

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.

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

charter proceeded on the narrative of the ardent zeal which the Magistrates of Canongate had “ for the preservation of due order among our beloved neighbours, the inhabitants of the town of Lieth, on both sides of the water thereof, within our parish of Holycross, and considering that, by our office, we are bound, as far as it lies in our power, to provide for them as members of our church ;” and after disposing in fee and heritage for ever the chapel of St. Ninian’s, for payment of a small annual feu-duty, if required, contained the following clause : “ Providing, nevertheless, that if any of the said inhabitants of said town, our feuers aforesaid, endeavour to apply the said chapels, lands, annual-rents, and duties thereof, to any particular uses, so that the same cannot be converted unto the uses above-written, in that case, the said chapels, houses, annual-rents, &c. shall *ipso facto* return to us and our successors ; and moreover, the set of our present feu shall be of no strength, efficacy, or effect, as is provided in our charter of donation thereof allenary,” &c.

Soon after the charter was obtained, the inhabitants of North Leith erected, on the site of the chapel of St. Ninian’s, a church, for the accommodation of the village, which, in 1606, was, by act of Parliament, erected into a distinct parish, independent of Holyroodhouse.

This church has been used ever since, and was repaired, from time to time, at the expense of the parish of North Leith, who exercised the right of patronage. The Magistrates of Canongate never demanded the feu-duty payable by their charter, and had no connection with the church, except being allowed the occasional use of a seat, and of the session-house for holding an annual court.

On account of the great increase of inhabitants, the church of North Leith became deficient in point of accommodation ; and the site of the church, besides other inconveniences, was too small to contain a church of sufficient dimensions. Accordingly, the inhabitants purchased a piece of ground ; and as the ground on which the church stood was valuable, on account of its vicinity to the harbour, it was proposed to sell it, and employ the price in building a new church of sufficient dimensions. But while this scheme was in agitation, intimation was made by the Magistrates of Canongate, that if the church was sold, and converted to secular purposes, they would consider it as having reverted to them by the charter. An action of declarator was brought in the name of the minister, kirk-session, and other inhabitants of North Leith, against the Magistrates of Canongate, concluding, that they were entitled to sell the area of the present church, to enable them to build a new one of proper dimensions, transferring to the title deeds of the new area the same conditions which were contained in the present charter, and that the Magistrates should be bound to grant a new charter, without a clause of return, for payment of the present feu-duty, with double feu-duty at the entry of heirs and singular successors.

The Lord Ordinary made great *avisandum* ; and the pursuers

Pleaded : Restrictive clauses are unfavourable in law, and therefore to be strictly interpreted. Accordingly, a clause of pre-emption, or clause of return, inserted

No 104.
superior if at any time it be applied to secular purposes, may be sold, when it becomes necessary to have a larger church than can be built on the area, provided the price be applied to that purpose.

No. 104. in a charter, after the failure of a certain series of heirs, does not prevent the grantee from alienating the subject; Stirling against Johnston, No. 70. p. 2342. *voce* CLAUSE; Johnstone against Marquis of Annandale, No. 39. p. 4356. *voce* FIAR, ABSOLUTE, LIMITED; Duke of Hamilton against Douglas, No. 40. p. 4358. *IBIDEM.* Even when the clause of restriction relates to the use of the subject, if, by any possible construction it can be evaded, it is construed to the advantage of the proprietor, though contrary to the evident meaning of the expression; Governors of Heriot's Hospital against Fergusson, No. 33. p. 12817. *voce* PROPERTY.

But this rule of interpretation applies much more forcibly, when a subject has been conveyed with a special object in view, when the grantee has been merely restrained from doing any thing by which that object may be defeated, and when he, in fact, only proposes to do what is evidently calculated more completely to fulfil the intention of the granter. By every fair and reasonable construction of the clause of return, the proposal of selling the present church, for the purpose of building another more commodious, is no departure from the purposes of the grant, and consequently can give no room for its operation. On the contrary, the judaical interpretation which the Magistrates put upon the charter would defeat the very object of it. They can have no reasonable interest in opposing the measure, since they are to retain the same privileges with respect to the new church that they formerly enjoyed.

Answered: By the principles of feudal law, every grant from a superior to a vassal is presumed gratuitous. But there is no need for presumptions in the present case, as the narrative of the charter shows that it was a donation; and it is stated so expressly in the clause of return. The Magistrates, therefore, as feudal superiors, cannot be compelled to renew the investiture in different terms, or under different conditions, from those expressed in the original grant. As that grant was to successors only, for special purposes, and not to assignees, no part of the premises can be sold without the consent of the superior.

The object of the pursuers is to convert the subject of the original grant in some measure to their own private emolument, since they mean to lay out the difference between the price of the old and new area in building a manse and offices for the clergyman, which the inhabitants are bound to do. The Magistrates were willing to accept of a small increase of feu-duty from the purchaser of the old area; in consideration of which, they would leave out the clause of return in the charter to be granted by them to the purchaser. As administrators of the burgh, it is reasonable that some share of the profit should be communicated to its funds, instead of being wholly appropriated by the inhabitants of North Leith.

The conclusions of the pursuers' summons were inept; for suppose they are found entitled to sell, that decree will not render the clause of return effectual, or prevent the defenders from evicting the property, whenever it is applied to any secular use.

The Lords had no difficulty in decerning conformably to the conclusions of the declarator, being satisfied that the proposed plan was not adverse to the intentions of the original grant.

No. 104.

Lord Ordinary, *Bannatyne.*
Alt. *Cranstoun.*

Act. *Moncrieff.*
Agent, *Jo. Macritchie.*

Agent, *Jo. Mowbray, W. S.*
Clerk, *Home.*

J.

Fac. Coll. No. 165. p. 372.

SECT. XXV.

Description of the Vassal's Title.

1798. *January 16.*

The PERSONAL CREDITORS of ALEXANDER CRICHTON *against* The SOCIETY FOR PROPAGATING CHRISTIAN KNOWLEDGE, and ALEXANDER WOOD.

In 1751, John Henderson disposed the lands of Newington to Patrick Crichton, and, at his death, to Charles, William, and Alexander Crichtons, his three sons, equally amongst them; and failing one or other of them, by decease, before marriage or majority, to the survivors or survivor, their or his heirs and assignees; whom failing, to Patrick Crichton, and his heirs and assignees, in fee;" reserving "full power to the said Patrick Crichton, without consent of his said children, to sell or dispose of, or contract debts on, the foresaid whole lands and others, in the same manner as if the substitution had not been taken to the said children before named."

The disposition contained procuratory and precept. Infeftment was immediately taken on the precept to "Patrick Crichton, for himself, and as procurator for his said sons."

In 1758, Patrick Crichton executed a general disposition, without precept or procuratory, in which he revoked all former settlements in favour of Charles Crichton, his eldest son, and, reserving to him an annuity, disposed his whole heritable and moveable property, at his death, to the said "William and Alexander Crichtons, his second and third sons, equally betwixt them, and the heirs whatsoever of their bodies; and failing any one of them, by decease, without heirs of his body, to the survivor of his said two younger sons, and to the survivor's heirs and assignees whatsoever, except the said Charles Crichton."

No. 105.

A precept of *clare constat* sustained, although it contained an inaccurate description of the vassal's title.