1759. *February* 8.

ALEXANDER MACDONELL, of Glengary, *against* His MAJESTY'S ADVOCATE.

No 339.
The subsistence of a right of wadset presumed against a plea of property, urged by the reverser.

THE lands of Cullachie and Cullienalich were surveyed by order of the Barons of Exchequer, as forfeited by the attainder of Lochgary, who was at the time of the forfeiture in possession of them. Glengary claimed the property, as superior and reverser of these lands. The Crown *objected*, That the claimant had no right to the property, but only to the reversion to the lands, as they were wadset in the 1738, by Glengary to Lochgary, for 8000 merks; and in evidence of it, produced an extract of a sasine, by which it appeared, that Lochgary was infeft on this wadset-right in the 1741, and that the wadset-money was paid. Certain interrogatories being put to Glengary, he acknowledged, that the lands had been wadset to Lochgary; but added, that only 2000 merks of the wadset-money having been paid, there had been an account fitted in the year 1744, betwixt Glengary and Lochgary, at which clearance the wadset-right was delivered up, and the subscriptions torn from it, since which time Lochgary possessed the lands as tacksman, not as wadsetter.

*Pleaded* for the claimant, Except by his acknowledgment, there is not any evidence that the wadset-right did ever exist. The extract of the sasine was no evidence of it; and the principal sasine, although it had been produced, was only the assertion of the notary, that such an instrument had been taken, not that the warrant of it, the right of wadset, did exist; and suppose the wadset-right to have existed, many clauses in it, favourable to the reverser, may have been omitted in the precept and instrument of sasine.

2*do*, The evidence arising from the claimant's acknowledgment, cannot hurt the claimant's plea. As one part of it cannot be separated from the other, the whole of it must be received in evidence, or the whole rejected. By one part of it he acknowledges, that this wadset-right did exist; and by the other, that it was extinguished by delivering up and cancelling the deed. The last part is an intrinsic quality, and the first part cannot be received without it.

Redemption and redelivery of the wadset-right operates *ipso facto* an extinction of it, in the same manner as intromissions with the rents of lands adjudged, to the extent of the sums adjudged for, operates an extinction of the adjudication; so that a resignation *ad remanentiam*, or a renunciation and discharge of the wadset, are not requisite to re-invest the reverser, (who, besides having the right of reversion prior to the wadset, is still vested in the supereminent right to these lands, the superiority), particularly in a question with the wadsetter, and his universal successor, the Crown.

3*tio*, A proving of the tenor of the wadset-right is necessary to make it effectual, which cannot be obtained in this case, as the *casus amissionis* is not condescended on or proved, which must be done in every case where the deed is extinguishable, by being restored to the obligant.

No 339.

*Pleaded* for the Crown, The evidence arising from the extract of the sasine, is sufficient to prove, that the wadset-right did exist in the terms above mentioned. The like evidence of a wadset-right, the Court lately sustained in favour of a claimant on the estate of Lovat, Mactavish of North Migovy. See Appendix.

2*do*, Was any more evidence of the existence of the wadset necessary, the acknowledgment of the claimant put it beyond doubt. The quality added can have no effect, as there was no reference to his oath or acknowledgment. The queries were put in terms of the vesting-act, by which claimants are obliged to answer, upon oath or otherwise, such interrogatories as are put to them by the Court, or the counsel for his Majesty. Every article of their answers, even though upon oath, may be redargued by contrary evidence; the Crown therefore cannot be foreclosed by such oaths or acknowledgments, whether they contain intrinsic qualities or not. But the quality adjected to this acknowledgment is extrinsic, as the method of extinction of the wadset condescended upon, is not a habile one. By the infeftment taken on the wadset-right, it is made real; and the lands affected by it, cannot be disincumbesed of it, except by a registered renunciation and discharge, or by a resignation *ad remanentiam*. It cannot be done, as in personal rights, by cancelling or retiring the contract of wadset. The right of superiority and reversion remaining with the reverser, is separated entirely from the right of the wadsetter; and they cannot be consolidated, but *habili modo*.

3*tio*, If the Court is convinced, by the evidence produced, that such a wadset-right did exist, it may hold the tenor of the wadset as proved, without putting the parties to the trouble and expense of a proving of the tenor. This was the practice of the Court of Inquiry in the 1716, and of this Court, in the case of Mactavish above mentioned. The *casus amissionis* need not be condecended on, and proved, in this case, as the deed amissing is not of a nature to be extinguished by cancelling or retiring.

" The Lords adhered to Lord Bankton's interlocutor, finding it presumed, that the wadset-right in favour of Donald Macdonell, the attainted person, did subsist at the time of the attainder; and therefore dismissing the claim to the property."

Act. *Dav. Grame.* Alt. *The King's Counsel.*

*J. C.* *Fol. Dic. v.* 4. *p.* 131. *Fac. Col. No* 163. *p.* 291.

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No 340.
A person presumed to be dead, upon a proof of common fame and belief.

1760. *February* 12. John Forrester *against* James Boutcher and Others.

In a reduction of a decreet of adjudication, led in the 1740, against David Yule, as lawfully charged in 1739 to enter heir to his father, among other reasons it was *alleged*, That David Yule had been dead ever since the year 1732;