1684. *January.*

The ARCHBISHOP of ST ANDREW'S *against* BETON of BLEBO.

No 39.
The Lords found, that a bishop not being *dominus*, but only an *œconomus, dispensator, curator, et administrator beneficii*, cannot change a vassal's simple ward into taxt ward.

THE Archbishop of St Andrew's pursues a reduction and declarator against John Beton of Blebo, of a charter granted by the deceased Archbishop, of the lands of Blebo, changing the holding, which was formerly ward, and paying a certain duty yearly, *nomine canæ*, to taxt-ward, and taxing the ward to L. 100, and the marriage to the like sum, and insisted upon these reasons; That, by the canon law, prelates and other beneficed persons, albeit they have an absolute right to the fruits and rents during their incumbency, and may dispose of them at their pleasure, and being administrators of their benefices, and considered in law as tutors, curators, and husbands, who can do all just and necessary acts of administration, such as entering vassals and doing other deeds allowed by the law; but they cannot alienate or do any deed to the detriment and prejudice of the benefices, such as the changing of the holding from a simple ward to an inconsiderable taxed duty, as is clear from these titles in the canon law, De rebus ecclesiæ non alienandis and particularly that canon, lib. 3. tit. 4.; Extravangand. commun. ambitiose cupiditate illorum precipue, qui divinis et humanis affectati damnatione postposita, immobilia, et prætiosa mobilia, Deo dicata, ex quibus ecclesiæ monesteria et pia loca rogantur illustranturque, et eorum ministri sibi alimonia vendicant profanis usibus applicare, aut cum maxime illorum ac divini cultus detrimento exquisitis mediis usurpare præsumunt occurrere capientis omnium rerum et bonorum ecclesiasticorum alienationem, omneque pactum per quod ipsorum dominium transfertur, concessionem, hypothecam, locationem et conductionem ultra triennium, nec non in feudationem vel contractum emphiteticum, preterquam in casibus a jure permissis ac de rebus et bonis in emphiteusum ab antiquo concedi solitis, et tunc ecclesiarum evidenti utilitate ac de fructibus et bonis quæ servando servari non possunt pro instantis temporis exigentia, hæc perpetuo constitutione præsenti fieri prohibemus; si quis autem contra hujus prohibitionis nostræ seriem de bonis et rebus eisdem quicquam alienare præsumpserit, alienatio, hypotheca, concessio, locatio conductio, et infeudatio hujusmodi, nullius omnino sunt roboris vel momenti. And as this is clear from the canon law, so likewise from our own law, act 11th Parl. 10th Ja. VI. by which it is statuted, That all persons provided to bishoprics, or whatsoever inferior benefices, shall find caution that they shall leave the said benefice at their decease or demission, unhurt or vitiated in the quantity of the yearly rent thereof, as they shall find it at their entry thereto; and in case they shall happen to do otherwise, and by any feus, tacks, provisions, or changing of victual, for money, or any other disposition, shall make their benefice in worse estate than the same was in at their entry thereto, all setting and disposition shall be of none avail, force, nor effect. And by the 3d act Parl. 18th Ja. VI. anent the dilapidation of bishoprics, it is statuted, That it shall nowise be leisome to any

