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against the injuries of time, in this particular, as well as in all others? The Judges, indeed, seemed to be all of this opinion. The plurality who were for the complaint, put their opinion upon this narrow footing, that Swinzie's act of applying to the Commissioners was evidence against him, that there never had been a decret of division. This evidence is extremely slender. But, admitting it to be good, For what good reason ought not an acquiescence of the Commissioners, for 40 years, to be held equivalent to their decree? For, as it is their business to see the land-tax effectually secured, their acquiescence in a private division presumes that the division is justly made, without collusion.

Sel. Dec. No. 49. p. 56.

1755. *January 17.*

JOHN GALBRAITH of Balgair *against* WILLIAM CUNNINGHAM of Ballindalloch.

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Though the real rent be the proper standard of division, yet a division of valued rent sustained, though proceeding on a proof of the use of payment of cess by the vassals of the lands.

The regular method of dividing *cumulo* valuations, is by proportioning them according to the real rents at the time of the division; but, when land-tax has been paid for a considerable time, in certain proportions, the valuation may be divided according to such payment.

AT the meeting of the freeholders of Stirlingshire, held 17th May 1754, John Galbraith of Balgair claimed to be enrolled amongst them, upon the following titles, *viz.* partly as heir to his brother in the lands of Balgair; for instructing of which, he produced his service, dated 2d March 1753, a precept from the Chancery, dated 17th April, and his sasine thereon, dated 3d May, and registered 6th June said year; and partly as proprietor of the lands of Staneich and Rollis; for evidence of which, he produced his charter of these lands, under the Great Seal, dated 23d February 1743, and sasine thereon, dated 4th, and registered 7th April of that year; and he produced a certificate of the lands, being valued in the cess-books at L. 410 : 10 : 8.

William Cunningham, one of the freeholders, *objected, 1mo,* That he could not be enrolled in virtue of the lands to which he had succeeded as heir to his brother, because his right of apparenry was at an end by his having made up titles; and he could not be enrolled in virtue of these titles, because his sasine had not been registered one year before the meeting for election; *2do,* That he could not be enrolled in virtue of the lands to which he produced a charter and sasine, dated and registered in 1743; because his title to these lands was a redeemable right, but not a proper wadset; for the contract contained no clause empowering Mr Galbraith to call for his money; *3tio,* That the valuation of the last mentioned lands, which had been purchased from Mr Stirling of Herbertshire, was not properly divided from the valuation of Herbertshire's other lands. The majority of the freeholders sustained the objections; and John Galbraith complained to the Court of Session for redress.

It was *pleaded,* in support of the objections; That, by the act *12mo Anne,* and *16to George II.* none, except apparent heirs, can be enrolled, unless their sasines be recorded one year before the test of the writs for calling the Parliament, or at least one year before the enrolment be demanded. Now, the

complainer ceased to be an apparent heir, so soon as he completed his titles to the lands; and he could not be enrolled on his titles, because his sasine was not registered one year before the diet for election at which he claimed to be enrolled.

2do, The complainer's right to the other lands is not a wadset of any kind, but an actual sale, under a power of redemption in favour of the seller; for the contract grants no power to the complainer to call for his money, which is essential to the nature of a proper wadset; for a *jus crediti*, without a power of requiring payment, is incongruous and absurd; and therefore his title to the lands, being a redeemable right, but not a proper wadset, cannot entitle to a vote.

3dly, The division of the valuation of the lands is erroneous in two respects; 1mo, The lands, belonging in property to Mr Stirling of Herbertshire, stand separately valued from the lands belonging to his vassals, in the cess-book 1691 (which is the most ancient and authentic valuation-book of the shire now extant;) and yet the Commissioners of Supply, in dividing the valuations of the lands, whereof the superiority had been disposed or wadset to the complainer, from the valuation of the other lands, blended the valuation of Herbertshire's property-lands with the valuation of his vassal's lands, as if they had been valued *in cumulo*; 2do, The Commissioners divided the valuation, not upon a proof of the real rent of the lands, but upon a proof of the use of payment of the cess to a private collector, who paid in the whole to the Collector for the shire; but the use of payment of the cess could be no rule for dividing the valuation; because the use of payment was without any legal authority, by consent of parties alone, and could have been departed from by any of the parties when they pleased, and often bears no proportion to the real rent of the lands; and a proof of the real rent of the lands is the only legal rule for dividing the valued rent; for, were there no valuation of the lands, the cess behoved to be paid according to the real rents; and when the valued rent of the lands, formerly valued *in cumulo*, is divided, it ought to be in an exact proportion to the real rents of the lands, whereof the valuation is divided.

It was answered for the complainer to the *first* objection; That the right which the law gives to one as apparent heir to his predecessor, cannot be lost through his completing his titles by service and infestment. The law gives the privilege of being enrolled and voting to apparent heirs; not because they are in a state of apparenacy, but because it appeared reasonable that they, upon their predecessor's death, should have the same right to choose representatives to Parliament which their predecessors had, although these heirs had not completed feudal titles to the lands. The act 1681, when giving this privilege, had only occasion to mention apparent heirs; because, as the law then stood, so soon as one was infest, even on singular titles, he was entitled to vote. And the act 12mo Anne does not take away this privilege, either from apparent heirs, properly so called, or from heirs entered; it enacts, 'That no conveyance or

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'right whatsoever, whereupon infestment is not taken, and sasine registered one year before the test of the writs, shall entitle to vote.' But the complainer was not demanded to be enrolled and to vote in virtue of the right on which infestment had been taken, but in virtue of the right which had been in his predecessor, and was now transmitted to him by his predecessor's death.

