1773. *July* 1.

Sir JAMES COLQUHOUN of Luss, Baronet, and Others, Freeholders of the County of Dumbarton *against* JAMES HAMILTON, Younger of Hutchison.

No 131.
A disposition of lands under a power to redeem them for a certain sum without the intervention of a loan, real or assumed, is not a wadset, and gives no right to vote.

Lands disponed to one in liferent, and another in fee, redeemable as to the fee, do not entitle the fiar to vote.

ARCHIBALD EDMONSTONE of Duntreath, after having taken a charter under the great seal, in favour of himself, his heirs, and assignees, heritably and irredeemably, of the lands of Middleton and Barnhill, &c. as the same were then possessed by the respective heritable vassals, upon the 30th August 1771, disponed the said lands of Middleton, &c. to his brother, Charles Edmonstone, in liferent, for his liferent use only, and to James Hamilton, younger of Hutchison, and the heirs-male of his body in fee; whom failing, to return to the said Archibald Edmonstone, his heirs or assignees whatsoever; but redeemable always, and under reversion, the said lands and others, with their pertinents, in so far as concerned the fee thereof, by the said Archibald Edmonstone, and his foresaids, from the said James Hamilton the fiar, and the heirs-male of his body, by payment to them, or lawful consignation, for their behoof, of the sum of 10 merks Scots, at and upon the term of Whitsunday then next, 1772, or at any other term of Whitsunday or Martinmas thereafter, upon premonition always of 40 days preceding any such term, to be made to the said James Hamilton, or his foresaids, in manner therein directed.

The said Charles Edmonstone, and James Hamilton, for their several rights of liferent and fee, were infeft in the lands, in virtue of the precept of sasine contained in the foresaid charter under the great seal, which was specially assigned by their disposition; and, having lodged their claim, were enrolled upon these titles, the one as liferenter, and the other as fiar, at the Michaelmas meeting of freeholders in the county of Dumbarton, in 1772.

Sir James Colquhoun, and certain other freeholders, who were not present at the Michaelmas meeting, presented a complaint against the enrolment of the said James Hamilton as fiar. In support of which, they insisted, 1*mo*, That this is no proper wadset, but a sale or disposition of superiority, under reversion; 2*do*, That the fee of a wadset of superiority, subject to a liferent in favour of a third person, is not a right of that nature which entitles the fiar to be enrolled, or to vote as a freeholder.

Upon the *first* point, Whether the right upon which the present claim is founded, is a proper wadset? *argued*, It will not be maintained, that the lands being disponed under a faculty or power of redemption is, *per se*, sufficient to constitute a wadset right, that being common to every redeemable right. The deed in question does not bear to be granted in wadset, which is the usual tenor of all such rights, where a wadset, proper or improper, is intended. The word wadset is not to be found within the four corners of the deed, nor any expression that has the most remote tendency to show that it was the intendment of parties to constitute such right. It is conceived in the precise form

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of, and plainly imports a disposition of the property of these lands, under a perpetual power of redemption, for payment of the elusory sum of ten merks; being that very species of right which the statute of the 12th of the Queen did, *in terminis*, declare should give no freehold qualification; so that the sustaining it as a proper wadset would at once destroy that destinction which the law had so anxiously established between proper wadsets and other redeemable rights.

Upon the *second* point, viz. that James Hamilton's claim, *qua* fiar of these lands, subject to a liferent in favour of Major Edmonstone, is anomalous, and inconsistent with the nature of a proper wadset, such as the statute 1681 must be supposed to have had in view;

Argued, The distinguishing characteristic of a proper wadset, is not only its being granted by way of impignoration, and in security of the sum thereby acknowledged to be due, and under reversion, upon payment of that sum, but also of the wadsetter's acceptance of the rents of the lands, with all the hazards attending the same, in satisfaction of the sum for which the security is granted, redeemable upon payment of the principal sum itself, without annualrent, the rents of the lands standing in place of the annualrents of the money.