person provided to a bishopric, to dispone, or give in pension, any part of the patrimony of the bishopric, which shall endure and last longer than the giver of the said pension shall bruik the said bishopric; and if it shall happen that any person provided to the said bishoprics dismember any part of the said benefices or patrimony thereof, it is declared that all such deeds shall fall under the compass of dilapidation of benefices; and albeit, it be declared lawful to bishops to set tacks of the duties and fruits of the said benefices, yet they are ordained, that a careful regard be had that the said tacks be set for a competent duty, which in some reason may proportionally answer to that which is set in tack, which duties shall be reputed as a part of the rental of the said bishoprics, and which rental shall be nowise hurt, vitiated, nor diminished by the titular of the said bishopric; and by the 5th act Parl. 22d Ja. VI. it is declared, That all tacks or assedations made of any casualty pertaining to the Prelate, be null, and that it shall not be lawful to any Prelate to dispone, alienate, or set, any of his casualties, in whole or in part, longer than during his own lifetime, allenarly. And by the 9th act, Parliament 23d James VI. giving liberty to bishops to set their ward-lands in feu-farm, it is statuted, that it should be lawful for bishops, who have lands holden of them by ward and relief, to set the same in feu-farm, for payment of a competent feu-duty; providing that the said feu-duty be answerable to the retour-duty of the lands; and where the lands have not been retoured, that the retour be ruled according to the custom of retours of lands in the country, of the like value where the said lands lie; and declare, that the said act shall only remain in force for the space of three years, and no longer, which evinces, that the same could not be done after the expiring of that time. And Craig, *lib.* 1. *digest.* 13. p. 125. Semper autem in feudis ecclesiastisis hoc est observandum, ut per talia feuda melior ecclesiæ conditio reddatur, vulgo census sive rentalis augmentationem dicimus. Neque sufficit, et ejus conditio non fiat deterior aut nihil ei ex fructibus et redditibus sit diminutum; lædi enim censetur ecclesia per talis emphiteuseos concessionem, licet pro solito canone emphiteusis sit constituta, cum libere non possit tenentes, aut colones substituere, etiam licet ex fructibus nihil ei auferatur. Itaque, pro libertate aliquatenus ei diminuta, melior et locupletior aliunde ejus conditio facienda est, et utilitas aliqua reponenda. Itaque, si aliquid minuatur, non valet emphiteusis. Ecclesia autems emper pro minore habetur quoties de ejus commodis agitur.—And, albeit Prelates and titulars are sometimes allowed to grant feus of lands, yet that is only in case of necessity, et ob utilitatem ecclesiæ, where there are terræ steriles, and not reduced to culture; as also bishops, or other ecclesiastic persons, cannot dispose of the casualties of the benefices, before they fall; and, if that were allowed, then beneficed persons might change lands holding ward of them to taxed ward; then, by that same reason, they might set tacks, or grant other rights of their casualties, before they fall; and, if they were allowed to tax their casualties of ward, marriage, relief, and non-entry, then, by that same reason, they will be

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No 39. allowed to tax the ordinary non-entries of singular successors, recognitions, escheats, and all other casualties of superiority; and so might absolutely dilapidate the benefice. And if bishops, and other beneficed persons, could be allowed to tax the casualties of ward and marriage, as they cannot, yet this charter ought not to be sustained; the conversion of the tack-duty being so much within the true value; in so far as, albeit the lands be worth 3000 merks yearly, yet the ward and relief are only taxed to L. 100; and albeit the marriage may be worth 10,000 merks, yet it is only taxed to another L. 100. *Answered*, That, albeit bona ecclesiastica, quæ sunt in patrimonio ecclesiæ, are considered in law under a two-fold notion—one is the temporality of benefices, which are the lands belonging to the Church—and the other is the spirituality, which is the teinds; and, by the Canon law, prelates, and other beneficed persons, were allowed to grant feus both of lands and teinds; they always observing the due solemnities requisite in law, which were, that, in the case of a collegiate Church, the feu should be granted with consent of the convent, or prebends; and, in the case of other benefices, not collegiate, the rights were allowed to be granted by the beneficed person, with consent of the patron, and that either for payment of a feu-farm-duty, or *nomine canæ*, or for service of ward and relief; and which is the foundation of all feus and heritable rights of kirk-lands, either in this kingdom, or in other nations; and such rights were so far looked upon by the Canon law as valid rights; that these solemnities being observed, there was no necessity of the Pope's confirmation; albeit many persons, for their farther security, did take a confirmation; and such feus, either of temporality or spirituality of benefices, were sustained; in which it was decreed, quod decimæ in feudum dare non possunt, ratis manentibus feudis, quæ ante eum synodum concessæ erant; so that, after that council, it was not lawful to grant feus of teinds, which were looked upon as the proper and peculiar patrimony of the Church, and were sustained inter jura spiritualia de quibus laici erant incapaces; so that the right of tithes could only be conveyed by tacks and assedations, which prelates and titulars of benefices might, and did set, for many generations, which, by our law, is limited, in inferior beneficed persons, to the space of their lifetimes, and five years thereafter; and in prelates, to the space of 19 years. But it was always leisome to grant feus, or other heritable rights of the temporality benefices, whether the lands were *demensa*, *prelati*, or *extra mensam;* Craig, *L.* 1. *Dieges.* 13. providing that the same be granted without diminution of the rental, and having the ordinary solemnities requisite in law, which is not only clear from the Canon law; but from our own law, act 71st, Parliament 14th, James II. by which it is statuted, that the King, Lords, Prelates, Barons, and Freeholders, may set their ward-lands in feu-farm; and, by the 91st act, Parliament 6th, James IV. it is declared lawful to every man, both spiritual and temporal, to set their lands in feu-farm, so that it be not with diminution of the rental. And Craig, in the foresaid title, *De feudis Ecclesiasticis*, *lib.* 1.

