narrated, has by the hands of Henry Bal-'canqual, writer in Edinburgh, made payment to me, the said 'Thomas Cockburn, as trustee foresaid for the use and behoof 'of the creditors of the said Andrew and Thomas Davidson, of 'the foresaid sums, amounting to L.1798. 14s.; therefore wit 'ye us, the said Thomas Cockburn and Thomas Davidson, for 'our several rights and interests above-mentioned, with mutual 'advice and consent of one another as aforesaid, not only to 'have exonerated and discharged, as we hereby exoner, acquit, 'and simpliciter discharge the said John Duke of Roxburghe, 'his heirs and successors, and all other heirs and representatives 'of the said deceased William Earl of Roxburghe, granter of 'the said contract of wadset and bond of eik, and also the re-'presentatives of the said deceased Robert Earl of Roxburghe, 'and Henry Lord Ker his son, the original debtors in the bond 'narrated in the said contract of wadset and bond of eik, of the 'whole sums of money before narrated, now paid to me the said 'Thomas Cockburn, trustee foresaid, and all contained in and 'due by the said contract of wadset and bond of eik, and other 'writs there contained, and of the said writs themselves, and 'whole clauses and obligations therein contained, and of all ac-'tions competent thereupon, and all that has followed, or may 'follow upon the samen; but also to have renounced, discharged, 'and overgiven, as we hereby discharge, renounce, and overgive, 'in favour of the said John Duke of Roxburghe, and his fore-'saids, all and haill the said five husband-lands of Burnward 'and Wester-Grange, &c. with all right, title, we have, &c. in 'virtue of the contract of wadset and bond of eik, and charters 'and infeftments, and other writs following thereon as aforesaid, 'with the said whole writs themselves, teinds, and other perti-'nents thereof, to be duly and lawfully redeemed from us, and 'freed, purged, and disburdened in all time coming of the re-

March 9. 1825.

'spective sums before-mentioned, contained in and due by the 'said contract of wadset and bond of eik, now paid to me as 'aforesaid, in the same manner as if the lands and teinds had 'never been charged, burdened, or affected therewith.' The deed also contained a procuratory of resignation ad remanentiam, bearing, 'And, moreover, to the end we may be more effectually 'denuded of our respective rights in the said lands, we, for our 'respective rights and interests above specified, with mutual 'advice and consent foresaid, do hereby make, constitute, and 'ordain . . . . and ilk ane of them, conjunctly 'and severally, our lawful procurators for us, in our name to 'resign, &c. all and haill the foresaid lands of Wester-Grange, 'and others, &c. in the hands of the said John Duke of Rox-'burghe, or his heirs or successors, or lawful commissioners in 'their name, ad perpetuam remanentiam, to the effect our 'right of property thereof may be consolidated with his Grace's 'right of superiority of the same, and to remain with his Grace 'and his heirs and successors inseparably, in all time coming.'.

This procuratory Duke John executed in his own person. He did not record the renunciation in the Register of Sasines.

On the 5th November 1803 Duke John executed a trust-deed, whereby he made over his whole effects, heritable and moveable, to John Wauchope, writer to the signet; and among these, 'the property or dominium utile of the lands and other 'heritages after-mentioned, whereof the superiority also belongs 'to me, but makes part of my tailzied estate, viz. all and whole 'the five husband-lands of Burnward and Wester-Grange, with 'houses, buildings,' &c. Some time afterwards the Duke executed, on death-bed, a deed of instructions, by which he directed his trustees to sell the whole subjects contained in the trust,—to invest the residue, after paying his debts and legacies, in the public funds, or in real security in Scotland,—to pay the dividends or interest to his sisters, Ladies Essex and Mary Ker, during their lives,—and at their decease the principal, in certain proportions, to certain individuals.

After the Duke's death Mr Wauchope took possession of the trust-estates, and, among others, of Wester-Grange, and drew the rents as they fell. Duke John was succeeded by Duke William, after whose death a competition ensued for the honours and estates of the family. Pending the litigation a judicial factor was appointed, and entered on the management; but during this period (about ten years) no challenge was made against Mr Wauchope's right, under the trust-deed, to the lands of Wester-

Grange. At length, on James Duke of Roxburghe being preferred, these lands and rents were claimed by him as forming part of the entailed estate. A multiplepoinding was then brought by Mr Wauchope in regard to these and certain funds in his possession, in which Duke James appeared; and his Grace having repeated a reduction, the Lord Ordinary, on the 24th of February 1815, found, 'that his Grace John Duke of Roxburghe, in 1764, 'having, in virtue of his right of reversion as heir of entail, 'taken an unconditional discharge and renunciation of the wad-'set, containing also procuratory of resignation ad remanentiam, 'subscribed by Davidson, the person in right of the wadset, and 'by Cockburn his trustee, and having afterwards executed that 'procuratory of resignation in his own hands, the wadset right 'was thereby extinguished, and did not remain a separate estate 'or right in the person of the Duke which he could convey to 'his heir-at-law, and therefore reduced in terms of the libel;' and the Court, on the 14th December 1815, adhered.* March 9. 1825.

