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The objector's last argument is nothing else than a mere quibble. It resolves into this, that the Court are to presume without evidence, and, which is more, even contrary to evidence, that the burgh of barony of Monygaff, and the tower of Largs were extended, and were therefore entitled to some part of the *cumulo* in the valent clause, and which would have the effect to destroy the effect of the descriptive clause, as not corresponding with the valent. The complainer does deny, that either the burgh of barony of Monygaff, or the Tower of Largs were extended. There is no evidence they ever were, and, indeed, if the complainer is not much mistaken, they were not the subject of the old extent; and, it is believed, the respondent will find himself difficulted to point out an instance of the contrary.

The Lords 'repelled the objection.'

Act. *Crosbie, Macqueen.* Alt. *Rae.* Clerk, *Kirkpatrick.*

W. W. *Fac. Coll. No.* 181. *p.* 100.

1776. *March* 7.

JOHN HENDERSON, Younger of Fordell, Esq. and others Freeholders in the County of Fife, *against* CAPTAIN HUGH DALRYMPLE of FORDELL.

No. 2.
What to be accounted such a wadset as to entitle to a vote? Sale *sub pacto de retrovendendo.*

AT Michalemass 1767, a claim was entered in the name of Captain Hugh Dalrymple of Fordell, to be enrolled as a Freeholder in the county of Fife. In support of his claim he produced a charter under the great seal in his favour, bearing date 3d July 1766, and infeftment following thereon, together with a certificate that the lands were valued in the Cess Books at £888 Scots. To this claim it was objected, that nothing was produced to show that Captain Dalrymple was a proper wadsetter, and that he could not therefore be admitted upon the roll. This objection was sustained, and Captain Dalrymple chose for the time to acquiesce in the judgment.

At the election of a representative for the county of Fife, he again put in his claim, and besides his charter and sasine, produced the disposition upon which the charter proceeded, to prove that he was a proper wadsetter. The conveyance bore as follows: 'I James Wemyss, of Wemyss, Esq. superior of 'the lands and others underwritten, Whereas Hugh Dalrymple of Fordell, Esquire, 'has made payment to me of the sum of £20 Sterling, for my granting these 'presents, whereof I hereby grant the receipt, renouncing all exceptions and ob-'jections in the contrary; therefore witt ye me to have sold, annalzied, and dis-'poned, as I by these presents sell, annalzie, and dispone, to and in favour of 'the said Hugh Dalrymple, his heirs and assignees heritably, but redeemable 'always and under reversion in manner after-mentioned, all and haill the lands 'of Powguild, and Glenningston, &c. providing always, as it is hereby expressly

No. 2. 'agreed upon, that the lands and others above disponed shall be redeemable by 'me, my heirs and successors, from the said Hugh Dalrymple and his foresaids, 'at the term of Whitsunday 1770 years, or at any other term of Whitsunday 'thereafter, by payment making to them or consignation for their behoof, of the 'sum of £20 Sterling, upon premonition to be made to them 40 days preced-'ing the term of redemption,' &c. It was objected to the claim, that the disposition from Mr. Wemyss was not a proper wadset, but only a redeemable right, which was reprobated by the act of the 12th of Queen Anne. The objection was repelled by a majority of the freeholders, and the claimant enrolled accordingly. Against this judgment of the freeholders, Mr. Henderson, one of the candidates for being elected to serve the county in Parliament, and others, preferred a complaint to the Court of Session, which was followed with answers, replies and duplies. The complainers contended, that the freeholders did wrong in admitting Captain Dalrymple to the roll, and prayed the Court to ordain his name to be expunged. The chief stress of the complaint was laid upon the nature and form of his right; and the following arguments were used to prove that it could be no proper wadset, but a redeemable right of the same kind which are reprobated by the statute of Queen Anne.