To the *second* objection, it was *answered*; That a clause, empowering the wadsetter to call for his money from the reverser, was no way necessary to the constitution of a proper wadset, as appears from Sir George Mackenzie's definition of a wadset, tit. Redeemable Rights, § 3, and § 12.; and that clause seems only to be a modern invention; for anciently wadsetters commonly got such beneficial bargains, that they never called for, and seldom chose to have, their money offered to them; and although Craig has a whole title, in his 2d book *De feudis*, upon wadsets, yet he makes no mention of any power in the wadsetter to call for his money; which, had it been necessary to the constituting of a wadset, he certainly would have done. It is a mistake to say, that a wadset is a *jus crediti*; for it is a *jus domini*, Stair, tit. Wadset, § 2.; and it is on that account that it gives right to vote.

To the *third* objection, it was *answered* in the general; That, as the division of the valuation was made by a general meeting of the Commissioners of Supply; who are a Commission of Parliament, the freeholders are not entitled to set aside their decrees by exception, but their decrees must stand good until reduced by a proper process.

And, more particularly, to the *first* part of the objection, *answered*, That although the lands, which were Herbertshire's property-lands, at the time when the shire was originally valued, had been separately valued from the lands then belonging to his vassals; yet the heritors of Herbertshire have since that time feued out part of these property-lands; and it is not now certain what of the vassal's lands had been feued out before, and what after, the said valuation; and therefore the Commissioners of Supply behaved to add the two original valuations together, and then to divide the whole.

To the *second* part of the *third* objection, *answered*; That the Commissioners of Supply are not confined to any particular mean of proof, but may use any proof that appears to them proper for the end in view; and the use of payment of the cess seems to be as proper a rule for dividing the valuation of the lands as any whatever; especially when, as in the present case, that use has been for any considerable time, and is among feuars; for it is not to be presumed, that any of the feuars would agree to pay a larger proportion of the cess than what effeired to the rent of the lands; as they could not thereby acquire a right to vote, because not the Crown's vassals. And as this use of payment was begun long ago, and when Herbertshire was superior of the whole lands, it could not be with a view to serve a turn, but in order that each vassal should pay such proportion of the cess as corresponded to the value of his lands.

“THE LORDS repelled the objections to the qualifications of the complainer, and ordained his name to be added to the roll of freeholders of the county of Stirling.” See Div. 4. Sect. 1. *h. t.*

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Act. *And. Macdowal et R. Bruce.* Alt. *Lockhart et And. Pringle.* Clerk, *Forbes.*
B. Fol. *Dic. v. 3. p. 407. & 408.* Fac. *Col. No 127. p. 188.*

1755. January 17.

PATRICK CAMPBELL of Monzie *against* JAMES CAMPBELL of Ardkinglas.

No 52.

Found in conformity with the above.

AT the meeting for electing a Commissioner to Parliament from the county of Stirling, mentioned in the preceding case, Patrick Campbell of Monzie claimed to be enrolled in the roll of the freeholders entitled to vote. His claim was founded, partly upon his right to the superiority of certain lands, which had been disposed to him by Sir James Stirling, and partly upon his right to certain feu-duties, payable out of the lands of Bothkennar, which had originally belonged to the abbacy of Cambuskenneth, and after the Reformation had been erected into a temporal Lordship; to which feu-duties Mr Campbell of Monzie had acquired right.

It was *objected* by James Campbell of Ardkinglas, one of the freeholders, That Mr Campbell of Monzie was not entitled to be enrolled; *1st*, Because he was not infeft in either the property or superiority of the lands, out of which the feu-duties were payable; for the vassals in these lands had taken the benefit of the acts of annexation, and held their lands immediately of the Crown; so that they were not vassals to the claimant, who, by his charter, had no other right than that of uplifting the feu duties; which could no more entitle to a vote, than a perpetual annuity upliftable furth of lands; *2dly*, That the valuation of those lands purchased from Sir James Stirling had not been properly divided from the original valuation *in cumulo* of the lands of Glorat, whereof they were a part; as the Commissioners of Supply had not taken a proof of the real rent of the lands, but only of the use of payment of the cess.

The majority of the freeholders sustained the objections; and Mr Campbell of Monzie complained to the Court of Session, and *pleaded*, for obviating the first objection, *1mo*, That he was the Crown's vassal in these feu-duties, and that 'they were liable in public burdens for his Majesty's supply;' and as their valuation, joined to the valuation of the complainer's other lands, is above L. 700 Scots, he was, in terms of the act 1681, entitled to a vote. These feu-duties were the rents of the lands at the time when the lands were feued out; the complainer is entitled to use a pointing of the ground for payment of them, and has a preferable right in the lands to the vassals, who have only right to the new or improved rent, after the feu-duties or old rent is paid.