The case having returned to the Lord Ordinary to decide as to the bygone rents, and Mr Wauchope having stated that he had bona fide paid the greater part of them to Ladies Essex and Mary Ker, his Lordship appointed them to be called as parties; and thereafter ordained 'the defenders to condescend on the 'whole trust-funds, real and personal, of John Duke of Rox-'burghe, and the past application of the produce thereof, to-'gether with the grounds on which they claim to retain or com-'pensate the bygone rents of the lands of Wester-Grange.' And thereafter 'found, that the defenders, the trustees and 'legatees, have no title to retain any part of the funds uplifted by 'them on account of the sum paid by Duke John for the extinc-'tion of the wadset of Wester-Grange; but that as this wadset 'was discharged, and the subjects incorporated with the entailed 'estate, there are no means by which Duke John's trustees can 'claim the sum he paid for extinguishing the wadset, especially 'as he himself, after the wadset had been extinguished, was 'amply repaid for the advance by the additional rent which he 'drew. *2d*, That the Duke having conveyed the lands of Wester-'Grange to his trustees for the purposes mentioned in the trust, 'and the trustee having entered into the quiet possession of 'these lands in virtue of the Duke's conveyance, and uplifted the 'rents thereof without the slightest challenge until the present

---

* Vide Fac. Coll. No. 18.

March 9. 1825.

'challenge was brought, the trustee was a bona fide possessor 'for the purposes of the trust; and he accordingly applied these 'rents, as he was bound to do, for the purposes of the trust; 'therefore found, that the trustee is not accountable for the rents 'of these lands to the pursuer until the first interlocutor was 'pronounced by the Lord Ordinary reducing his right. Found, 'that the trustee is accountable to the pursuer for the rents 'from Whitsunday 1815, but for no prior rents uplifted by him; 'and decerned, and remitted to the clerk of the process to make 'up a state of accounts betwixt the parties upon these principles.' And on advising a representation and answers, adhered, 'for the 'reasons already stated, and also in respect of the decision of the 'Court with regard to the bona fide possession of Crookedshaws 'in this same entail of Roxburghe.' The question being brought before the Inner-House, their Lordships, before answer, ordained Wauchope to lodge in process a state of his accounts, shewing the funds received, and the application and disposal of the same. This order Mr Wauchope obeyed; and lodged a state of the affairs of Duke John, containing a debit and credit account, enumerating all Mr Wauchope's intromissions, his receipts and payments, &c. Among the latter were entered; 'Payments to Ladies Ker on interim warrants of the Court of 'Session, whereby consideration was reserved, whether the same 'were to be applied to account of the general liferent of the 'funds provided to them by the Duke's settlement, or towards 'the bond debts due to them—L. 17,000. *Nota.*—The Ladies 'have since been found not to be entitled to a liferent of the 'funds.' Thereafter the Court, on advising a petition and answers, minute and state, adhered, and refused a reclaiming petition without answers, on the 13th June 1822.*

Mr Wauchope and the residuary legatees appealed from the judgments finding that the wadset right was extinguished and did not remain a separate estate, and that they were not entitled to retention on account of the price of the wadset; and the Duke appealed from the judgments sustaining the defence of bona fide perception and consumption.

Wauchope and others, appellants.—(Wadset). Although Duke John, upon paying up the redemption money, took a discharge and renunciation of the wadset, containing also procuratory of resignation, he did not thereby render it incapable of

---

* 1. Shaw and Ballantine, No. 537.

being conveyed by his trust-deed. Even viewing the wadset as a mere burden on the entailed estate of which it was held feu, the same rule must apply as to any other burden bought up by an heir of entail; and it is now fixed law, that if the heir of entail either pays the debts of an entailed estate, or becomes, by succession, the creditor in these debts, no such extinction necessarily ensues. A reverser, redeeming in virtue of his right of reversion as heir of entail, can still preserve the wadset right free from fetters. It is said, that the preservation of the right as a separate right can only be effected by taking an assignation, and that a renunciation extinguishes the right. It is plain, however, that the efficacy of the assignation depends on the intention manifested to keep the right separate, and this intention cannot be denied in the present case. The mere superadding the renunciation and resignation affords no evidence to the contrary. But, independent of this view, the form adopted did in law leave the wadset unentailed, and capable of being again disjoined from the entailed superiority. Properly speaking, a wadset is an actual right to the lands themselves, subject to the privilege of redemption in the reverser, although, no doubt, it has also been viewed as a mere burden. According to these views, different forms of reconveyance have been adopted. In the view of its being an actual right to the lands, it is proper to execute a procuratory of resignation, which vests the reverser with a right to the wadset, considered as a separate and substantive heritable right transferred to him by the wadsetter. In the view of being a burden, the wadsetter executes a renunciation, which, being recorded in the Register of Sasines, reinstates in the reverser the full right of the lands. To meet both views, the practice is, to execute both a renunciation and a procuratory of resignation. This form the Duke adopted; but in doing so he did not merely discharge the wadset; on the contrary, he took a conveyance to it, and this conveyance effected no entail of the wadset even against the future heirs who came to take it, and much less against the Duke, the acquirer; nor could the execution of the procuratory impose fetters. From the circumstance of Duke John being the superior of the wadset, he was enabled to complete a feudal title by resignation in his own hands; but that did not effect an entail of the subjects resigned. It consolidated, but did not entail. Besides, Duke John did not register the renunciation; and the resignation ad remanentiam in the hands of the original superior, Duke John, having proceeded in virtue of a procuratory from the sub-vassal Cockburn, and not from the vassal Davidson, was

March 9. 1825.

