by the granter any other manner of way were also paid, so that the wadset could not be redeemed till the sums for which the annual-rent was granted were also paid, No. 30.

The Lords finding the wadset not burdened with the provision, and the rights being *separata jura*, they declared as to the wadset, the sum therein not being by way of eik to the annual-rent, nor registered as eiks ought to be.

Harcarse, *No.* 1028. *p.* 292.

1686. *November* 24. LADY DRYBURGH *against* CREDITORS.

No. 31.
Effect of a voluntary restriction.

The Lady Dryburgh having voluntarily restricted her jointure of sixteen to twelve chalders of victual, in favours of her son, and the heirs-male of his body, secluding heirs-female, with this provision, That if payment was not made at the terms appointed, she should return to the sixteen chalders, and the restriction be void, the terms of payment not being observed, she pursued for the whole sixteen chalders.

Alleged for the creditors of the son, who was dead: That they were content to purge bygones, and to pay in time coming.

Answered: This being a voluntary restriction, and no failzie, or *pactum commissorium* in wadsets, was not purgeable now, as had been several times decided.

Replied: The clause not being taxative and personal to the son, was apprisable by his creditors.

The Lords allowed the creditors to purge between and Candlemas; and they did not consider if there was an onerous cause for the restriction or not, as was done in the Lady Dean's restriction.—This decision seems contrary to some former decisions.

Harcarse, *No.* 1030. *p.* 293.

1688. *June* 16. RAMSAY *against* CLAPPERTON of Wylliecleugh.

No. 32.
Offer of caution.

One Ramsay, in England, having right to the reversion of a lucrative proper wadset in the person of Clapperton of Wylliecleugh, required him to take caution, and quit the possession; and insisted in a count and reckoning for the superplus above the annual-rent.

Alleged for the defender: The offer was not sufficient; because, 1*mo*, It was made by a notary for strangers who were minors, and no procuratory mentioned in the instrument or shewn; 2*do*, The offer was but general, without naming any person, so that it could not be considered, if the caution was sufficient.

Answered: The act of Parliament requires no instrument, or that the party should be present, or send a procuratory; and if that had been questioned, a procuratory

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