Not one of these characteristics is to be found in the right upon which this claim is founded. The disposition by Mr Edmonstone of Duntreath was merely gratuitous; no antecedent debt, nor any price received for security and repayment of which a proper wadset could be created; and, therefore, though granted under a faculty of redemption, however it may be construed a redeemable disposition of property, it is adverse to every idea of a proper wadset.

Every freehold qualification requires possession of the subject, either by the party himself, or by others who hold under him; and, therefore, the oath of possession is enjoined to be taken by every such claimant, when required. With what propriety the oath of possession can be taken by this claimant, upon a right so strange and anomalous, where he has plainly nothing to possess during the lifetime of the nominal liferenter, is quite incomprehensible; and the complainers are confident, that, were it to be tendered to him, he would not take it.

The case in hand differs widely from the case of a common fiar of lands subject to a liferent, where the liferenter's possession is, in the eye of law, held to be the fiar's possession; and, therefore, the law did, with great justice and propriety, allow to the fiar, in absence of the liferenter, a voice in the election of a Commissioner to Parliament.

The wadsetter is not a fiar of the lands; he is a creditor; and, as the liferenter, in such case, possesses *proprio jure*, which excludes the nominal fiar from having access to the lands themselves, it seems a manifest absurdity to

characterise a right such as this, a proper wadset in the person of the nominal fiar. No 131.

Proper liferents are, in their nature, but subaltern rights, burdens upon the fee; and the extinction of the liferent restores the fiar to the full possession and enjoyment of that fee with which he was vested. The fee may subsist without the liferent; but that the liferent should subsist after extinction of the fee, is incongruous and absurd. The fee and liferent constitutes the whole right, the liferent being a burden upon the fee; and, therefore, as in this case, the fee was declared to be redeemable upon payment of this elusory sum, the liferent could not subsist but as a separate and independent right after redemption of the fee; and, if the complainers had been timeously apprised of the true nature of this right, they should have thought it equally incumbent on them to have included Charles Edmonstone's qualification in the complaint.

A liferent granted to one of a redeemable right belonging to another, implies a manifest contradiction, especially where, as in this case, the liferenter is not entitled to the liferent use of the money for which the lands are redeemable, but his right of liferent to continue of the lands themselves, equally after the redemption as before; which, therefore, is demonstration, that, though this nominal fee and liferent to different persons, was granted by one and the same deed, they are quite unconnected with one another, in so far as the liferent was to subsist, even after the redemption of the wadset; and, as both rights must therefore stand upon their own bottoms, allowing the right thereby granted to Charles Edmonstone to be a proper liferent of the lands, nowise depending upon the right of the fee granted to James Hamilton, however the law may be supposed to stand with respect to the liferenter, it seems impossible that the nominal fee of this redeemable right can entitle James Hamilton to a freehold qualification as of a proper wadset; a title that clearly has not the shadow of a foundation in the law.

Answered, The statute 1681 has pointed out, with great accuracy, the different titles sufficient to constitute a freehold qualification; and, among others, a proper wadset-right of lands, of the valuation and extent therein mentioned, is a good qualification, until a declarator of redemption is obtained, or until a voluntary renunciation or resignation can be produced. Proper wadsetters, during the not redemption, are, in this particular, on the same footing with those who have the absolute irredeemable property of the lands. And indeed it was very reasonable it should be so. Where a proper wadset is granted to be holden of the Crown, no more remains with the granter of the wadset, than a personal right of reversion. He is totally divested of the feudal right of the lands, and the wadsetter, during the not-redemption, is, to all intents and purposes, the vassal of the Crown. He is liable to the whole burdens and prestations incumbent on the vassal, and consequently it was highly

No. 131. reasonable that he should enjoy the benefits and privileges arising from his property.