March 9. 1825.

inept. This resignation may have united the mid-superiority held by Davidson with the entailed superiority, but could not consolidate the wadset with the entailed superiority. The property, therefore, of the wadset continued, until the Duke's death, to be held as a personal right in virtue of the purchase, and free from the fetters of the entail.

Duke of Roxburghe, respondent.—(Wadset). . Duke John having exercised the power of redemption competent to him as heir of entail, took an absolute discharge of the debt for which the lands were wadsetted; and by which that debt was extinguished. He might have kept it up by taking an assignation or conveyance; but he adopted a different form, and completely extinguished the burden. By the execution of the procuratory in his own hands, the lands were relieved, and the full right to them thenceforth held by Duke John under the fetters of the entail; and consequently they could not be conveyed by the trust-deed to trustees. Correctly speaking, it was not necessary for the extinction of the wadset right to resign ad remanentiam. That was effected by the renunciation and discharge. There is no evidence of intention to hold the wadset lands free of the fetters; and as to the opinion of Counsel, it has not been shewn that the Counsel knew that the lands had been previously part of the entailed estate. Cockburn's infeftment was merely an infeftment in trust, the truster still remaining feudal proprietor. He, therefore, validly could have resigned. But in point of fact, the procuratory was the deed of both Cockburn and Davidson; was executed by them as principals, and each consenting to the deed of the other; and thus the consolidation of the wadset with the entailed superiority was completed.

Duke of Roxburghe, appellant.—(Rents). The lands of Wester-Grange came into the respondent Mr Wauchope's hands solely through inadvertence; but that was not, in the circumstances which attended the competition for the honours and estates of the house of Roxburghe, imputable to the appellant. The defence of bona fide perception and consumption is not available to the respondents. Mr Wauchope was merely the trustee, and that defence is not competent to him in that character. In point of fact, the rents are still extant in his hands; for these rents were levied, not for the use of the residuary legatees, (who had no right until after these ladies' death), but for the use of the ladies themselves. But having challenged their brother's trust-deed on the head of deathbed, and thus taken the lands to which they were heirs alioqui successuræ, the rents were not paid to

them as liferentrixes, but solely as creditors, which character they also held. Thus they did not consume any part of the fund in dispute. The trustee had therefore merely the duty of accumulating; and he was challenged before the application.

Wauchope and others, respondents.—(Rents). The trustee acted optima fide in taking possession of the lands of Wester-Grange, and drawing the rents; and it is a fixed rule, that bona fides protects the party who can plead it from all obligation to restore the fruits of the subjects so possessed during the continuance of his bona fides. The distinction attempted to be drawn between the general case of bona fides, and the present, is entirely imaginary. The possession of the trustee was, to all intents and purposes, the possession of the parties beneficially interested; and although the funds extant may, in a question among the parties, be considered as a fund in medio, they cannot, in a question with the true proprietor of the lands: quoad him, it is the same thing as if the individual interested had, after drawing the rents, invested them in a Bank, from whom certainly the proprietor of the lands could not have reclaimed them. The Ladies Ker claimed both the fee of certain of the trust-lands, the liferent of the other funds conveyed,—and as creditors. The payment to them under order of the Court was made, reserving for future determination in what manner the same is to be applied, whether to account of their general liferent of the whole funds, or in part of the debt owing to them. The rents of Wester-Grange were included in the amount of the revenue drawn from the trust-estate; and, in point of fact, a sum equal to the whole annual proceeds of that estate has already been paid away to the Ladies Ker. But, in a question with the Duke, that is of no consequence. The rents were percepti, and the parties interested entitled to the benefit of the plea of bona fides, equally as if they had individually drawn their respective shares.

The House of Lords 'ordered and adjudged, that the said 'original and cross appeals be dismissed, and the interlocutors 'complained of affirmed.'

LORD GIFFORD.—My Lords, It is my duty now to call your Lordships' attention to two appeals which were heard in this House a few days since, in one of which his Grace the Duke of Roxburghe is the appellant, and John Wauchope, Esq. W.S. and other persons, are respondents; and the other was a cross appeal, in which Mr Wauchope, and other persons, are the appellants, and the Duke of Roxburghe the respondent.

These appeals are brought for the purpose of submitting to your

March 9. 1825. Lordships' consideration certain interlocutors of the Court of Session, to which, in the course of what I shall have to address to your Lordships, I shall call your Lordships' attention.

