1760. *February* 22.

LAUCHLAN GRANT of Drumphad *against* FREDERICK CAMPBELL, Esq; and other FREEHOLDERS of Dumbartonshire.

No 129.
Wadset of a superiority, where the feu-duty payable to the wadsetter was precisely equal to the interest of the redemption-money, found a proper wadset, so as to entitle to vote.

SIR JAMES COLQUHOUN of Luss, having purchased the five-merk land of Drumphad, in the county of Dumbarton, from the Lord Cathcart, obtained a charter under the Great Seal, of these and other lands; after which Lauchlan Grant, writer in Edinburgh, acquired a freehold upon them in the following manner.

Sir James, after taking out his charter, obtained himself infeft in the lands upon a special procuratory granted by him to take infeftment in his name upon the precept *de me* in Lord Cathcart's disposition.

He next granted a feu-charter of the lands of Drumphad to Charles Crawford, (supposed to be a trustee for Sir James), for payment of a yearly feu-duty of 16s. 8d. Sterling; upon which Crawford was infeft upon the 23d March 1758.

The property of the lands being thus separated from the superiority, Sir James, upon the 24th March 1758, entered into a contract of wadset with Lauchlan Grant, whereby he wadsetted to him the lands of Drumphad, under the exception of Charles Crawford's feu-right, redeemable at the term of Martinmas 1763, for L. 16 : 13 : 4; the legal interest of which sum exactly corresponded with the yearly feu-duty levyable by the wadsetter. Sir James, at the same time, assigned to Mr Grant so much of the precept of sasine in his own charter from the Crown as corresponded to the lands of Drumphad; and as it still remained to take Sir James's base infeftment out of the way, so as so bring Crawford's sub-feu to be held immediately under the wadsetter, Sir James, in order to accomplish this, resigned the lands, *ad perpetuam remanentiam*, in the hands of Lauchlan Grant; and the base right being thus consolidated with Grant's right of superiority, Grant, in the next place, obtained himself infeft upon the precept in Sir James Crown-charter, and assignment thereto.

Lauchlan Grant having claimed to be enrolled upon these titles at the Michaelmas head-court held at Dumbarton in October 1759, his claim was objected to; and the objections having been sustained by a majority of the freeholders, Mr Grant complained to the Court of Session.

Pleaded for the defenders, *1mo*, The titles produced by the complainer carry evident marks of a nominal and fictitious qualification, created with the sole view of making a vote at an election, without intending to confer any substantial interest in the land. Had a real purchase been intended, the parties would never have gone about it in the manner they have done. Mr Grant has made no real acquisition, but has only lent his name to create a vote. He has acquired the subject, not for his own behoof, but to serve his author; and

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though it may true, that he is under no positive engagement to Sir James Colquhoun; yet he is, from the nature of the thing, under a tacit and implied obligation, which is equally binding in conscience. It was plainly with a view to guard against practices of this sort, that the oath required by the 7th of King George II. was introduced. It is not enough that the person claiming to vote has given no promise nor backbond, directly or indirectly; he must likewise be able to say, "That his title is not nominal or fictitious, created or reserved in him, in order to enable him to vote at an election; but that the same is a true and real estate in him for his own use and benefit," &c. It is plain, therefore, that the legislature reprobates all such nominal votes; and if the Court is satisfied, from the face of the deeds, and the nature of the transaction, that the complainer's title fall under that description, it is the same thing as if Mr Grant had acknowledged, upon oath, that his qualification was nominal and fictitious.