dieges. 13. lays it down as a principle, that not only the Pope, ex plenitudine potestatis, sed etiam archiepiscopi, abbates, abbatissæ, præpositi, rectores, possunt res ecclesiasticas in feudum dare; and subjoins, Quod si prelatus aliquis terras eclesiasticas in feudum dare voluerit, opus est consensu capituli, sic in omnibus aliis actibus, ubi verti possit prejudicium ecclesiæ, consensus capituli requiretur, prelatus vero cum consensu capituli, si non liberam et omnimoddam saltem aliquam rerum ecclesiasticarum administrationem habet, dummodo ecclesiæ commodo et utilitati exacte ponderatis, id fiat. And *dioges.* 14. he adds, Quodquidem jure canonico res ecclesiæ prædictæ licet in feudum dantur, servatis tamen solemnitatibus quæ priori diogesi præmissæ sunt; and the act 11th, Parliament 10th, James VI. is only when any feus or tacks are granted without diminution of the rental that was formerly paid. But it is clear from our law, that the constant practice is, both in the case of feus and tacks, that, when the feu returns to the Church, *ob defectum heredum*, or *ex dilecto vassalli*, or that the tack of the lands be expired, yet the beneficed person may grant new rights, upon the payment of the ancient duty, with some small augmentation; such as eight pennies, or the like, which is added only *dicis causa*, without regard to the extrinsic value of the lands or teinds; and the 3d act, Parliament 18th, James VI. is only as to pensions, which cannot be granted by beneficed persons, but only during their lifetimes. And albeit it be ordained, that tacks should be set with some regard to the worth and value of that which is set in tack; that, in the constitution of law, is to be understood, the worth and value, if the lands be feued, and the tack set, according to the old duty, without diminution of the rental. And the 5th act, Parliament 22d, James VI. is only as to the quots of testaments, or other ordinary casualties belonging to the benefice, which are ordained not to be set in tack for a longer space than the present incumbent's lifetime; but cannot be extended to the casualties of ward and marriage; for, if these were comprehended under the act, then, by the same reason, a bishop, or other beneficed person, could not grant gifts of ward, non-entry, liferent escheats falling to them during their incumbency, to take effect after their decease, nor could grant gifts of commissariots or bailiaries, to continue during the receiver's lifetime, which is contrary to our law, and the daily practice, by which such gifts are always sustained. And the 9th act, Parliament 23d, James VI. allowing bishops, and other beneficed persons, to set their lands in feu-farm for the space of three years, can import no prohibition to do the same after that time, seeing it was lawful to beneficed persons to change their ward holding to feu, before that act, as appears by the foresaid 71st act, Parliament 14th, James II. and 91st act, Parliament 6th, James IV. by which it is recommended to superiors to change such holdings to their vassals, for the public good and police of the kingdom. And albeit, by the 12th act, Parliament 18th, James VI. it be declared, that the act of Parliament of King James VI. was not to be understood to give liberty to the vassals of prelates, or other

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No 39. subjects, to set lands holden ward in feu, without the superior's consent; yet that cannot be extended to bishops, or others, who hold their benefices and lands immediately of the King; and there is no alteration of the holding in this case, it being still ward, as formerly; and if the bishop might have changed the ward into feu, for payment of a certain feu-duty, effeiring to the retour, as certainly he might, then, by that same reason, he might tax the ward-duty; and the casualties of non-entry, liferent, escheat, or the like, cannot be taxed nor discharged, when they should occur, in prejudice of the next incumbent; because, that would directly lead to the evacuating of the right of superiority itself; and, if that were allowed, vassals should lie out, and never enter, or acknowledge their superior; and, therefore, such gifts are reprobate in law, as being prejudicial to the Church, and in diminution of the rental; whereas, the law allows beneficed persons to change the ward holdings of their vassals into feus, or taxing of the same to a competent duty, as has been practiced by the pursuer's predecessors, Archbishops of St Andrew's; and, particularly, Archbishop Spottiswood, who did grant such charters to Aitoun of Kinaldie, and others; and the defender has ancient rights of other lands, whereof the ward and marriage is taxed by former Archbishops. THE LORDS sustained the reasons of reduction; and found, that bishops could not tax the ward holding in prejudice of their successors, and to the prejudice of the King, who had right to these casualties, when the same should vaick.

