

No. 42. wadset right; and therefore, that Hugh Macleod could only be ranked *ultimo loco* for these rents and profits."

Act. Lockhart.

W. J.

Fac. Coll. No. 22. p. 37.

1775. November 17. THOMAS BUCHANAN against JOHN ADAM.

No. 43.

Whether  
proper or  
improper?

The defender having, in virtue of a wadset and right of annual-rent transmitted to him from the original wadsetter, been long in possession of a small pendicle of land belonging to the pursuer, this action was brought in order to have it found and declared, that the said wadset was extinguished, and the debt satisfied by intromissions, and that the defender might be decerned to remove from the lands.

The question turned chiefly upon the nature of the wadset right, which is somewhat anomalous, the same debt having been secured partly by a wadset, and partly by a right of annual-rent, at a time when the interest of money was at ten *per cent.*

In the year 1615, John Lennox, then of Barnshogle, borrowed from James Adam, the sum of 400 merks; for security of which, he disposed to the said James Adam, "That part and portion of his said lands of Barnshogle, commonly called Taillabout, then possessed by the said James Adam," redeemable by the said John Lennox: "Likeas, the said William Lennox grants him to have sold and disposed, &c. to the said James Adam, and his foresaids, heritably, all and hail an annual-rent of 20 merks money, to be uplifted forth of all and hail the said John Lennox, his forty shilling-land of Barnshogle, with the pertinents, beginning the first payment thereof at the feast and term of Whitsunday next to come, *in anno* 1615 years, and so forth, to continue ay and while the lawful redemption thereof under-written." So that the creditor, in the *first* place, got a wadset of the little pendicle of Taillabout, a part of the lands of Barnshogle; and, *2dly*, got also a right of annual-rent over the whole lands of Barnshogle for five *per cent.* of his money.

The said James Adam thereby obliges himself to grant a sufficient letter of regress and reversion in due and competent form, with all the other usual clauses of a wadset and right of annual-rent; and there are several clauses which it was said seemed to point more at an improper than a proper wadset, such as the warrandice given by the reverser from all life-rents, annual-rents, feu-duties, &c. and other perils, dangers, and impediments whatever, bygone, present, and to come; and a *proviso*, that the redemption should not take place, unless the bygone annuals of the said annual-rent should be first paid.

Argued on the part of the pursuer: That, whatever may have been originally intended, it is clear these double securities could not subsist after the reduction of interest, to any other effect or purpose than for enabling the creditor to recover

his principal sum advanced, and interest thereof; which accordingly he has many years ago recovered, the rent of the pendicle of land called Taillabout having, for many years, been 30 *per cent.* of the sum advanced.

The rate of interest was first reduced from ten to eight *per cent.* in the years 1649 and 1661; and, last of all, to five *per cent.* by the act 12th of Queen Anne, Cap. 15. The annual-rent right of 20 merks out of the whole forty shilling-land of Barnshogle, was of itself equivalent to five *per cent.* of the money advanced; and, therefore, it is at least a clear proposition, that the creditor in this case had no right to possess both the wadsetted lands and the right of annual-rent, without accounting for the one, or the other, or for both, in extinction *pro tanto* of the debt, principal as well as interest.

The reverser has all along paid the public burdens and feu-duty to the superior for the lands of Taillabout, as well as for the rest of his estate; and, although the wadsetter has been allowed till now to possess this trifling pendicle, yet there are various circumstances, which show, that he was conscious of the insufficiency of his right; particularly, he has not for some time made any demand for the annual-rent of 20 merks, independent of his intromissions with the rents of Taillabout.

The case is attended with very particular circumstances, the security being of a mixed kind, partly a wadset, and partly a right of annual-rent; and probably the rent of the little pendicle in question was, at the date of the transaction, no more than 20 merks *per annum*, whereby the annual-rent payable out of the lands in general, and the rent of these particular lands taken together, were only equal to the legal interest of the money at that period. But, when the interest of money came to be gradually reduced, the transaction became always more and more usurious, if it was meant that the wadset should be held as a proper wadset, and that the wadsetter should have the full benefit thereof, as well as of the right of annual-rent.

It has always been understood, and is laid down in the law books, that where a lender runs no hazard of rents, he ought to have no chance of getting more than his legal interest; and, therefore, when a wadset right is so conceived as not to be attended with risk to the lender, or where, by a back tack, or any other device, the wadsetter is made sure of drawing his neat interest, the wadset does, *eo ipso*, become an improper one, and all intromissions with the rents must be imputed in extinction both of principal and interest.

Now it has so happened in the present case, that, from the fall in the rate of interest, the wadsetter became absolutely insured of receiving his whole interest, without running the smallest risks of rent; for, by the very writing which contains the wadset of a part of the lands, he has a Catholic security over the whole lands for an annual-rent equal to five *per cent.* of the money; which brings the case into the same situation as if security had been offered in terms of the act 1661, or rather into a better situation, the security being already given. There was no occasion to offer it when he had it already.

No. 43.