From the tenor of the deed, it was no proper wadset, they said, but to all intents and purposes a sale under reversion;—two distinct species of rights, and of which the very names are sufficient to point out the difference. A wadset is an impignoration of lands in *security* of a sum of money *lent;* the reverser is debtor, the wadsetter creditor, and, like any other creditor, must have right to redemand payment of his money if he incline. In a sale a *price* is *paid*, the lands are not given in *security*, but conveyed in *property;* and the buyer having taken the lands not in security, but in full of his money, has no title to re-demand it. Now the disposition in question does not contain, from the one end to the other, a single word that can import a loan of money, or an impignoration of lands. In short, it seems impossible to figure a sale under reversion conceived in any other form. A clause of requisition, besides, is essential to the constitution of a wadset. If the right of requisition is taken away, nothing of the character of a wadset remains, for there are no creditors: And without a creditor, there can be no wadset. Since therefore this right cannot be called a proper wadset; since it is evidently a redeemable right; and since the act of the 12th of the Queen expressly declares, that no other redeemable right whatsoever, "except a proper wadsett," shall entitle to the privilege of voting for a member to serve in Parliament; it follows of necessary consequence, that Captain Dalrymple's right can afford no claim for enrolment.

For Captain Dalrymple it was answered, That a proper wadset is nothing else than a conveyance of land redeemable upon payment of a certain sum, but giving the disponee in lieu of interest the full right and property of the lands until they be actually redeemed from him his heirs or assignees. But this is precisely the respondent's case. The conveyance by Mr. Wemyss was granted

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in the consideration of a sum of money, and in consequence of that conveyance, the respondent has a title to enjoy the whole rents, profits, and emoluments of the subjects so conveyed, until the lands shall be redeemed from him, by paying or consigning the sum in consideration whereof the conveyance was granted. The word *wadset*, indeed, does not occur in the conveyance; but there is no charm in that word, and the law hath pointed out no *verba solennia*, as essential or indispensably necessary in the constitution of a wadset. In proof of this, the respondent appealed to Dallass's Book of Styles, page 709, wherein the form of a contract of proper wadset, the word "*wadset*," is not used, but "Sells, annailzies, and dispones," in the precise same form and language as is done in the present case; nor is that word to be found in the style of such deeds given in suplement to Spottiswood's "Introduction to the knowledge of "the Style of Writs."

That the definition of a proper wadset given above is just, the respondent appealed to the authority of Lord Stair, B. 2. Tit. 10. § 9.; to the description of a wadset given by Craig, Lib. 2. Dieg. 6. § 27.; and to Sir George M'Kenzie's Institutes, B. 2. Tit. 8. § 3.

The essential characteristics of a proper wadset are two; the right of reversion, and the holding the rents without accounting as long as the right subsists. Where the right accordingly cannot be withdrawn but upon payment of the sum which was given from obtaining it, the person possessed of such right is to be considered to all intents and purposes as a proper wadsetter, and as entitled to vote at the election for a member of Parliament. This is plainly the import of the statute 1681, of which the intendment was to confer the right of voting upon the person who was proprietor of the subject, and who held the rents and profits thereof for his own benefit, without accounting to any mortal; but to exclude those from the right of voting who had only a mere right in security, and where the person possessed of the right was accountable for his intromissions. Hence proper wadsetters, and adjudgers. and apprysers, after expiry of the legal, are declared to have the right of voting; which act of voting is like any other act of possession and exercise of the person's right of property, who is entitled to the full use and enjoyment of the subject in every other respect.

With regard to the objection that there was no clause of requisition, it was answered, that such clauses never were considered as essentially necessary to the constitution of wadsets, and that in reality the bulk of the wadsets in Scotland, whether ancient or modern, contain no clause of requisition. It is never so much as mentioned by Lord Stair as any of the component parts of a wadset, and Sir Thomas Craig, though he wrote a whole title upon the subject of wadsets, says not a word of any clause of that sort. An objection accordingly, founded on that circumstance, was repelled by the Court, 17th January 1755, Galbraith against Cuming, No. 51. p. 8644. Another case, that of Mr. Monro of Culcairn, 18th July 1745, No. 125. p. 8738. was also appealed to, where the con-

No. 2. veyance bore the grant to be made, "*for certain onerous causes and considera-* "*tions,*" without mentioning a single syllable concerning any loan or advance of money; and yet an objection brought against this right as being not a proper wadset was repelled by the Court, and the claimant found entitled to be put upon the roll. In this case also, it was contended that there should be a borrower and a lender, a debtor and a creditor, and a sum advanced by the person who was to become wadsetter or mortgagee, to be again repaid to him; therefore, that Mr. Monro's right, being without these, had not the essential characteristics of all proper wadsets; and that he might as well prove himself to be a *bird* because he was *bipes*, as prove himself to be a proper wadsetter, because he was entitled to possess rents or feu duties without accounting. Yet the elaborate reclaiming petition, in which these arguments were stated, was refused without answers.

