

1754. *March 6.*

ARCHIBALD CAMPBELL, Younger of Succoth, *against* CAPTAIN JOHN STIRLING of Herbertshire.

At the Michaelmas meeting 1753, Archibald Campbell claimed to be enrolled amongst the freeholders of Stirlingshire, and produced as his titles a charter under the Great Seal, dated 27th July 1752, in favour of himself in liferent, and his eldest son in fee, of certain parts of the barony of Herbertshire, and sasine thereon in September 1752, redeemable and under reversion, as mentioned in a contract of wadset, dated 22d March 1735, betwixt William Stirling of Herbertshire, and Captain Charles Campbell, the claimant's author.

It was *objected* by Captain John Stirling, *1st*, That the wadset was an improper one, and therefore did not entitle to a vote; *2dly*, That the claimant was not in possession of the whole of the wadset lands; and, *3dly*, That there was no legal evidence of the valuation of Thornie-hill, part of the wadset lands. And the freeholders sustained the objections.

Archibald Campbell complained to the Court of Session; and as the first objection is founded on the conception of the wadset, it is necessary to observe, that William Stirling the reverser, had only right to the superiority of the greatest part of the lands given in wadset, whereof the feu-duties amounted to L. 22 : 6 : 10 Scots, and to the property of a small part whereof the real rent was L. 27 Scots; and these two sums nearly corresponded to the annual rent of L. 82 Sterling, the sum given for the wadset. And the contract warrants the yearly feu-duties and rents to amount, at the date of the contract, to L. 49 : 6 : 10 Scots; and also warrants the lands 'from schoolmaster's salaries, and future augmentations of minister's stipends, and all other burdens and impositions whatever, imposed, or to be imposed on the said lands; and generally, from all perils, dangers, inconveniences, and impediments whatsoever, as well named as not named, bygone, present, or to come, at all hands, and against all deadly.' Then it excepts from the warrandice the several feu-rights granted to the vassals; and goes on to except, 'As also the feu right granted, at least claimed, by the family of Lord Forrester of the said lands of Gunnershaw, to which the said William Stirling himself now claims right; which feu-right is expressly reserved to the said William Stirling, or those having right thereto, under the burden always of 17s. 4d. Scots of yearly feu-duty forth of the same in favour of the said Captain Charles Campbell; and under which burden of the said yearly feu-duty, any feu-rights hereafter to be granted shall be expressly taken.'

The contract contains also a clause relating to the casualties of superiority; whereby it is provided, 'That whereas, besides the annual profits and feu-duties of the foresaid lands wadset to Captain Charles Campbell, it may likewise happen, that, during the not-redemption, certain sums of money will become

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If a division, made by a private meeting, be confirmed or homologated by a subsequent legal meeting of the Commissioners, it will thereby be validated.

No 8. ' due and payable to the said Captain Campbell, upon his receiving heirs or singular successors on the said feu-rights or by the said feus remaining in non-entry; therefore Captain Campbell obliges himself, his heirs and successors, personally, to submit to two persons to be mutually chosen, what shall be paid to William Stirling, or his heirs, for the said casualties of superiority; and that either when the said casualties fall due, or at the redemption of the wadset, in the option of the said William Stirling. And if Captain Campbell, or his foresaids, shall refuse or fail to submit, or to pay what is awarded by the arbiters; it shall be lawful to the said William Stirling and his foresaids, *To redeem* the said lands and superiorities from the said Captain Campbell and his foresaids, at any term after such refusal or failure to submit or pay, by payment or consignment of the foresaid sum of L. 82 Sterling, *With deduction* therefrom of what compositions shall have become due by law for the entry of such vassals; and that upon such payment or consignment, the wadset right shall become *eo ipso* void and extinct, without any process or declaration.'

It was *objected* for Captain Stirling, That this wadset was evidently an improper one, as the wadsetter was secured in the annualrent of his money, and could not possibly receive any more; for the lands are warranted to be worth the annualrent of the wadset sum at the wadsetter's entry; and as the subject given in wadset was chiefly the feu-duties of lands, there could be no hazard of their decreasing in value, or becoming ineffectual: And further, there is an anxious clause of warrandice securing the wadsetter from all burdens and impositions whatever, and from all other perils, dangers, burdens, and inconveniences, &c. past, present, or to come; and as he thereby had security for the annualrent of his money, so he could have no more, seeing he was accountable for the casualties of superiority; and if he did not make payment of the sums of money thence arising, these sums imputed towards extinction of the wadset sum; so that this wadset was only a security for money, and therefore improper.

Lord Stair, tit. WADSETS, § II. observes, ' If there be a provision to compt for the profits of the lands, or to hold the lands at such a rent, it is an improper wadset.' Such is the case here; for the casualties of superiority are part of the profits of the lands, and it is inconsistent with the nature of a proper wadset to account for these casualties; for that a proper wadsetter has the *plenum dominium* of the lands during the not-redemption, and therefore must have right to the casualties which fall due before the redemption.

*2dly*, It was further *objected* by Captain Stirling, That neither the property nor superiority of the lands of Gunnershaw were conveyed to the wadsetter, but only a right to uplift 17s. 4d. Scots yearly out of these lands, as appears from the clause relative thereto. And if the complainer contend that the family of Lord Forrester had a feu-right to these lands holding of Herbertshire, he must at least show that the feu-duty payable to the superior was precisely 17s. 4d. Scots.

