

No. 4. the feu-duty was not payable to the Crown, but was payable to the immediate vassal by the sub-vassal. The reason is obvious; for as by the acts 1661 and 1681, a privilege of voting was given to Crown lands, retoured at 40s. of old extent, it was provided by the latter, and indeed followed of course, that 40s. must be the true avail of such lands, distinct from the feu-duties paid out of the lands to the Crown, which so far from being part of the value of the estate, was a burden upon it: The feu-duties, however, payable to the Crown vassal, form the value of the estate: The act 1681, therefore, only applies to feu-duties payable to the Crown, and the feu-duties payable to the Crown vassal neither fall under the words nor the sense of that statute.

The Court, chiefly upon the first ground, dismissed the complaint.

For Mr. Hay, *H. Dundas, J. Swinton.* For Mr. Pierris, *Hay Campbell.*

D. C.

1800. July 11. The TRUSTEES of General Fraser *against* SIMON FRASER.

No. 5.  
A copy of a retour inserted in the record-book of a Sheriff-court, along with other adminicles, held, incidentally, in the course of a process of cognition and sale, and without an action for proving the tenor, sufficient evidence of the old extent of the lands.

The trustees of General Fraser of Lovat, as authorised by act of Parliament, brought an action of cognition and sale against Simon Fraser of Foyers, and other heirs of entail of Lovat, for selling certain superiorities and feu-duties, as well as parts of the property of the estate, for payment of General Fraser's debts.

By the act of Parliament, the vassals were to have a preference in the purchase of the superiorities of their lands, on payment of a price to be fixed by the Court of Session.

The price afterwards fixed was twenty-five years purchase of the feu-duties, and £400 Sterling for each freehold-qualification.

Among other superiorities, the trustees proposed to sell those of the lands of Mussadies and Mellagies, belonging to Fraser of Foyers.

In the course of the process, they discovered, in the hands of a gentleman who had lately held the office of depute Sheriff-clerk of the county of Inverness, a book, bearing to be the record of the Sheriff-court from 1540 to 1594, containing copied into it various retours, and particularly one of Janet Fraser, as heir to her father in the lands in question, dated 6th October 1575, bearing, that the lands amounted to £3 of old extent.

With the view of obtaining the price of a freehold-qualification, the trustees presented a petition to the Court, craving that the record-book should be produced, delivered into Chancery, and considered as the proper record of the retour in question.

The book was produced, and the Court appointed two of their number to examine it and report.

From their report, the Court were satisfied of the authenticity of the book.

The trustees likewise produced the following writings in support of the authenticity of the retour : *1mo*, Letters of reversion (8th April 1529) by Hugh Fraser of Aberchallader, addressed to Hugh, Lord Lovat, acknowledging, that although he held the lands in question by a disposition from his Lordship to himself, his heirs and assignees, *ex facie* absolute, they were redeemable on payment of the debt there mentioned.

*2do*, Precept of *clare constat*, by Alexander, Lord Fraser of Lovat, (11th March 1555), to Hugh Fraser, as nearest heir to his father in the lands in question.

*3tio*, Precept of *clare constat*, (*ult.* February 1571), by Hugh, Lord Fraser of Lovat, in favour of William Fraser, as brother of Hugh, and nearest lawful heir-male and of tailzie to him in the lands of Aberchallader, with instrument of sasine following thereon.

This Hugh Fraser was the father of Janet Fraser, whose retour is inserted in the record-book ; and William's titles were founded on, as shewing the right of the daughter to the unentailed lands.

*4to*, They produced a precept of *clare constat*, (1st June 1575), by the Countess of Moray and Argyle, to Janet Fraser, as to certain other lands contained in her retour, as further evidence of the justice of it.

*Lastly*, They produced a contract of wadset, (7th May 1613), between Simon Lord Fraser and Hugh Fraser of Foyers, by which former wadsets over the lands in question were renounced, and a new wadset-right granted, redeemable on payment of the sum there mentioned.

The Court appointed the record-book to be lodged in the General Register House, and remitted to Lord Craig to hear parties on the new evidence.

His Lordship afterwards reported the case on minutes.

Fraser of Foyers objected, That the authenticity of the retour could only be established in a process of proving of the tenor ; and that supposing an extract from the record-book to be lodged in Chancery, an extract from it being only from a copy of doubtful authenticity, instead of an extract from the original, would not be received as evidence of the value of the lands in a court of freeholders ; and therefore could not be made the foundation of a demand against the defender for the price of a freehold.

The Trustees answered : That as Foyers was a defender in the process of sale, there was no occasion for a separate process for proving the tenor of the retour : That at its date it was not necessary that retours of land held of subject-superiors should be recorded ; and that the wadset-right granted in 1613, accounted for the principal retour in question not being preserved ; but that the record-book and adminicles since produced, completely established its authenticity ; and that the Court should ordain an extract to be inserted into

No. 5. the Chancery records, and extracts from it afterwards to have the same effect as from the original.

The Court, adopting the argument of the trustees, held that there was sufficient evidence that the lands afforded a freehold-qualification. See 26th July 1753, Abercrombie against Baird, No. 32. p. 8605; 13th November 1755, Chalmer against Tytler, No. 34. p. 8615; and "found the defender Simon Fraser must pay for the superiority in question £400 Sterling, and twenty-five years purchase of the feu-duty, in case he chuse to accept thereof."

Lord Ordinary, *Craig*.  
*Peter Grant*.

Act. *Montgomery, Ar. Campbell*, junior.  
Clerk, *Sinclair*.

Alt. *John*

*Fac. Coll. No. 192. p. 440.*

\* \* Mr. Fraser afterwards declared his acceptance; and the Court, on a petition from him, (25th Nov. 1800,) "ordained an extract of the retour in question, from the manuscript in the General Register House, to be delivered to the petitioner, to be made use of by him as accords."

Mr. Fraser got an extract accordingly, which he deposited in Chancery.

*D. D.*

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1803. November 26. SOUTER *against* FREEHOLDERS OF BANFF.

No. 6.  
Nominal and  
fictitious qua-  
lification.

AT the Michaelmas head court for the county of Banff, David Souter claimed to be enrolled as a freeholder on a charter of resignation of the lands of Northfield, in favour of him and his heirs-male, by the Earl of Fife, with this provision, that, in the event of his selling this property, he shall give the first offer to the heir of entail of Braco; and that on the failure of lawful heirs-male of his body, the estate shall revert to the family of Fife. On this charter sasine had followed, the instrument of which was produced to the court of freeholders, along with a special retour of the lands in 1628, shewing that the lands were retoured at the sum of ten merks Scots of old extent.

Colonel Andrew Hay of Mountblairry objected, that this title was nominal and fictitious; and the freeholders sustained the objection.

The claimant complained to the Court. In support of the judgment of the freeholders, Colonel Hay

Pleaded: The criterion by which it is to be decided, whether a freehold qualification be nominal and fictitious, is thus pointed out by 7 Geo. II. that it be 'a true and real estate' in the person who claims, 'for his own use and behoof, and for the use of no other person whatever,' whether it be a liferent qualification merely, or whether the fee has been conveyed. It may be nominal and fictitious in the one case as well as in the other.