

1754. *January 5.*

INTER EOSDEM.

A FREEHOLDER in this county had his lands valued in a cess-book of the county, as old as the year 1691, at the rate of L.473, and had paid cess, he and his predecessors, accordingly, from the year 1691 down to this day. It was objected that the book 1691 was of no authority, not being anyways authenticated, and by a prior book in the year 1687, it appeared that these lands were jointly valued *in cumulo* with other lands, nor was there any evidence of their ever being legally divided; and as to the use of paying cess for so long a time, it was decided in a case last summer, from the county of Caithness, that the use of paying cess for forty-five years did not ascertain a man's valuation.

The Lords nevertheless repelled the objection unanimously. Those of them that were for the Caithness decision made this distinction betwixt the two cases,—that in the Caithness case the freeholder, not content with his use of payment of cess, had attempted a division of the valuation before the commissioners of supply, thereby giving up his ancient use of payment, to which the Lords could not afterwards let him have recourse, upon relevant objections being made to the new division.

1754. *January 10.*

INTER EOSDEM.

THE question here was, Whether a wadset of a feu-superiority, bearing not only a clause of redemption, but a clause of resignation of the money for which the superiority was wadset, gave a right to vote? It was objected that this was no proper wadset, because, *1mo*, That a feu-duty being precisely the annualrent of the wadset sums, and being a certain rent that could not fail, there was here no hazard, or no chance of either profit or loss to the wadsetter.

To which it was ANSWERED, That there was some risk more or less in the case, as the risk of total sterility, or of the lands being overblown with sand, which happened to the whole parish of Cubin, in the shire of Murray; and it was not the greater or less hazard that made a wadset proper or improper, but it was the wadsetter's accepting of the fruits for the annualrents of his money. *2do*, Because there was here absolute warrandice not only against all past burthens and impositions upon the lands, but also all burthens and impositions in time to come, and particularly future augmentations of ministers' stipends; so that in this respect the wadsetter was to run no risk.

To which it was ANSWERED by Lord Elchies,—That this was no more than the common warrandice in all sales, by which every eviction of the subject is guarded against, and an augmentation of the minister's stipend is an eviction of so much of the tithes. *3tio*, Because there was a clause in the wadset, obliging the wadsetter to account for the casualties of superiority, if any should fall during the wadset; so that, by these casualties falling, the wadset sum might have been compensated and extinguished: which is directly contrary to the nature of a proper

wadset, by which the wadsetter gets all the fruits of the subject, whether casual or otherwise, and is not obliged to account.

To which it was ANSWERED by Lord Elchies, That the characteristic of a proper wadset, as may be learned from the Act 1661, betwixt debtor and creditor, is this, that the wadsetter accepts of the fruits of the subject, or some part of these fruits, for the annualrent of his money; nor is it necessary that the whole fruits should be assigned him for his annualrents, but it is sufficient that only a part be given him, out of which he must take his hazard of making his annualrent the best way he can, and for the rest he may be obliged to account: for this reason it is that the wadsetter often takes a tack from the reverser, and is obliged to account for the surplus tack-duties after paying his annualrent, notwithstanding of which the wadset is undoubtedly a proper wadset; and in the same manner, in the wadset-contract a superplus-duty is often stipulated to be paid by the wadsetter over and above that part of the rents or fruits which he has for his annualrents, which is the case of the wadsetters on the estate of Skelbo. For the same reason it is that, in the wadset of lands, mines and minerals, coals might be excepted and declared to belong to the reverser, and yet the wadset continue proper, just as the casualties of superiority are reserved in this case. Put the case that the wadsetter had granted a discharge of all the casualties at the time of the wadset, or made a gift to the reverser of them; would the wadset for that reason be less proper? The Lords sustained the vote; *dissent*. Drummore. March 7th, adhered unanimously. Lord Elchies mentioned a case, decided in the year 1734, where a wadset was found proper though the reverser was bound to pay so much every year to the wadsetter as part of the annualrent of his money; so that to make a wadset proper, it is not necessary the wadsetter should take his hazard of the fruits for his whole annualrent, but only for a part.

*N. B.* In this case it was said in the pleadings, and not disputed, that a liferent of a superiority would not entitle to a vote, unless it was a liferent by reservation; because any other liferenter was not entitled to the casualties of entries, and consequently so far was not in possession of the subject.

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1754. February 15.

— against —

UPON report of Mr Boswell, Lord Probationer, the Lords found that even the wife of a journeyman tailor might have paraphernalia, such as rings and other trinkets, which in this case the woman, who was the daughter of a bailie in Linlithgow, had brought with her; but they found that she could not assign or dispose of them without the consent of her husband; for though the wife be absolute proprietor of her paraphernalia, the husband is her curator, and she cannot act without his consent. This the Court found unanimously, though they had formerly varied in their decisions upon this point.