3dly, Neither had the complainer or his author ever been in possession of the said lands of Gunnershaw, or of the said 17s. 4d. upliftable furth thereof; for that the said William Stirling did, soon after the date of the contract of wadset, dispose these lands to Lady Forrester to be held of the Crown, without any mention being made of the said yearly burden or annuity of 17s. 4d.: The Lady Forrester conveyed them to Forrester of Denoven, who is now in possession of them by charter and sasine from the Crown; and this annuity has never been demanded from him. And the lands of Gunnershaw being deducted, the valuation of the complainer's other lands will not amount to L. 400 Scots.

4thly, It was objected, That there was no legal evidence of the valuation of the half of the lands of Thornie-hill, (part of the wadset lands,) they being originally valued *in omnibus* with other lands, and their valuation only disjoined by a private meeting of Commissioners in 1740.

It was answered for Archibald Campbell, That feu-duties are no less the subjects of proper wadsets than rents of lands are. And in the present case, part of the subject given in wadset is the rents of lands, which may rise or fall; and the whole of the wadset is proper, as the wadsetter takes the rents and feu-duties for his annualrent, accounts not for any part of them if they exceed it, nor has any claim for the difference if they fall short of it. And where such is the contract, the wadset is proper, as appears from act 62d, Parl. 1661, § *ult.* The clause warranting the rents to be so much at the time of the wadsetter's entry, is usual, and renders not the right an improper wadset, as the wadsetter takes his hazard of the future rising or falling of the fruits, as well as of the failure of tenants, &c. the other part of the clause of warrandice is no more than words of style used both in wadsets and in absolute dispositions; and the warranting against augmentations of stipend was reasonable, because such augmentations are really an eviction of part of the tithes.

Neither can it alter the nature of this wadset, that the wadsetter was not to have right to the casualties of superiority; for these are not the fruits of the lands, nor were they proper subjects to be relied on for the payment of the annualrent of the money, as they might not fall due for many years: The wadsetter relied on the rents and feu-duties for payment of his annualrent; and as he gave no consideration for the chance of casualties, it was reasonable that he should account for these when they fell due; but this did not make him cease to be proprietor of the lands: In like manner, a superior may agree to gift or discharge the casualties, and yet he will remain superior, and be entitled to vote in right of his superiority.

With respect to the lands of Gunnershaw, it was answered, That formerly Herbertshire had only right to the superiority of these lands, and the property of them belonged to Lord Forrester; that before the date of the contract of wadset, Herbertshire had acquired right to the property, by purchasing apprisings which had been deduced against Lord Forrester; and both rights being

No 8. theseby in the person of Herbertshire, he, by the contract, only conveyed the right of superiority to the wadsetter, and retained the property.

The complainer is as much in possession of these lands as the nature of his right will admit; for that by the clause in the contract of wadset, reserving William Stirling's right 'under the burden always of 17s. 4d. Scots of yearly 'feu-duty furth of the same,' William Stirling acknowledged himself to be Captain Campbell's vassal in these lands; and the possession of the vassal is always held to be the possession of the superior; and this possession could not be inverted by William Stirling's having afterwards disposed these lands to be held of the Crown, no more than a tenant could invert his master's possession by taking a tack from another. And Mr Campbell's infeftment being prior to any infeftment taken by Lady Forrester, or Forrester of Denoven, on a charter from the Crown, must be preferable.

It is of no consequence, whether or not the complainer or his author have been in use to levy the feu-duty of 17s. 4d.; for it often happens, that when feu-duties are small, superiors do not demand them for several years, until the sum due becomes considerable: And in blanch-holdings, the blanch-duties are never demanded; but this impairs not the right of superiority. And the complainer, since his purchase, granted a factory for uplifting this feu-duty, and the other feu-duties and rents of the wadset lands; and, in December last, obtained a pointing of the ground for the feu-duties.

To the objection that the valuation of the half of Thornie-hill was not properly separated from the valuation of the other lands, it was *answered*; That although the distinction in 1740 was made by a private meeting, yet it was valid; for that a legal meeting of the Commissioners of Supply held in 1753, in their proceedings refer to the division made by the said private meeting; and thereby homologated that division.

THE LORDS found, That the complainer's right was a proper wadset, and the lands therein mentioned properly conveyed; as well those whereof the feu-rights of the vassals were excepted, as those whereof the property was conveyed; and found, that the lands of Thornie-hill were regularly divided; and the valuation of the half thereof, made in the year 1740, was confirmed by the reference made in the subsequent division by the meeting of the Commissioners of Supply in the year 1753; and found his possession of the lands of Gunnershaw sufficiently instructed; and therefore repelled the objections to the complainer's title, and ordained him to be added to the roll. See MEMBER OF PARLIAMENT.—WADSET.

Act. *Lockhart, Pringle, et Grant.* Alt. *Ferguson, Macdoual, Dundas, et Bruce.* Clerk, *Forbes.*

*Fol. Dic. v. 3. p. 137. Fac. Col. No 105. p. 154.*

This case was appealed :

THE HOUSE OF LORDS 'ORDERED that the interlocutors complained of be affirmed.'