My Lords,—The circumstances out of which this litigation has arisen I would now briefly state to your Lordships. It appears that, so long ago as the year 1648, Robert, the then Earl of Roxburghe, executed an entail of his whole estates, comprising in that entail the lands of Wester-Grange, to which your Lordships' attention will be called more particularly presently. He died in the year 1650; and in the month of January 1662, Earl William, who was then in possession of these estates under this entail, granted, in virtue of the power under the entail, what is called a wadset right, extending over the lands of Wester-Grange. That wadset was executed for the purpose of securing a considerable sum of money which had been owing to Mr Davidson by Robert Ker the entailer, and by Harry Lord Ker, his son. My Lords, this wadset subsisted upon the estate till the year 1764, when the late John Duke of Roxburghe wished to redeem this wadset, which, it appears, was then held by a gentleman of the name of Davidson, who had succeeded to it, but who, antecedent to the transaction to which I shall immediately advert, had been under the necessity of transferring this right to a gentleman of the name of Cockburn, as a trustee, for the purpose of paying his creditors, and for the purpose of rendering the surplus, if any, to Mr Davidson himself. My Lords, in the year 1764 his Grace, the then Duke of Roxburghe, wishing to redeem this wadset, it appears that the transaction was entered into between him and Mr Davidson, and Mr Cockburn his trustee, (which it is not necessary for me to state further than in general terms), consisting, on the part of the Duke, of a payment of this wadset; and on the other side, a renunciation, as it is called, of the wadset right; which also contained a procuratory of resignation on the part of Mr Davidson and on the part of Mr Cockburn to the Duke.

My Lords,—It appears, that in virtue of this procuratory of resignation, duly made on the 22d May 1764, Duke John of Roxburghe continued in possession of the whole of the entailed property, and in the year 1803 executed a disposition of his whole unentailed property to the respondents, Mr Wauchope and others, in trust, for purposes to be declared; and in that disposition were contained these lands of Wester-Grange; and the Duke afterwards, in 1804, while on deathbed, duly executed a deed of instructions, by which he directed his trustees to sell the whole subjects contained in the trust, to invest the residue, after paying his debts and legacies, in the public funds, or upon real security,—the interest of which was to be enjoyed by his sisters, Ladies Essex and Mary Ker.

My Lords,—In 1804 John Duke of Roxburghe died, and he was succeeded by Duke William, who, in 1805, was succeeded by Duke James. On the death of Duke John, Mr Wauchope entered into possession of these lands of Wester-Grange, and continued in such pos-

session, and in the receipt of the rents, until the year 1815. In that year, after a competition with respect to the titles of Roxburghe, which had been determined, an action was brought by Mr Wauchope in the nature of an action of multiplepoinding, upon the narrative that, in virtue of a trust-deed by Duke John, he held a variety of property which was claimed by various persons; and the conclusion of that action was, that all these parties should make appearance in the action for their respective interests, in order that he might be enabled to divest himself in favour of those who truly had the right to these subjects. In this action, James Duke of Roxburghe, who, it is stated, had discovered the situation of the lands of Wester-Grange, appeared and entered his claim to them as heir of entail, and to the rents thereof, which had been received by Mr Wauchope since the death of Duke John. In point of form, it was directed by the Lord Alloway, the Lord Ordinary, that Duke James should raise and repeat a reduction of the trust-deed, in so far as it conveyed these lands, which was immediately done. March 9. 1825.

My Lords,—In consequence of that action of reduction, an interlocutor was pronounced, on the 24th February 1815, by the Lord Ordinary. (His Lordship then quoted it. See ante, p. 45.) A short representation was made against this interlocutor, which was refused by the Lord Ordinary by an interlocutor of the 12th May 1815; and the Lord Ordinary, upon considering a second representation and answers, again adhered by an interlocutor of the 11th of July 1815. These interlocutors were then submitted to the review of the First Division of the Court of Session by petition on the part of the Duke of Roxburghe, upon considering which, with answers, their Lordships, on the 14th December 1815, adhered.

My Lords,—This decision settled the question as to the effect of the transaction between Duke John and the persons who had held the wadset right in the year 1764; and the effect of this determination was, that the result of what took place in the year 1764 was this, that the wadset right was discharged, and that that wadset right was consolidated with the superiority, and therefore was subject to the original entail; and consequently that Duke James was entitled, as heir of entail, to those lands, and Mr Wauchope, as trustee under the disposition executed by Duke John, had no right to retain the possession of those lands.

My Lords,—Then a question arose with regard to the bygone rents. The Duke contended, that it being decided that he was entitled, as heir of entail, to the lands, he was entitled to the bygone rents. Mr Wauchope, on the other hand, contended, that he bona fide holding these lands until the first decision of the Lord Ordinary of the 24th February 1815, the Duke, according to the law of Scotland, was not entitled to recover from him the rents he had received. My Lords, these questions came to be discussed before the Lord Ordinary on the 6th March 1816, and he then pronounced this interlo-

March 9. 1825. cutor:—(His Lordship then read it. See p. 45.) The condescendence ordered by this interlocutor having been accordingly lodged and followed by other procedure, it appears that the Lord Ordinary, having made avizandum, pronounced the following interlocutor on the 27th November 1817:—(His Lordship then quoted it. See p. 45.) I should have stated, that Mr Wauchope contended that he was entitled to retain part of the sum uplifted by him on account of the money paid by Duke John for the wadset; and that point has been partly discussed at your Lordships' Bar.