Neither does the law make any distinction as to this matter, between a wadset of property holding of the Crown, where the wadsetter has right to the *dominium utile*, and rents of the lands, and a wadset of superiority, where he possesses by a vassal holding the lands under him, and only enjoys certain feu-duties and casualities In either case, he is, in the eye of the law, proprietor of the lands; and, although it has been sometimes thrown out, that wadsets of superiority were mere nominal rights, not founded in the original nature of wadsets, which were an impignoration of so much land for money, the wadsetter taking the hazard of "fruits, tenants, war, and trouble;" yet the Court have repeatedly over-ruled such objections; particularly, in the case of Lauchlan Grant of Drumphad, in 1760, No. 129. p. 8740. and the numberless cases which occurred about the time of the last elections, from Cromarty, Forfar, &c. where the Court did uniformly maintained such qualifications, particularly after a hearing in presence in one of the Forfar cases; nor will an instance be produced where they were rejected, either here or in the last resort.

But, say the petitioners, there is here no wadset, either of property or superiority, but a disposition of lands under a perpetual redemption, for a small elusory sum, which is something different from a proper wadset; and the act of Queen Anne declares, that no redeemable right, other than proper wadsets, adjudications; or apprisings, allowed by the act 1681, shall entitle to vote. It is further observed, that the word wadset does not occur from beginning to end of the deed.

As to the smallness of the wadset sum, it is, with submission, thought, that this is of no importance; for the Court has never sustained it as a good objection, that the right is of little value, if it otherwise amounts to a sufficient legal qualification. In all the cases already mentioned, the feu-duties were nominal, and the wadset sums mere trifles. It is enough to constitute a freehold qualification, that the lands are held of the Crown; that they are L. 400 of valuation, or forty shillings of old extent; that the claimant is infeft in them upon a charter under the great seal, either heritably or irredeemably, or in liferent, or in the form of a proper wadset, or as the first adjudger after the legal is expired.

Neither is it any objection, that the redemption is perpetual. This is always the case in wadsets; and is rather contradictory to the supposition, that the right in question was meant as a sale under reversion, and not as a proper wadset. Indeed, stipulations limiting the redemption in wadsets, have always been considered as oppressive, and are reprobated in law.

At the same time, the respondent does not, with submission, see what material difference there is between a sale of lands under reversion, and a proper wadset; especially when, in the former, the right of redemption is not limited to any precise time, but is made perpetual. The two transactions are in form

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and substance the same; and it is impossible that the law could mean to make any distinction between them. When a man having occasion for money, sells his land for a certain price, under a stipulation, that he shall be at liberty to redeem it by re-payment of the same price, at any term of Martinmas thereafter, upon using certain forms of premonition and consignation; what is this but a proper wadset? The purchaser, in the mean time, holds the lands as his property, enjoys the rents or profits of them in lieu of the interest of his money, without being accountable.

These are the characteristics of a proper wadset; and it is quite immaterial, whether it goes by the name of a wadset, or of a right of property in the lands under reversion; for these two are, in reality, the same.

Dallas, in his book of Styles, p. 709. gives the form of a contract of proper wadset; and, although he wrote in those days when wadsets were much more common than they are at present, and consequently the style of them better known; it is remarkable, that he does not make use of the word *wadset*, but 'sells, and annailzies, and dispones,' in the precise same form and language as is done in the present case; and it is believed the same has continued to be the practice all along. The lands are disponed under reversion; and, although a pledge, or wadset, is only intended, dispositive words are always used.

By the old practice, when lands were wadsetted, the disponer gave an absolute irredeemable disposition, and the reversion was contained in a separate writing. Afterwards, it was thought more secure to make the reversion a condition of the grant, and to insert it *in gremio* of the disposition. But these different modes of doing the same thing, show clearly, that the essence of a wadset does not consist in words, but in the substance and meaning of the transaction; and accordingly Lord Stair defines it, not by the form of the writing, but by the substance of it, in these words: 'A proper wadset is, where the fruits and profit of the thing wadset are simply given for the annualrent of the sum, and the hazard or benefit thereof, whether it rise or fall, is the wadsetter's.' The same description is given by Craig. He explains a wadset to be, in reality, an alienation *sub pacto retrovendendo*.

