

pose no burden, but, by accepting the resignation, is bound to infeft the new vassal in a right as full and ample as that which stood formerly in the person of the resigner. Nor is it of any weight, that Warriston accepted the charter with such a clause, since it was entirely unwarrantable, in so far as it is different from the disposition; and therefore the vassal had no reason to regard it. Put the case, a superior should unwarrantably impose a new burden in a charter of adjudication, surely the adjudger's accepting of the charter, or even taking infeftment thereon, would not infer an acquiescence, so as to establish against the adjudger a servitude to which the debtor was not liable.

As to the pretence, That, at the time of extending the charter, there had been an agreement betwixt Sir George Mackenzie and the proprietor of the servient tenement, there is not the least evidence produced to shew such was the fact; and as, on the one hand, it cannot be presumed that the magistrates would be officiously interposing in an affair they had no concern with; so, on the other, it cannot be supposed that Sir George, if any such thing had been intended, would have rested satisfied with a servitude constituted in so precarious a manner that it could be taken away at any time without his own consent; for the charter, the only document thereof, might have been retired next day, and a new one taken, without any mention thereof. But, supposing a superior could, *proprio motu*, without any warrant, impose a new burden in a charter of resignation, yet the argument would not apply here, since the words of the charter, if rightly understood, contain nothing more than what is in the disposition; and it will be plain, upon comparing the two, that any small variation betwixt them has been owing to the inaccuracy of the writer in translating the clause in the disposition.

The Lords found, "That the servitude is sufficiently constituted by the charter and sasine, and cannot be restricted by the marginal note in the disposition; and found, That David Clelland can neither build in the yard in question, nor otherwise prejudge the suspender's lights; and therefore suspended the letters *simpliciter*."

*C. Home, No. 117. p. 185.*

1745. January 15.

EARL of BREADALBANE *against* CAMPBELL of Lochdochart.

SIR ROBERT CAMPBELL of Glenorchy, in the year 1648, feued out to Alexander his fourth son, "totas et integras terras de Leragan, terras nuncupat. lie Port de Lochdochart, terras de," &c. mentioning the names of some other parcels of land; and then follows, "et lie Scheillis de Conynche." The same expression runs through the whole clauses of the charter, and the precept is to give sasine, "totarum et integrarum prænominatarum terrarum de, (repeating them all) et lie Scheillis de Conynche, per terræ et lapidis fundi dictarum terrarum traditionem;" and accordingly the sasine has been always taken on the ground of the lands of Conynche, as well as the other lands specified.

No. 9.

No. 10.

A feu charter of certain lands, *et lie Scheillis de Conynche*, was found to give the property of Conynche, and not a servitude only.

No. 10. Lochdochart being about to work a lead-mine in the lands of Conynche, was stopped by a suspension on the part of Breadalbane his superior, which was this day reported on the bill.

Pleaded for the suspender, The right given to the vassal is only a servitude of pasturage, expressed by the word *Scheillis*, which hath that signification instead of *terras*, which is the word made use of with regard to that part of the estate, the property whereof was designed to be given him; and as "terras nuncupat. lie Port de Lochdochart" is the expression used, because there the property was intended to be conveyed, so it would have been "terras nuncupat. lie Scheillis," if that had been intended with regard to them.

That the expression must be so understood, clearly appears from this, That the feu-grant was in consequence of a contract and bond of tailzie in the year 1640, entered into betwixt Robert Campbell of Glenfalloch, and John Campbell, fiar thereof, his eldest son, with consent of John Campbell of Glenorchy, eldest brother to the said Robert, by which Robert binds himself, that, on his succeeding to the estate of Glenorchy, by the death of his brother without children, he should obtain himself infest therein, (and here the lands are particularly mentioned, and amongst them the half merk land of Conynche,) and settle the same on his son, and the other heirs of tailzie by him mentioned; and that he should infest his younger sons in certain parcels of the estate, particularly Alexander, in the share actually given him by this charter, which precisely copies the terms of the contract wherein the word lands is used, when the property is intended to be spoke of, as that was meant to be comprehended in the general tailzie; and *Scheillis* is the expression made use of for the feu intended to be given the vassal. It is also observable, that in the same deed the lands of Strouna are mentioned, which are only proper for grazing; but the property being intended to be given, the word is lands.

Pleaded for Lochdochart, That *lie Scheillis* was no more than the designation of the place; that the word *terras*, in the beginning, applied to the whole particulars mentioned in the sentence, and consequently the property was granted; and, in any other sense, it would have been absurd to have given him a special infestment; that his possession had always been as of property, and he had recovered decreets before Breadalbane's baron-courts, against several persons for cutting his hained woods on the lands of Conynche.

The Lords found, That the charter 1648, granted by Sir Robert Campbell of Glenorchy, to Alexander Campbell, his son, and sasine thereon, conveyed to the said Alexander Campbell the property of the lands designed "lie Scheillis de Conynche, and not a servitude only upon the lands.

Act. H. Home.

Alt. W. Grant.

Elchies, Reporter.

Gibson, Clerk.

D. Falconer, v. 1. p. 46.