My Lords,—This interlocutor having been submitted to review, the Lord Ordinary was pleased to pronounce, on the 12th of May 1818, the following interlocutor:—(Quotes it). These judgments were brought under the review of the Court by the Duke of Roxburghe; and on the 27th of November 1818, the First Division of the Court of Session, having ordained Mr Wauchope to lodge in process a state of his accounts, shewing the funds received, and the application and disposal of the same, thereafter, on the 23d May 1822, pronounced this interlocutor:—(Quotes it). The result, therefore, of these interlocutors of the Lord Ordinary and the Court of Session is this, that, in their judgment, Mr Wauchope had been the bona fide possessor of these lands until the first interlocutor of the Lord Ordinary was pronounced, so far as respects the lands of Grange; and that therefore the Duke of Roxburghe had no right to recover from him these bygone rents, except from the period of that interlocutor.

My Lords,—His Grace has appealed from those interlocutors which decided against his right to bygone rents; and the respondents, in consequence of that appeal, have, in respect of the interlocutors pronounced in the action of reduction, entered a cross appeal against the judgment of the Court of Session, by which it has been decided that the lands of Wester-Grange had been, by the transactions of the year 1764, consolidated with the superiority, and therefore had been incorporated in the original entail. The two questions have been very ably argued at your Lordships' Bar. The first question I have stated to your Lordships is upon the effect of the discharge of the wadset in the year 1764. My Lords, it appeared to be admitted in the argument, that an heir of entail, whose estates were subject to a wadset right of this description, might, if he chose to discharge that wadset, keep alive that wadset right as distinct from the entailed lands. On the other hand, that it was competent for him to discharge that wadset right so as to consolidate it with the entailed estate; and it was said that, therefore, that reduced it in every case to a question of intention on the part of the party who discharged the wadset, whether it was his purpose to keep alive the wadset right as distinct from the entail or not? And it was argued on the part of the appellant in the cross appeal, that in this case you have evidence of the intention of John Duke of Roxburghe not to discharge this wadset right, in consequence of a case which had been stated in his behalf shortly before that tran-

saction, and in consequence of an answer which had been given by certain persons at that time very learned in the law of Scotland. March 9. 1825.

My Lords,—In looking through that case, it did not appear to me that the Duke of Roxburghe, or his agents, indicated any such intention; but that, on the contrary, it rather appeared that it was his wish to get rid of the wadset right, but with a view to reannex it to his entailed estate,—the lands of Wester-Grange having been originally comprised in the entail.

My Lords,—In answer to one of the questions which were stated to the learned Counsel on this occasion, those learned persons perceiving, as I apprehend, that it was the intention of the Duke to reannex this wadset right, and to consolidate it with the entailed estate, gave it as their opinion, that 'though the Duke, as heir of entail, may not be 'liable to the debts and deeds of Earl William, granted by the wad-'set 1662, and takes the reversion as heir of entail, he must take it 'cum suo onere, whereof this is one, that the wadsetter be relieved of 'the minister's stipend. But it is proper that his Grace should know, 'that when he shall have redeemed this wadset, and taken a reconvey-'ance or renunciation of the same, in favour of himself and his heirs 'of tailzie, they will not be subjected to the fetters of the entail, or 'inalienably consolidated therewith, unless a new deed of entail of 'these is executed.' Now, my Lords, a very important remark was made on this case by the Counsel for the Duke, that that case did not state—and I believe he was accurate according to my perusal of it—that the lands of Wester-Grange had been originally comprised in the entail, but that, for whatever appeared in that case, the wadset right had been granted anterior to that entail. But, however, my Lord Duke having discharged the wadset, took from the trustee for the wadsetter what is called a renunciation, containing also a procuratory of resignation. My Lords, that deed is executed on the 22d day of May 1764; and it appears that, by virtue of the procuratory of resignation, the resignation was duly made on the 11th June 1764.

My Lords,—It appears to me that this question must be decided upon the force and effect of these instruments, because, as I have already said, I do not see any distinct evidence in this case, either on the one side or the other, unless you have recourse to the disposition of 1803, which was long subsequent to the transaction, whereas I apprehend the intention of the party must be shewn at the time when his resignation took effect. Then if you are to decide this question, as I apprehend you must, on the effect of the written instruments, several objections have been made, on the part of Mr Wauchope, to the effect of the renunciation and this resignation. It is said, in the first place, that this renunciation alone was not sufficient to divest the predecessor of his wadset right in those lands the feudal right of which he was invested with, and that it was absolutely necessary it should have been accompanied with this procuratory of resignation, and a resignation made in consequence of that.