For the pursuers, replied: The two particulars founded upon by the respondent as characters of a proper wadset, viz. the right of reversion, and the holding the rents without accounting, are not sufficient. They are indeed characters of a proper wadset, but they are not distinguishing characters of it. There are other redeemable rights where the rents are levied without an obligation to account: A disposition of lands redeemable upon payment of a rose-noble is one of these; a proper sale under reversion is indeed of itself a sufficient instance of such rights. In order therefore to show that the present is a proper wadset, it is incumbent upon the respondent to point out some other criterion than any yet mentioned. It may be yielded to Captain Dalrymple, that neither the word *wadset*, nor a clause of requisition are essentially necessary to characterize a deed as a proper wadset. But though both may not be necessary, one or other of them is, or at least some other clause to denote that the right is a wadset or impignoration of the lands in contradistinction to a sale. Thus, if the lands are said to be given in wadset, then the case is perfectly clear, though there be no clause of requisition; or if the word wadset be not used, but a clause of requisition inserted, that clause being peculiar to an impignoration or wadset, makes the case equally clear, and renders it altogether incompatible with a sale under reversion. But neither of these being the case with the deed now in question, it can in no way be considered as a proper wadset.

For the respondent duplied: There is a material difference betwixt the right now under consideration and a right redeemable upon payment of a rose-noble. The last is a mere gratuitous right defeasible at the pleasure of the granter, without payment of any thing but a mere elusory sum, whereas in the present case a sum of money was advanced for procuring the right, and the respondent is entitled to the full use and possession of the estate during the subsistence of his right, and cannot be denuded but upon receiving payment of the sum he advanced for procuring it.—A very material distinction also exists betwixt the present case and that of a proper sale *sub pacta de retrovendendo*. The reversion here is perpetual, and the faculty of redemption can never be foreclosed. But in the case of

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a proper sale, the right of redemption must be limited to a particular term. The intention of a sale is to transfer the right from the seller to the purchaser, and though it may not be inconsistent with the nature of that contract, that the right should be kept in dependence for a limited time; yet it is perfectly absurd and altogether inconsistent with the nature of a sale, to suppose that the reversion should be perpetual, and that it should never be in the power of the purchaser to acquire the absolute right of the thing sold. Now, as the *pactum legis commissoriæ in pignoribus* is unlawful, so a limitation of the term of redemption is inconsistent with the nature of a wadset. Here then is the true criterion to distinguish a proper wadset from a proper sale *sub pacto de retrovendendo*. In every wadset the right of reversion ought to be perpetual: In every sale the right of redemption must be limited. The present case is therefore a wadset, for in it the reversion is perpetual.

The respondent lastly maintained, that even granting this to be a proper sale *sub pacto de retrovendendo*, still such right is not struck at by the statute of the 12th of Queen Anne, but must be considered in the sense of that law as a proper wadset. The rights intended to be cut down by that act were rights held in *trust* for behoof of others, not for behoof of the holder; and nominal rights, where nothing real or substantial was vested in the disponee, but which were resolvable at the will and pleasure of the granter. Such is the case at this day of rights granted with reserved powers to alter; such, in former times, and particularly before the statute of Queen Anne, when these faculties to alter were not much known, were those rights granted under the condition of being redeemed upon payment or consignation of an elusory sum, such as an angel of gold, a rose-noble, &c. These rights are very properly called redeemable rights, and deserve no favour. But it can never be supposed that the legislature meant to put in opposition to proper wadsets, rights which were materially and substantially the same, and which were productive of the same consequences and effects to the holders.

The following interlocutor was pronounced, 7th March 1776: "The Lords "having considered this petition and complaint, with the answers, replies, and "duplies, they repel the objections, and dismiss the complaint, and decern."

Against this judgment a reclaiming petition was given in on the part of the pursuers, which was followed with answers on the part of Captain Dalrymple. But before these were advised, a petition which Mr. Henderson had presented to the House of Commons upon the thirteenth of February, came to be heard in presence of the committee of that House, appointed to try the merits of the election, upon the 20th March 1776. The chairman delivered the opinion of the committee in the following words, "That Hugh Dalrymple, Esq. of "Fordell, and William Melvill, Esquire of Graigston, had a right to vote at "the last election of a member to serve in Parliament for the county "of Fife."

For the Pursuers, *Ilay Campbell, H. Dundas.* For Captain Dalrymple, *Wright, M'Queen.*

J. W.