It is plain, therefore, that, wherever the person who is seased of the property for the time, holds the rents or profits unaccountable, and is only subject to a condition of reversion, on repayment of the stipulated sum, he is a proper wadsetter in the sense of the law; and, being truly vassal in the lands during the not redemption, subject to all the burdens, and entitled to every privilege as such, it was most just he should have the right of voting for a Member of Parliament. His lands holding of the Crown, and being of the proper valuation, either he must have this right, or no other person can have it, the reverser having no feudal right in him before redemption; and it would not be reasonable that those lands, though amounting to a legal qualification, should nevertheless give no qualification to any person.

No 131. The other redeemable rights which, by the acts 1681, and 12th of Queen Anne, are excluded from this privilege, are those which are only held in trust by one man for another, or where the person infeft does not enjoy the rents unaccountably, but only holds the lands as a security for relief or payment of sums; as an improper wadsetter, an annualrenter, an adjudger within the legal, &c. In all of these cases, the real and substantial right of property still remains with the original owner; he continues vassal in the lands, the casualities of superiority fall by his death, and not by that of the other person infeft; and therefore, it would have been improper, had the right of voting been given to this person, who, in no sense, can be held as proprietor of the lands, even during the not redemption.

The present case is by no means of this last kind. Mr Edmonstone, the reverser, stands, at present, absolutely divested of the feudal property of these lands; he has nothing in him but a mere personal right of reversion of the fee. On the other hand, the respondent stands vested in the full right of fee, and is entitled to the unaccountable enjoyment of it during the not redemption, subject only to the burden of a liferent upon him; which he shall now endeavour to show, in answer to the petitioner's second objection, is no bar to his qualification, though he admits he can only vote in absence of the liferenter.

The act 1681 says, that the fiar shall be entitled to vote when the liferenter does not claim his vote, without distinguishing whether the right of fee is redeemable or irredeemable; and it does not occur, that, upon any just construction of the statute, can the right of voting be denied to a fiar, who is a proper wadsetter, more than to the fiar of an irredeemable right. The fee is certainly in him, and in no other person, during the not redemption; he has all the use and possession of the lands during the not redemption, that he would have had if his right had been irredeemable. The law does not distinguish, whether the fiar possesses by himself or by a liferenter. In both cases he is entitled to be upon the roll, but with a preference to the liferenter as to the right of voting, who appears and claims his vote.

It is said, that, being subjected to a liferent, is inconsistent with the nature of a proper wadset, such as the statute 1681 must be supposed to have had in view; that the distinguishing characteristic of a proper wadset is, that the wadsetter accept of the rent of the lands, with all the hazard attending them, in satisfaction of the annualrent of the wadset sum; whereas, the fiar, in this case, is excluded from the rents, and can have no possession of the wadset lands during the subsistence of the liferent; that he cannot take the oath of possession, where he has nothing to possess; that the liferenter, in this case, possesses *proprio jure*; so that his possession cannot be constructed the possession of the nominal fiar.

But the respondent must own, he is not sensible of the force of this reasoning; for, although it is the nature of a proper wadset, that the wadsetter accepts of the yearly profits of the subject, with all the hazards and burdens attending them, in lieu of the interest of his money till redemption; yet it is by no means

essential to a proper wadset, that the fiar should possess the lands himself; for, No 131.
although a right of liferent should be constituted in favour of another, the wadset right in the person of the fiar is not thereby affected. The liferenter draws the yearly rents and profits during the subsistence of his right, and the possession of the liferenter is, in the eye of law, held to be the possession of the fiar; and, in that view, the fiar is in perfect safety to take the oath of possession; he is equally safe with every fiar of a right of absolute property, who can have no access to the rents during the subsistence of the liferent.

The respondent does not well understand what is meant by saying, that the possession of the liferenter cannot, in this case, be held to be possession of the fiar, because the liferenter possesses *proprio jure*. There is truly nothing in this case which renders it different from numberless qualifications that have been created of late years. In many cases, the liferent was not created as a burden upon the fiar who granted the liferent; but the proprietor did, in the present case, in the same deed, create a right of liferent in favour of one, and a right of fee in favour of another: And it was never doubted, that, in every such case, both fiar and liferenter were thereby entitled to be put upon the roll, and that the fiar was in safety to take the oath of possession, as being *fictione juris* in the possession, by the possession of the liferenter. It is by no means necessary that a right of liferent should flow from the fiar claiming in the right of that fee. It makes no difference, whether the liferent right flows from the fiar himself, or his author; or, whether the liferent was created anterior or subsequent, or at the precise same time with the right of the fiar.

