

tenant may be pursued to leave the houses of his matling as good as when he entered.

No 6.

*Fol. Dic. v. 1. p. 376. Haddington, MS. No 1826.*

1629. March 25. L. AFFLECK against MATHIE.

IN a removing, the receipt of an herezeld from the eldest son of the father, who was liferentaller of the land, is sufficient to save the payer from removing from that land for a year after the rentaller's decease. *Item*, a promise not to remove, made by the pursuer, may be proven by witnesses, to save the person to whom the promise is made from removing, for the space of a year only after the promise; and if it be proponed for longer space, it must be therewith alleged, that the promise was then accepted, and must only be proven *scripto*, or by the oath of the maker of the promise. See PROOF.

No 7.  
Receipt of herezeld entitles the heir to possess for an year.

*Fol. Dic. v. 1. p. 377. Durie, p. 439.*

1715. June 23.

GATHARINE SIMSON, and DAVID KELTIE her Son, against HALLIDAY of Tilliboll, and Others.

A DECLARATOR being raised at the instance of the said David Keltie, Tilliboll's feuer, against his superior, who had exacted both at his father's and his own entry a triple of the feu-duty, whereas, by his charter, he is only liable to pay a double *primo anno introitus*, and had also taken away a cow and a mare upon the pursuer's father's decease by way of herezeld; and concluding restitution of the two years feu-duty *indebite* paid; as also restitution and violent profits for the cow and mare, as in a common spuilzie; concluding also a declarator of his freedom from these in time coming;

No 8.  
No herezeld due by feuers but by tenants only.

As to the point of right, *answered* for the defender, That a feu-duty being only a taxing of the service during the time that the fee is full, as when the fee falls in the superior's hands by the death of the vassal *in feudis rectis*, the vassal must either pay a full year's rent, or whatever is taxed by the original charter; so in feu holding, the obligation to double the feu farm is nothing but a taxing the relief to a double feu-duty, and is quite different from the annual prestation. Therefore, as in other holdings, the vassals are bound to pay the relief beside the ordinary prestations, so in feu holdings, by and attour the current feu-duty, the vassal ought to pay the sum to which his relief is taxed, which does not respect the annual prestation, which is due *ex natura feudi*.

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*Replied* for the pursuer; That there can be nothing with more clearness express than commonly the *reddendo* of these charters is, viz. *duplicando feudifirmam*; which, according to the defender's way of arguing, would be *triplicando*. But it is plain, from the general custom of the country, and from the words of such charters, that one year's duty is payable as the current prestation, and another as the *laudemium* or relief; which is also consonant to the common feudal customs; besides that, the Crown (whose practice in such cases ought to be a rule and standard for all subaltern superiors) never exacts more from feu vassals but the double.

*Duplied* for the defender; That though the Sovereign *ex gratia* gives abatement of one year, (which is no rule for others) yet the *capiendo securitatem* is always for three years.

As to the herezeld, *answered* for the defender; *imo*, That a feu-charter being a mixed right, having something in it of the nature of vassallage, and something in it of the nature of tenantry, the vassal considered as the superior's tenant may be liable to the prestations of tenants. *2do*, The defender's charter not being granted *cum herezeldis*, he as vassal, not being thus excused from that burden, may be liable, as all are who die upon a master's ground.

*Replied* for the pursuer; *imo*, That it is the first time it was ever pleaded that a vassal was liable in the herezeld; and it is redargued not only by the *reddendo* of the charter, (which is certainly the rule as to the vassal's prestations), but by the uniform custom of the nation. *2do*, Though the defender's charter be not granted *cum herezeldis*, yet that imports no more but that he shall not have right to exact the herezeld from his own tenants, which otherwise he could do if that clause were inserted in his charter; but the want of that clause can never import that he is liable in the herezeld, since, by the nature of his feudal contract, he is exempt from all burdens whatsoever, except either such as are expressly contained in his *reddendo*, or are the *naturalia* of his fee, whereof the herezeld is none.

As to the second thing libelled, viz. Restitution, *answered* for the defender, That whatever may be said as to the point of right, yet he cannot be liable to repeat what is already paid, because payment was made by way of transaction; wherein *quid pro quo* was given by the defender, viz. his granting precept of *clare*, and so saving the pursuer the trouble of serving, retouring, charging the superior, &c.

*Replied* for the pursuer; That the said payment being made ignorantly, repetition is undoubtedly competent; besides, that there could be no proper transaction here, since the superior, in receiving his vassal, did nothing but what by law he might have been compelled to.

As to the restitution of the herezeld, violent profits, &c. *answered* for the defender, *imo*, That his infeftment *cum herezeldis* is sufficient to excuse a spuilzie; *2do*, That masters in that part of the country, particularly the defender,

have been in constant use of exacting an herezeld, nor has ever such exaction been quarrelled to this day.

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*Replied* for the pursuer; *imo*, That such a clause in the defender's charter can never afford him any title to exact a herezeld from a vassal, whose *reddendo* is his sole rule. *2do*, The constant use of such an oppression rather loads than excuses the defender.

THE LORDS found Tillibole liable in repetition; to which their Lordship adhered, after a reclaiming bill, without answers.

Act. *Abercrombie*.Alt. *Falconer, sen.*Clerk, *Gibson*.

*Fol. Dic. v. 1. p. 353. Bruce, v. 1. No 105. p. 129.*

1733. *July*. FERGUSON of Auchinblane *against* M'ANDLISH.

No 9.

HEREZELD regulated by custom, and due only by the tenant's heir where such is the use of the barony. *See* APPENDIX.

*Fol. Dic. v. 1. p. 376.*

*See* PROOF, *Laws, Customs, &c.*

*See* APPENDIX.

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