March 9. 1825. My Lords,—In answer to that it was argued on the part of the Duke, that, according to Mr Erskine's Institutes, a book certainly of very considerable authority, a renunciation alone was sufficient. I should, however, state to your Lordships, that my Lord Stair certainly does not confirm Mr Erskine upon that subject, because my Lord Stair, when speaking of the destitution of wadsets, says, (page 344. B. 2. tit. 10. § 13.) 'It remaineth now to consider the destitution of 'wadsets, and how they cease; and this is either by consent or law: 'by consent, either when the reversion is discharged, whereby the in-'feftment becomes irredeemable and ceaseth to be a wadset, which 'discharge of the reversion is not effectual against singular successors, 'unless registrate conform to the said Act of Parliament 1607, c. 16.; 'or otherwise by voluntary renunciation of the wadset, which must be 'registrate by the said Act, or else it prejudgeth no singular succes-'sor in the wadset; yet it is not effectual to denude the wadsetter who 'remains in the fee of the wadset till the reverser get a resignation ad 'remanentiam, if the wadset be holden of the granter himself, or be 'reserved by the superior, if the wadset was public; and a renuncia-'tion, without a new infeftment, is not sufficient.'

My Lords,—Mr Erskine, (2. 6. 17. and 18.) who wrote in more modern times, states, 'In the redemption of wadsets which have not 'been made real, a simple discharge or renunciation by the wadsetter, 'though not registered, is a proper extinction of the right, because as 'long as a right remains personal, it may be effectually renounced by 'a personal deed. But where sasine has proceeded on the wadset, it 'must be distinguished whether the right be holden base of the 'reverser who grants it, or of the reverser's superior. When the wad-'set is holden of the reverser, it is usual to insert in the wadsetter's 'renunciation a procuratory resigning the lands to the superior, 'granter of the wadset ad remanentiam, and, after the surrender is 'made, to register the instrument of resignation, together with the 'renunciation, in the Register of Sasines; which, without any new in-'feftment, extinguishes the wadset, and consolidates the property, 'with the superiority, in the reverser. But a simple renunciation, 'properly registered, has the same effect without resignation.' It was contended, therefore, that, according to this statement, a renuncia-tion would have been sufficient without its being accompanied with a procuratory of resignation, and a resignation made in consequence. It does not appear to me, however, that it is necessary for your Lord-ships to decide that question, because here this renunciation has un-doubtedly been accompanied by that which my Lord Stair said it should be accompanied by; and which, it is agreed by Mr Erskine, is generally the accompaniment of a renunciation in modern times. There is a procuratory of resignation by the then wadsetter, the per-son in the succession of the wadset, and by his trustee. But it was said that that was incorrect; that the disposition made by Davidson, who was the representative of the wadsetter, to Cockburn, created a

new right in Cockburn, a base fee as it is called, a right holden of Davidson; and therefore the proper course would have been for Cockburn to have resigned the whole to the Duke, and that this joint procuratory of resignation was therefore incorrect. I observe that the Lord Ordinary has proceeded upon the ground that Mr Cockburn was a trustee for Davidson; and it seems to be admitted in the argument, that if that was established there was no objection to this procuratory of resignation. But it was said he was no trustee. On handing up, however, the instrument, it appears clear that he was trustee. It is true he was trustee for creditors; but he was trustee also for Davidson. If there was any surplus of the estate, he was to be trustee for Davidson quoad that surplus. This appears to be a very nice question in the law of Scotland to raise in a case of this sort; but I must confess, that on the best consideration I have been able to give to this judgment, it appears to me that the conclusion at which the Lord Ordinary arrived is the correct conclusion; that in this case there is a sufficient procuratory of resignation of these parties, Mr Davidson and Mr Cockburn, to the Duke; and that this procuratory of resignation having been afterwards executed, the wadset right was thereby extinguished and consolidated with the superiority in the Duke of Roxburghe; and that having been previously entailed by the author of the entail in 1642, the Court of Session have adjudged rightly in saying that wadset lands come again under the fetters of the entail, and that consequently James Duke of Roxburghe was entitled in this action of reduction to succeed in reducing this trust-disposition, inasmuch as John Duke of Roxburghe, not having taken it to himself to keep it alive, had no right to dispose of it by that trust-disposition in 1803; and consequently that James Duke of Roxburghe was entitled to succeed to it as heir of entail. It appears to me, therefore, that there is no ground to disturb that decision of the Court of Session. March 9. 1825.

The next question is one of great importance, and which an English lawyer must always approach with great distrust; for we have no such law in this part of his Majesty's dominions. With us, if a man possesses a right to an estate, it follows of course that he is entitled to the produce, with the exceptions introduced for the purpose of quieting possession. The law of Scotland, however, is quite different in that respect; and it is of the utmost importance to the administration of law in that country, that when your Lordships are called upon to decide a question coming from those Courts, you should take care to be most cautious that no prejudices arising from education in English law, that no prejudice arising from English decisions, shall at all affect your judgment in deciding upon that point, but that it shall be decided according to the law of Scotland; by virtue of which law the parties hold their estates, and into which law you would introduce the greatest confusion, if you attempted, even by analogy, to carry that which is the law of England; and since I have had the honour of rendering my humble and feeble assistance to your Lordships, as well as before,

March 9. 1825.

when I was intrusted with the conduct of cases for argument at your Lordships' Bar, it has been my anxious desire, (and I trust I have succeeded), to bring my mind as fully as possible to judge in a Scotch case on the principles of Scotch law and on the decisions in Scotch law, abstracted from English decisions and from English law.