It is, no doubt, true, that the liferenter, after his right is constituted and established, so far possesses *proprio jure*, that his right does not thereafter depend upon the will of the fiar. The right in him is indefeasible, and must continue for life; and, if it were otherwise, it would afford a solid objection to the qualification of the liferenter; but, although the liferenter possesses *proprio jure*, yet still, in the eye of the law, the possession of the liferenter is considered to be the possession of the fiar. There cannot be a doubt, that the possession of the liferenter would be available to secure the right of the fiar, by prescription, against every challenge that might lie at the instance of third parties; and, for the same reason, it must likewise entitle him to be put upon the roll, and with absolute safety to take the oath of possession when required.

The petitioner is next pleased to doubt even of the liferenter's qualification; and the respondent admits, that there might have been foundation for a doubt, if the liferenter's right had been extinguishable upon redemption of the wadset, though during his life; but, to prevent any objection on that head, the liferent is, by the conception of the right, made to subsist during all the days of Major Edmonstone's life; and, accordingly, the petitioners appear to have been advised, that the Major's qualification was undoubted; nor are they now entitled to call it in question.

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But, whatever may be the case as to the liferenter, it is, with submission, thought, that the respondent, in virtue of his right of fee of these lands holding of the Crown, and of a sufficient valuation, has a clear title to be on the roll; and that it was a matter of moonshine in what manner the liferent was constituted, or who is liferenter; for the liferenter's possession must, in every view, be considered as the possession of the fiar; and it is equally immaterial, whether the fee be an irredeemable right of property, or a right of wadset, both being equally good, by the act 1681, to constitute a freehold qualification.

'THE LORDS find, That the respondent, James Hamilton, is not entitled to be enrolled in the roll of freeholders for the county of Dumbarton; therefore grant warrant to expunge him.'

Act. *Dean of Faculty.* Alt. *Macqueen, Ilay Campbell.* Clerk, *Tait.*

Fol. Dic. v. 3. *p.* 416. *Fac. Col. No* 79. *p.* 194.

1774. *February* 23.

Mr JAMES COLQUHOUN *against* CAPTAIN DUNCAN URQUHART.

No 132.
Previous registration, for year and day, of a renunciation by a liferenter, is not requisite to entitle the fiar to vote.

SIR LUDOVICK GRANT executed a proper wadset of certain lands affording a freehold qualification, in favour of Sir James Colquhoun, in liferent, and of his son Mr James Colquhoun, in fee.

A few months before Michaelmas, Sir James granted to his son a renunciation of his liferent right; upon which the latter, at the Michaelmas meeting claiming to be enrolled, it was *objected* to him, That his claim was premature, as it ought to have been a year and a day posterior to the registration of the renunciation; besides, that a proper wadset could not admit a double qualification of fee and liferent. The freeholders having sustained the objections, Mr Colquhoun complained to the Court, and

Pleaded; The first part of the objection is founded upon not distinguihsing between the right of enrolment and that of voting, and in supposing Sir James's renunciation to be an essential ingredient in the complainer's qualification; whereas he had a good title to be enrolled, independent of the renunciation. It was the charter and infeftment which constituted his freehold qualification; and whether the fee were affected with a liferent or not, the fiar's claim to be enrolled was the same in both cases, whatever effect that circumstance might have on the right of voting, which no doubt belongs to the liferenter, if he chooses to take it; but otherwise it as undoubtedly falls to the fiar. The renunciation, therefore, being no ingredient in the complainer's qualification, did not require a year's previous registration.

As to the second part of the objection, it is sufficient to observe, that the statute 1681, which allows of proper wadsets being legal freehold qualifications,