

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-

que successoribus, principalem herezeldum dicti Joannis Campbell et ejus antedict. cum contigerint: et liberando nobis nostrisque successoribus de omnibus taxationibus, decimis, aliisque publicis oneribus, in futurum; nec non comparando ad tres curias capitales annuatim, et præstando omnia debita servitia ut referunt, et hoc pro omni alio onere, exactione, quæstione, demanda, et seculari servitio, quæ de prædict. terris, per quoscunque exigí poterint quo modo libet vel requiri." And, in a precept of *clare constat*, dated 15th September, 1716, in favour of Duncan Campbell, granted by John Duke of Argyle, the clauses of *tenendas* and *reddendo* were much of the same purpört and tenor.

It was represented, That, from the tenor of these deeds, it was by no means clear that the lands were held ward, although that holding was mentioned in the *reddendo* clause of the charter: That, from the *tenendas* clause, the object of which is to express the particular tenure by which the lands are holden, it appeared that the lands were held in feu, and, therefore, that it must be presumed that the mention of ward in the *reddendo* happened *per incuriam*: That this was the more presumable, from this circumstance, that the casualty of ward was not taxed by the charter, although the casualties of relief and marriage, and the herezeld, were all of them taxed: That even the mention of herezeld tends strongly to show, that the lands were not held ward: That herezeld, properly speaking, was only due by the heir of a tenant: And that, though it was sometimes contained in a feu-charter, yet it was believed that no instance could be given where this burden was imposed upon a vassal in lands held by any other tenure.

It was farther represented, That, were the lands found to be held ward, there would be some difficulty in ascertaining the feu-duty payable to the superior, in lieu of the casualties incident to ward-holding: That the present case fell under neither of the cases provided for by the act of sederunt made in consequence of the statute of George II. abolishing ward-holdings: That, supposing the lands to be held ward, it was neither altogether a simple nor altogether a taxed ward: That the marriage was taxed, and the relief, but not the casualty of ward itself; and, therefore, it was necessary that some rule should be laid down for ascertaining the feu-duty to be paid to the superior in the special and peculiar circumstances of the present case.

It was farther submitted, how far, even supposing the holding to be ward, the superior could have any claim for any other casualty except those of marriage and relief; because the charter 1674, after enumerating the casualties of marriage and relief, and the herezeld, bore, that the same should be paid *pro omni alio onere*.

Answered for the Duke of Argyle, who sisted himself in the present question: That the words *in feodo et hæreditate*, in the *tenendas* clause of the charters in question, meaning "in fee and heritage," do neither express nor imply this to be a feu-holding; on the contrary, they are rather a mark of its being a ward-holding; for, in the family of Argyle's cartularies, it is found to be the common

No. 103. expression of a wardholding; whereas, the words constantly used to express a feu are, *in feudifirma seu emphyteusi*. That it is a mistake to say the marriage and relief of the vassal are taxed in this case; for it is clear, that no more was intended, by that part of the *reddendo*, than to fix the proportions to be levied from these lands, for the relief and marriage of the superior, at the hands of the Crown; a very common clause in charters by the family of Argyle to their vassals, as a very considerable part of the estate of Argyle held ward, or taxed ward, in those days.

Nor is the observation with regard to the herezeld well founded; as it can be shown, from the family cartularies, that the herezeld is reserved to them in ward as well as feu-holdings. In short, as there is nothing in the charters produced inconsistent with the nature of a ward-holding; and as no other holding is expressed, this must be presumed to be a ward-holding, and the Duke must be entitled to the whole casualties thereto belonging. Besides, there is another clause in these words towards the end of the *reddendo*, viz. "*Et præstando omnia debita servitia, ut referunt,*" which seems to import a wardholding, and is a sufficient answer to the observation founded upon the words *pro omni alio onere*. Indeed, if a ward-holding is not supposed, it is no holding at all; for there is no word either of a feu-duty or blench-duty through the whole of the charter. The Court will therefore have no difficulty of converting the casualties, according to the same rule which takes place in other cases of simple ward.

It was admitted that the teinds were not holden of the Duke.

Observed on the Bench: Very extraordinary to hold this to be a taxed ward-holding, when there is no taxation at all of the ward, but only of the marriage and relief.

The Court pronounced the following interlocutor:

"Find, That the lands above mentioned are held of the Duke of Argyle in simple ward; and remit to the Lord Ordinary to proceed in preparing the state accordingly."

Act. *Abercromby*.

Alt. *Ilay Campbell*.

Clerk, *Pringle*.

*Fac. Coll. No. 178. p. 95.*

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1804. May 30.

JOHNSTON and Others *against* The MAGISTRATES of CANONGATE.

No. 104.

A piece of ground feued for building a church, with a provision in the charter, that it shall revert to the

The village of North Leith originally formed a part of the parish of Holyrood-house; but when the number of inhabitants increased, the inconvenience of the distance from the parish-church induced them to establish a separate place of worship. With this view, in 1569, the inhabitants obtained a charter from the Magistrates of Canongate, granting to them in feu the chapel of St. Ninian's, with its appendages, situated on the north side of the water of Leith. This