

liament; and, in like manner, that the same rights of the King's vassals were saved and reserved to them by the saving clause in the act of Parliament 1742: And find, that this interlocutor applies, and shall extend to all the defenders who are entitled to hold of the Crown, as explained by the former interlocutors in this cause: And, upon these grounds, the Lords sustain their defences, and assoilzie them from the conclusions of the pursuer's declarator."

Act. *Rae, Wight.*

Alt. Advocate, *J. Campbell.*

Clerk, *Orme.*

O.

*Fol. Dic. v. 4. p. 317. Fac. Coll. No. 64. p. 116.*

\* \* This judgment was affirmed upon appeal.

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## SECT. XXIV.

Rights competent to the Superior.—Ward-holding.

1756. *January 13.*

ALEXANDER HAMILTON of Pencaitland, Esq. Supplicant.

Hamilton of Pencaitland disposed the lands of Udstone to Thomas Borland, his heirs and assignees, to be held in feu-farm of the disponer for payment of a high feu-duty, being the same with the former rent of the lands.

In July, 1754, Borland became bankrupt; his creditors pointed and carried off his whole moveable effects, and, amongst others, his corns growing upon the lands of Udstone; but none of the creditors adjudged, or entered to possess the lands.

In February, 1755, Mr. Hamilton, the superior, to whom Borland was debtor, both for by-gone feu-duties and for other sums, applied by petition to the Sheriff of Lanark, setting forth, That Thomas Borland was unable to stock or labour the lands; and therefore craving, that warrant might be granted for letting them by roup to one or more persons, and to ordain the rent to be applied for payment of the feu-duties, in the first place, and that the remainder, if any was, might be lodged with the Clerk of Court for behoof of the creditors. The Sheriff granted warrant to the Clerk of Court to let the lands by roup; and it was one of the articles of roup, that the fodder should be consumed upon the ground; but, upon the day of the roup, some of the creditors represented to the Sheriff, that the lands would let much higher if they were let in small parcels, and the tenants allowed to carry off the fodder: The Sheriff thereupon granted warrant for letting

No. 101.

No. 102.

A superior who has a considerable feu-duty payable to him out of his vassal's lands, may interpose to prevent these lands from being deteriorated by the fodder being carried off the land.

No. 102. the lands in small parcels, with liberty to carry off the fodder. The lands were accordingly let to fifteen different people, who laboured the whole, without leaving any of the lands in grass, and carried off the fodder.

Mr. Hamilton applied by petition to the Court of Session, representing, that if the lands were any longer let in that way, the ground would be absolutely impoverished; and that, although, where the feu-duty is small, the superior has no concern in what way the vassal labours the feu, yet, where the feu-duty is equal to the real rent, the superior has an evident interest that the land be not mislaboured; and that, by the Roman law, one of the ways of extinguishing the contract of *emphyteusis* was, if the *emphyteuta* had been guilty of mislabour, or of any other act whereby the subject was greatly deteriorated; Novel. 120. Cap. 8. Auth. Qui rem. C. De Sacrosanct. eccles.; and therefore he prayed a warrant for serving the petition upon Borland, and for letting the farm by roup, under the condition of the tenant's consuming the whole fodder upon the ground. The petition was served upon Borland; but he gave in no answers thereto.

“ The Lords remitted the petition to the Sheriff, with this instruction, that he should let the lands by public roup, for a term not exceeding three years, and with the express condition, that the fodder should not be carried off the ground.”

For the Petitioner, *Brown*.

Clerk, *Gibson*.

B.

*Fac. Coll. No. 174. p. 259.*

1775. July 11. NEIL CAMPBELL against The DUKE of ARGYLE.

No. 103.  
Holding construed to be simple ward.

Neil Campbell, as apparent heir of Patrick Campbell of Knap, brought a sale of his father's estate, comprehending, *inter alia*, the two-merk land of Kilmorie, the two-merk land of Fernock, the four-merk land of Balimore, and the four-merk land of Stronefield, all lying in the county of Argyle.

At making up the state, a difficulty occurred, from the peculiar terms in which the investitures of the lands above mentioned are conceived.

Archibald Earl of Argyle, the superior, granted a charter thereof, dated June 16, 1674, in favour of John Campbell of Knap, the *tenendas* clause of which was expressed in these terms: “ Tenendas et habendas omnes et singulas præfatas duodecim mercatas terrarum, antiqui extentus, cum pertinen. &c. memorato Joanni Campbell de nobis et hæredibus nostris in feodo et hæreditate, in perpetuum, per omnes rectas metas suas,” &c. The *reddendo* clause was conceived in these terms: “ Reddendo inde annuatim nobis et successoribus nostris taxatas wardas, divorias, aliaque servitia infra script. viz. summam duaram mercarum pro unaqueque mercata terrarum prædict. pro relevio, nec non summam quatuor mercarum pro unaqueque mercata terrarum prædict. pro maritagio, cum contigerint in manibus nostrorum superiorum, et solvendo summam quadraginta solidorum monetæ prædict. pro unoquoque herezeldo prædict. terrarum; reservan. tamen, nobis nostris-