2*do*, The defenders apprehend, that the right upon which the complainer's claim is founded, is not a proper wadset, in the meaning of the acts 1661 and 1681, which declare, that proper wadsetters having lands of the holding, extent, or valuation required by law, shall have right to vote. Wadsets of superiority distinct from the property, are a modern invention, and could not be in the view of the legislature at that time. In the act 1661, c. 62. a proper wadsetter is described, 'as taking the hazard of the fruits, tenants, war, or troubles;' but a wadsetter of naked superiority cannot possibly run any such hazards. Such a wadset, therefore, is more nearly allied to the improper kind; if indeed the terms proper and improper can at all apply to wadsets of superiority. In the present case, the complainer is secured in a feu-duty precisely equivalent to the interest of his money; he runs no risks, and he is much in the same case with a wadsetter who holds the lands at a certain rent, or who grants a back-tack to the reverser for a tack-duty equal to the legal interest of his money; in both of which cases the wadset becomes improper. Neither is there any chance for the fall of casualties before the time at which the wadset is redeemable; and though there were, it is not every minute and trifling inequality that is sufficient to render a wadset proper; as was found in the case of Doul against Creditors of Young, 18th July 1718, *voce* USURY.

3*tio*, It was irregular in Sir James Colquhoun, after the lands were resigned in the Crown's hands, the resignation accepted of, and in consequence thereof a charter of resignation granted by the Crown in his favour, to stop short, and, in place of executing the precept in that charter, to go back upon Lord Cathcart's disposition, and grant a special procuratory to take infeftment upon the precept *de me* therein contained.

Lastly, It was improper in Sir James Colquhoun to assign away and divide the precept in the Crown-charter among two or three different people, so as thereby to obtrude several vassals upon the Crown, in place of one. It has been found, that a vassal could not have three superiors in place of one ob-

No 129. truded upon him; and there is no reason why a superior should not be equally a favourite of the law.

Answered for Lauchlan Grant; To the *first* objection, that a title cannot be nominal or fictitious, where the claimant is truly possessed of the whole right that is set forth in the writings produced. Here the complainer possesses the lands with the burden of Mr Crawford's feu-right; he uplifts the feu-duties, he is entitled to uplift the casualties when they fall, and he is under no obligation to account for the same to any person. The whole right, such as it appears from his titles, is fully and truly in him, for his own behoof, without any promise or obligation to the contrary, and consequently it is a true and real estate in him, for his own use and benefit, and for the use of no other person whatsoever, in terms of the statute referred to in the objection.

Answered to the *second* objection, It does not alter the nature of an improper wadset, that the rent is certain and well paid, which may happen in lands possessed by good tenants, as well as when they are held of the wadsetter in feu. It is still a proper sale during the not redemption. If any alteration happen in the interest of money, it affects the reverser, who has the price in his hands. And, *e contra*, whatever alteration happens as to the lands, by the falling of casualties, or supervenicncy of burdens, these affect the wadsetter, who is purchaser, as long as the right is not redeemed. Wadsets of superiority have always been sustained as good titles for a qualification, when the lands amount to the extent or valuation required by law.

In answer to the *third* objection, Sir James had it in his power to take infeftment, either in the one way or the other, as the feudal right was still in Lord Cathcart.

And, in answer to the *fourth* objection, When the Crown or any other superior, grants a charter to a vassal, and his heirs or assignees, of the lands A, B, and C; as the vassal may take infeftment of the lands of A only, so, if he thinks fit, he may dispone these lands to a purchaser, or a creditor may adjudge them from him, without acquiring right to the other lands; and he may afterwards sell the rest of the lands to another purchaser; nor can the superior refuse to receive these purchasers or adjudgers.

'THE LORDS found, That the complainer had a good title, and appointed him to be enrolled.'

For the Complainer, *Ferguson*. Alt. *Hay Campbell*. Clerk, *Kirkpatrick*.

P. M. *Fol. Dic. v. 3. p. 416. Fac. Col. No 215. p. 390.*

1767. Sir GEORGE LOCKHART.

No 130. WHETHER a simple renunciation by the wadsetter is sufficient to reinstate the reverser in the right of claiming to be enrolled; or if a resignation, with a new charter and infeftment be necessary; debated, but not determined.—*See* APPENDIX.

Fol. Dic. v. 3. p. 416.