Now, my Lords, for the law of Scotland in this respect, I cannot do better, perhaps, than refer to that authority to which I have already referred, Mr Erskine, who states the more modern law upon the subject, and more at large than Lord Stair, though Lord Stair is of the highest authority in the law of Scotland. I shall call your Lordships' attention to what Mr Erskine states upon the subject (2. 1. 25.) when explaining the different effects of holding an estate bona fide and mala fide. (His Lordship then read the passage beginning, 'A mala fide 'possessor is one,' &c.) My Lords, the first question, therefore, which the Court had to determine was, whether there was a bona fide possession within the meaning of the Scotch law? and it was said there was; that Duke John had taken upon himself, as the owner of this property, to dispose of this; that he was not disturbed in that possession by the first Duke, who, at all events, lived a twelvemonth after Duke John; that he remained quietly in possession till the year 1815, when this suit was instituted. Then, after the death of Duke William, it is said, there arose a competition between those persons conceiving themselves entitled to the estates and the title of Duke of Roxburghe, and that therefore it could not be said that this person held with the consent of those persons entitled; that the right was not ascertained, but there was a person appointed to watch over the estates. It is sufficient, however, to say, that, from the year 1804 to the year 1815, the trustee possessed under a prima facie title under that deed of disposition. True it is, that deed of disposition has since turned out to be bad. It has since been determined, that the Duke had no right to dispose of the interest by that disposition; but as that was a question of difficulty, and as it must be admitted on all hands of some nicety, it is too much to say that the trustee was not a bona fide possessor of the property, having reason to think himself, (in the language of Mr Erskine), entitled to hold it under that trust-disposition. It appears to me, therefore, that the Court of Session have adjudged rightly in that respect.

But the main argument at your Lordships' Bar has been of this description,—that though a bona fide possessor, yet possessing qua trustee, and, as it was argued, the funds not being disposed of by him in pursuance of that trust, but remaining in his hand as an accumulated fund for the benefit of those who were entitled to the trust, that though those were rents and profits percepti, they were not consumpti, but in medio in the hands of the trustee; and that therefore the estate, being now found to be the property of the Duke of Roxburghe, he was entitled to them as funds in medio.

March 9. 1825.

Now, my Lords, let us for a moment consider the situation of the parties with respect to this question. The trustee, when he received these rents, (for received them he has), received them by virtue of that trust-disposition; and, I apprehend, when they got into his hands, they were in his hands for the benefit of the persons entitled under the trust. It is true that the Ladies Ker disputed the validity of that trust-deed, as far as affected their rights, and refused to come in under it; they being liferenters of the surplus of it, if they chose to accept it, and, at their deaths, the surplus being to be distributed among certain persons. But it appears to me, in the first place, that that was not a question which the Duke of Roxburghe could take any advantage of. The trustee had received the rents qua trustee, for the benefit of those who might be entitled under the trust. It was indifferent to the Duke of Roxburghe, and a question with which he had nothing to do, whether the persons, for whom the trustee was a trustee, were quarrelling in respect of the extent of their interest in this fund. If the fund was bona fide received by the trustee, as the Court of Session have found it was, it might have been in medio as between the persons entitled under the trust. But these persons entitled under the trust have a right to say, either I, A, or I, B, am entitled, as against the trustee, though we have not yet applied. It, however, appears to me, that your Lordships are not let in to that question; for I perceive, when the point fairly came before the Court of Session, they directed a state to be handed in by the trustee; and when your Lordships look at that state then handed in, you will find, that those rents of Wester-Grange, together with a great deal of other property, were brought to account; and, my Lords, in the accounts of payments to the Ladies Ker, which were pointed out to me in the course of the argument, occurs this passage:—'Payments to Ladies Ker on interim 'warrants of the Court of Session, whereby consideration was reserv-'ed, whether the same were to be applied to the account of the gene-'ral liferent of the funds provided to them by the Duke's settlement, 'or towards the bond debt due to them; per first report, L.5000, per 'second do. L.12,000,' making therefore L.17,000.

The argument is:—But the Ladies Ker have been found not entitled to the liferent of the fund, and the distribution that was made is to be taken to have been in consideration of the liferent, or in payment of the debts of the Duke. The rents of these lands of Wester-Grange have been mixed up with the other property, and have been applied by this trustee, as far as he could, in discharge of that trust. From the time it was ascertained that the Ladies Ker were not entitled to their liferent, they have not received payments on account of the liferent, but payments have been paid to them and others on account of the debts. And in the second account, which is carried up, I think, to 1815, your Lordships will find, that the trustee charges himself with all the rents of the unentailed estates, including the rents of Wester-Grange, and he charges himself with a variety of sums received on

March 9. 1825.

various other accounts. Then he discharges himself to the full amount to which he had charged himself, by various payments he had made to different persons, and by the investment of certain sums arising from the produce of the Library, and arising from the produce of a house in St James's-square, so completely balancing the account of those receipts and payments at that time.