It was farther *alleged* for the defender, That the Bishop had homologated the foresaid charter, by receiving of the *cana*, and duty payable yearly by the said charter. *Answered*, That the receiving of that duty could be no homologation, seeing he could not seek a greater duty so long as his charter was not reduced. THE LORDS found, the receiving of the *cana* and duty in the charter was no homologation, and could not preclude him of the action of reduction, in respect he could claim no more but that duty, so long as the charter stood unreduced.

Fol. Dic. v. 1. *p.* 529. *Sir P. Home, MS. v.* 1. *No.* 551.

*** Harcarse reports this case.

1684. *February.*—THE late Archbishop of St Andrew's having taxed ward-lands of 3000 merks a-year, for the yearly duty of L. 4 : 6 : 8, and L. 100 yearly, during the years of the ward *quandocunque contingit*, and taxed the marriage for L. 100:

The present Bishop raised reduction upon these grounds; *1st*, Churchmen are but administrators, and can do no deed to the prejudice of their successors; and the taxed duty is inconsiderable, in respect of the advantage that would arise by the ward; *2do*, By the act 11th, Parliament 10th, James VI. prelates, and beneficed persons, are discharged to feu or set tacks of their benefice, in diminution of their rent, as it stood in the year 1585; and by the

act 3d, Parliament 18th, James VI. bishops, and others, are prohibited to do deeds in prejudice of their rental and patrimony; and by the act 5th, Parliament 22d, *anno* 1617, bishops are discharged to set tacks of the quots of testaments longer than for their life; nor can they tax wards more than the casualties of escheat or non-entry, in prejudice of their successors; 3*tio*, By the act 9th, Parliament 23d, *anno* 1621, bishops are only allowed to set ward-lands in feu for the space of three years allenarly; and, if they cannot feu, far less can they tax, feuing being more advantageous to the Church than taxing. No 39.

Answered, Churchmen, before and after the Reformation, till the year 1581, having taken a great liberty in feuing and setting tacks of their patrimony, this was indeed restrained and regulated, in some measure, by acts of Parliament, act 101st, Parliament 7th, act 11th, Parliament 10th, act 3d, Parliament 18th, James VI. but feuing for a competent avail was allowed; and bishops were in use to set tacks for as many nineteen years and liferents as they pleased, till the act 4th, Parliament 22d, 1617, restricted them to nineteen years; and then the act 5th of the said Parliament discharges the setting tacks of casualties for longer than the incumbent's lifetime; that is to be understood of the casualties of quots of testaments, liferent escheat, &c. which ordinarily happen, and not of the contingent and rare casualty of ward. Again, though by the act 9th, Parliament 23d, James VI. churchmens liberty of feuing ward-lands is restricted to three years, it doth not follow that they cannot tax, or that taxing is a prejudice to the patrimony; for, by the narrative of the act, it is expressly declared, that the retoured duty, (though but a small thing in itself, in comparison of the land feued,) being a yearly prestation, equally derived to all incumbents, is of greater advantage to the benefice than a casualty that falls in the hands of the incumbent for the time; and the tax-duty of a noble yearly is answerable, or near to the proportion of the retoured duty, if the lands were feued.

THE LORDS, considering that many wards are taxed before and since the year 1621, they delayed at first to give an answer *in jure*, until the Parliament should determine the point.

March 13.—Thereafter, upon the pursuer's application for a present decision, the LORDS found, that the late Archbishop could not tax the ward, and reduced the same, though the pursuer had received the augmented duty by virtue of the tax for several years, and so seemed to homologate the taxing.

Harcarse, (MINISTERS.) *No.* 691. *p.* 194.

*** This case is also reported by Fountainhall:

1684. *February* 7.—THE case was, Blebo was a simple ward-vassal of that diocess; he agrees with the last Archbishop Sharp, and gets his lands taxed, and for it and some bygone casualties gave him L. 10,000 Scots. This Archbishop raises a reduction of that conversion, upon this ground, that church-