As soon as the interest was brought down to eight *per cent.* the wadsetter could not, without being guilty of usury, pretend to hold the security in the form, and to the extent originally granted, if it be true that a proper wadset of the pendicle in question was meant; for it is plain, that nothing more was intended by this transaction than to give the wadsetter an effectual security for his money, and the legal interest thereof; and this security would not have been so extensive, had the interest been less than ten *per cent.* at the time when it was granted.

When the interest fell to six *per cent.* the advantage became still greater, unless the excrescent rents over and above the interest were accounted for; and when at length it came down to five *per cent.* by the act of Queen Anne, the right of annual-rent came of itself to be a full and sufficient security, being equivalent to the legal interest of the money; and the other part of the transaction, whereby a pendicle of the lands was wadsetted over and above, came to be of no use or effect whatever as a proper wadset; the lender having an absolute and complete security independent thereof, and even the bygone annuals of this annual-rent being declared a burden upon the reversion, so that the reverser never could disincumber his lands without paying every sixpence of principal and interest; and this incumbrance affected the whole of his lands of Barnshogle, including the pendicle in question, because the right of annual-rent lay upon the whole; and the wadsetter having thus a full security for his money, principal and interest, without any hazard of rents, it is demonstrably evident, that he came into the situation of an improper wadsetter, with respect to the pendicle in question, whatever his situation originally may have been as to that pendicle.

Answered: It is perfectly clear, that the contract in question was a proper, and not an improper wadset, and consequently, that the lands cannot be redeemed but upon payment of the 400 merks, and what of the annuals of the annual-rent right of 26 merks should be resting and owing at the time; such being the express tenor of the clause, both of reversion and requisition.

The plain and obvious reason why the said annual-rent was not included in the wadset is, that money was then at ten *per cent.*; and the rent of the lands being computed only as equal to the twenty merks, the annual-rent right was granted for the other twenty merks out of other lands, to make up the legal interest of 400 merks at ten *per cent.*; but from thence to infer, that the wadsetter was in any event liable to hold count for the rents of Taillabout, is arguing both against the spirit and words of the contract.

The distinguishing characteristic of a proper wadset is laid down by Lord Stair, and every other lawyer who has written upon the subject, to be, "when the fruits and profits of the lands wadsetted are simply given for the annualrent of the sum; and the hazard or benefit thereof, whether they rise or fall, is the wadsetter's." Stair, B. 2. T. 10. § 9. Erskine, B. 2. T. 8. § 26

If this be the criterion for distinguishing a proper from an improper wadset, there is an end of the question. The annual-rent of twenty merks was plainly given to make up to the wadsetter what the rent of the lands were deemed to fall

short of the then legal interest of 400 merks, and therefore cannot properly be considered as part of the wadset itself. But allowing it to be such, nothing can be clearer than that the wadsetter was to run all the risk of the rise and fall of the rent of the land itself, as in place of the other twenty merks; and hence it was, that the whole right was declared to be redeemable upon payment or consignation of the 400 merks, and what of the annuals of the annual-rent right were owing; from which, therefore, it is evident, that, though the rents of the lands had proved ever so deficient for making up the other twenty merks, the wadsetter could not recur upon the reverser to make up that deficiency; for this plain reason, that the risk of these lay upon the wadsetter. If they rose to more than twenty merks, the profit would be his; if they fell short of that sum, his would be the loss.

It was thought by some of the Judges, that, from the time interest was, by the operation of law, reduced to five *per cent.* it became an improper wadset; but, by most of the Judges it was viewed in this light, that Taillabout was given as a wadset for the one half of the sum borrowed, and the other half secured by a right of annual-rent. It was plainly a proper wadset, and it was impossible to conceive that the bringing down of annual-rent could alter the nature of the right; and, in later times, the defender had only possessed the bit of the wadset, and deserted the other, which was dropped by the convention of parties.

“The Lords found that this was a proper wadset.”

Act. *Ilay Campbell.* Alt. *Maclaurin.* Clerk, *Kirkpatrick.* Reporter, *Stonefield.*

*Fac. Coll. No. 199. p. 135.*

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1777. January 22. AYTON and KEIR against VEITCH.

Keir conveyed his lands of Bardrum in wadset to Veitch, redeemable within 20 years, on payment of 27,000 merks, Veitch at the same time granting a tack of the lands of Keir during the period of redemption for a rent corresponding to the interest of the wadset sum. Keir possessed the lands for some years till his death, when his children declining to represent him, Veitch obtained warrant from the Sheriff, to let the lands, which he accordingly did, though not at a public roup, yet for the highest rent that could be obtained for them. After all, however there was a deficiency in the rent of about £20 Sterling less than that contained in the back-tack to Keir, and therefore an annual short coming of the interest of the wadset sum to that amount.

Ayton having purchased the right of reversion from the grandson and representative of the original reverser, consigned the redemption money; and he, together with David Keir his author, brought action of declarator of redemption against the representative of Veitch, who refused to comply with the order of redemption, till the sums in which the rents had fallen short of the interest should be consigned with the redemption money.

No. 44.

An improper wadset may, by acts and deeds of the wadsetter, be converted into a proper one.