It appears to me, therefore, that the Lord Ordinary was well justified in finding, not only that Mr Wauchope had received rents bona fide, but had applied them in discharge of his trust; and, in my opinion, it makes no difference that, in consequence of the determination which has taken place in the case of the Ladies Ker, the surplus may be increased. The question is, whether, during the period those rents were received, namely, from 1804 to 1815, they were received and were applied bona fide; and it is no question whether, in consequence of the disputes which have arisen, some of the parties entitled under the trust may have derived a greater benefit than they expected; but the only question is that which the Court of Session have decided, whether the trustee, during that period, recovered those rents bona fide, and applied them bona fide in execution of the trust. It appears to me, attending to the arguments which your Lordships have heard, and to all which is contained in these papers, that he has done so. I forgot, before I came to this part of the case, to state to your Lordships that which Mr Erskine lays down, and which is proved to be correct in all cases, that actual perception of the rents is not necessary; for he holds, that if a party is bona fide in possession, he is entitled to the rents which have become due during that time, even although he may not have received the rents till after that period. I merely mention that, to shew that it would be in vain now to go back to the origin of this rule, which probably was that stated by Mr Erskine, that parties in the bona fide possession of property have not only received the profits, but consumed them in their mode of living, and that it would be extremely hard that those profits should be withdrawn from them. The question of consumption cannot, therefore, come into the consideration of the Court. But, generally speaking, the question is, whether they had been received bona fide during the time of a bona fide possession; and here, not only have they been so received, but they have been applied by the trustee bona fide, in execution of the trust devolved upon Mr Wauchope by the trust-instrument.

My Lords,—Although it is not always usual, in cases where it is the intention to move to affirm the judgment, for the individual moving that to state all the reasons which induce him to ask your Lordships for the affirmance of the judgment, yet, in a case of so much importance as the present, I have thought it my duty to state to your Lordships the grounds on which I have arrived at the conclusion that the Court of Session have decided rightly in both respects, rather than leaving the parties in the dark as to the reasons which may have

induced the humble individual addressing your Lordships to make that motion. After the most anxious consideration, I have been unable to reach any other conclusion than that, in conformity to the law of Scotland, this was a redemption consolidating the wadset with the superiority, that superiority having been originally entailed by Earl Robert in 1648, and is brought within the fetters of the entail; and that, on the second question, the Court of Session are also right in determining that, until the first interlocutor of the Lord Ordinary, there was a bona fide possession, that might be carried, and has been carried by your Lordships down to a later period; for, in a case last Session, it was carried down to the decision of the House of Lords. It appears to me that there has been a bona fide possession; that the trustee has received these rents bona fide according to the laws of Scotland, according to which law this question must be decided; and that he has, as far as he could, applied these rents to the discharge of the trust imposed upon him; and that the Court of Session have therefore adjudged rightly in saying, that these bygone rents cannot be recovered by the Duke of Roxburghe, until the period of the first interlocutor of the Lord Ordinary. Having stated to your Lordships my view of the case, I have only further to move your Lordships that the judgment be affirmed.

March 9. 1825.

Duke of Roxburghe's Authorities.—(WADSET.)—2. Ersk. Inst. 8. 16.; Grant *v.* Donaldson, March 11. 1786, (8689.); Campbell *v.* Spiers, Dec. 14. 1790, (8652); Campbell *v.* Common Agent of Edderline, Jan. 14. 1801, (App. Adjudication). —(RENTS)—2. Ersk. Inst. 1. 25.; Ogilvie *v.* Ogilvie, (Note to Roxburghe *v.* Wauchope, June 13. 1822); Stair's Inst. 1. 28.

Wauchope and Others' Authorities.—(WADSET.)—Earl of Peterborough *v.* Creditors of Fraser, Feb. 4. 1736, (3086.); Kerr *v.* Turnbull, Feb. 15. 1758, (1555.); 2. Ersk. Inst. 8. 18.; Hope's Minor Practics, 170.; Ross's Lectures, vol. ii. p. 369.; Bell's System of Deeds, vol. ii. p. 74. et seq.; M'Lellan, Jan. 7. 1780; Grahame *v.* Galbraith, Jan. 14. 1814, (F. C.)—(RENTS.)—2. Ersk. 1. 25.; Bonny *v.* Morris, July 30. 1760 (1287.).

J. RICHARDSON—SPOTTISWOODE and ROBERTSON,—Solicitors.

PETER M'ARTHUR, Appellant.—*Sol-Gen. Hope—Fullerton.*

No. 8.

ANDREW JAMESON and Others, Trust-Disponees of LYDIA TURTON or FALCONER, deceased, Respondents.—*Adam—Abercrombie.*

Implied Revocation—Clause.—A husband having purchased landed estates at a judicial sale, and executed a deed of conveyance and settlement, proceeding on the narrative, that 'I am now resolved, in the event of my death, before my titles to the said lands 'and estate are made up and completed, to convey the said purchase to and in favour