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men are but dispensators, as tutors and curators to their see, and mere administrators of the benefice, and can do no deeds of property or dilapidation to the prejudice of their successors, as is clear from the Canon law, and several novel constitutions even in the Roman law, as Novell. 7. *De non alien. nec permutand. reb. eccles.* and Gudelin, *De jure noviss.* with the parallel title in the Gregorian decretals; and from Josephus Mascardus *De probat. voce, alienatio, conclus,* 75. where he shows the requisites to such alienations, and our law has not been short in providing the like remedies, by act 11th Parl. 1585, act 5th 1617 and act 9th 1621, which allow Bishops to feu their ward-lands; and though it be temporary, yet the *ratio legis* there is evident, for augmentation of the ecclesiastical revenues, which binds still; and there would have been the less to say against this taxing, if there had been insert in the charter an annual prestation of a feu-duty, which would have given the benefice a certain rent in place of the former uncertain casualty of ward, which might not exist in an age. *Answered,* Taxing a ward-holding is but a rational deed of administration, and no dilapidation; else the King's ward-vassals could not to the detriment of the Crown's patrimony be allowed to be taxed.——The Archbishop would gain more by losing the cause; for if this commutation were sustained, he could tax other ward-vassals, and get considerable compositions from them for doing it.—It is most just the clergy have a competent maintenance to vindicate them from poverty, and set them above contempt and all worldly cares; yea, they should be allowed somewhat even for hospitality; but when they began to get immense donations, and great temporalities by the munificence of princes, and their superstition, about the year 1600, then was that voice heard, *hodie venenum infusum est in ecclesiam.* We may now take up that old regret, when there were *calices lignei* there were then *sacerdotis aurii,* but now when our *calices* are of gold and silver, we have gotten *ligneos sacerdotes.*

1684. *February* 21.—THE Archbishop of St Andrew's pursuit against Blebo (mentioned 7th February current,) is advised; and after much agitation, they laid it aside as *egens decisione imperatoria,* and referred it to be determined by the next Session of Parliament, if a Bishop, (who was an administrator of his benefice), might tax a ward-holding without committing dilapidation. Now it was thought, though the Parliament should find they could not, yet that would not be retrotracted *ad præterita* but only respect *casus futuros.* So it seemed Blebo's right, in probability, would then have escaped as valid.

But the Archbishop could not be diverted from his zeal to the church, and so gave in a bill to the Lords on the 12th of March, craving that they would not delay their interlocutor, nor refer it to the Parliament, seeing the interest of the church suffered *medio tempore.* THE LORDS found, seeing the pursuer (contrary to his own private advantage, for the good of the Bishoprick,) urged for a decision, they could not refuse to advise it; and cited the 92d act Parl. 1576 ordaining them to proceed in all causes, without referring them to the Parlia-

ment; and therefore declared they would advise it to-morrow.——And accordingly on the 13th March, "THE LORDS reduced the conversion to tax-ward; and found a Bishop not being *dominus* (who may dispose, except law or paction restrain him,) but only an *œconomus, dispensator, curator, et administrator beneficii*, he cannot dispose farther than law permits him, which it does not, to change simple-ward to tax-ward." Sir George Lockhart, at delivering the interlocutor, repeated from Lucan, *victrix causa diis placuit, sed victa Catoni;* for he thought they had decided against the principles of the Canon law, and against Craig *de feud.*—This interlocutor reflected on the last Archbishop Sharp, who taxed this ward; but Blebo had warrandice in case of distress, and so resolved to recur upon Scotscraig, his son, for the composition he had paid. No 39.

Fountainhall, v. 1. *p.* 267. & 273.

1740. *November* 8. WEDDERBURN *against* DURIE.

No 40.
Feus granted by churchmen after the year 1558, are void, if not confirmed.

BY act of Parl. in 1584, all charters from the church, of whatever date, were declared void, unless brought in and confirmed within a certain time therein limited. This was made a bad use of; for new grants were obtained from the churchmen of lands that had been of old feued out, and confirmation thereof got from the Crown, whereby some old proprietors were stripped of their free-holds, however lawfully purchased, and, for onerous causes, conform to the laws for the time, merely for the neglect of not obtaining such confirmation; wherefore, by statute 186th Parl. 1593, the statute in 1584, was so far repealed, that all the charters granted by churchmen preceding the year 1558, being regular conform to the laws for the time, were declared effectual, leaving such only as were granted since that time to be void, if not confirmed in terms of the said act 1584.

And in this case, an heritor of church-lands anciently astricted to the mill of the abbey of Dumfermline, pretending immunity upon a charter from the commendator of the monastry in 1581, bearing a clause in the Tenendas, *cum multuris, &c.* notwithstanding the said charter had by prescription become good as to the property, yet, with respect to the immunity from thirlage, as prescription of immunity by 40 years discontinuance of coming to the mill could not be alleged, the charter as to that clause was found null, in respect the said charter 1581 had not been confirmed.

Fol. Dic. v. 3. *p.* 372. *Kilkerran,* (KIRK PATRIMONY.) *No* 1. *p.* 324.