

(betwixt which and non-entry in this case there is no imaginable disparity) falls to the superior's executor; *ergo*, that thir duties would fall under his escheat; *ergo*, are moveable: that all annual prestations after the term is elapsed at which payment should be made are moveable; as bye-gone annual-rents, feu-duties, tack-duties, &c. and thir non-entry duties are of the same kind, *Ergo*—

See a very full and learned reply to this in the Informations beside me.

The Lords found these bye-gone duties, never being declared, belonged to the heir and singular successor: which many judged disonant to the analogy of law.

As for the instance brought from the casualty of ward, I was stumbled by a resolution I found marked by Hadington in his practiques at November, 1609, No. 31, in a debate betwixt the Earl of Argile and the Laird of Ardkinlas; where it was thought a gift of ward and marriage undeclared fell to the donatar's heir, and not to his executor. And Craig, page 68, speaking of the same question, is very unclear; only insinuates as if what was due in right of the ward before the superior's decease appertained to his executors, and the rest to his heir.

In this action of Lindsay's, there were other two things controverted; the first was, that Lindsay's seasine was null, because not registrate, neither in the general register, nor in the particular of that shire where the lands about whose non-entry they were disputing lay. ANSWERED, they were registrate in the particular register of Fyffe, within which these lands lay; at which, by a dispensation contained in his charter, seasine was ordained to be taken, and to stand sufficient for the whole. REPLIED, that dispensation gave no allowance for this way of registration.

The next point was, the pursuer being forced to restrict his summons to the retoured duty for all years and terms preceding the citation in his declarator; after that he craved the full mails and duties of the lands, and cited a decision in a case of Sir Jo. Harper's, where the Lords found it so. The defender alleged, that he could acclaim nothing but the retoured mail till he should obtain a decreet, after which indeed they confessed the full mails and duties would be due; and alleged a practise between the Earl of Argile and the Laird of M'Claud, wherein the Lords, that same very Session, had so determined it.—See them in the Informations.

*Advocates' MS. No. 392, folio 216.*

1673. *June.* Sundry BARONS, &c. *against* The LORD LYON.

ABOUT the same time, in June, 1673, I heard of a process some Barons and Gentlemen had intended against my Lord Lyon, to hear and see it found and declared that he had done wrong in refusing to give them forth their coats of arms with supporters, whereof they and their predecessors had been in possession past all memory, and never quarrelled till now; and, therefore, that he might be decerned to immatriculate them so in his register, and give them forth an extract; conform as is provided by the late act of Parliament in 1672. The Lyon's reason is, because, by an express letter of his Majesty's, none under the dignity of a Lord must use supporters. (He grants them now to some who were in possession of them of old.)

But the gentlemen answer, that Lords at the beginning having been only Barons, and in regard of the considerable interest they had in their respective shires, being commissionate from the small barons and freeholders to represent them in Parliament, they, because of that credit, got first the denomination of Lords, without any patent or creation; and, upon the matter, were nothing but Barons: and so what is due to them is also due to the other, they originally not differing from the rest by any essential or superior step of dignity. So Craig, pages 78 and 79.—REPLIED, whatever was their rise, the other Barons have clearly acknowledged a distinction now; in so far as they have renounced their privilege of coming to Parliaments by the 113 act in 1587; and the distinction being made, and their privileges renounced, by the small Barons in the Parliament 1427. DUPLIED, that act is introduced in their favours, and nowise debars them; but allenarly dispenses with their absence, and the penalty they incurred thereby, &c. The Gentlemen found on the *Interdictum uti possidetis*: the Lyon says, it is but *vetustas erroris*, and an usurpation.

The complainers are the Lairds of Dundas, Halton, Polmais, &c.

*Advocates' MS. No. 393, folio, 216.*

1673. *June.* JAMES RAE *against* ALEXANDER GLASSE of Sauchy.

IN the same month of June, there was an action of count and reckoning pursued by James Rae against Alexander Glasse of Sauchy; wherein Sauchy having produced a bond for 7000 merks, granted by the same James to Marion Rae his niece, now spouse to Sauchy, and to which he had right *jure mariti*;—Against which it was alleged, that the said bond could found no debt against him, because it bears this express quality,—“providing always the said Marion marry with my consent,” and which he never gave:—

ANSWERED, the condition and quality was sufficiently purified and fulfilled; in so far as he was present at the marriage, and is a subscribing witness in the contract of marriage, and staid fourteen years in their house after the same.

REPLIED, where a consent is positively and expressly required to the constitution of an obligation, it must be specially adhibited, and must not be inferred upon presumptions, as that of being present, or a witness; that he never gave his consent to it, and, if he had, they would have taken him subscribing as consenter in the contract; that he never trysted nor communed, but was only witness therein *tanquam quilibet e populo*.

DUPLIED, that his simple presence (though he had not subscribed, as he has done) was sufficient in this case to import a consent, and it is enough he declared no dissent nor dissatisfaction; nor had he any reason, the parties being equal, and without any disparage, and with whom he staid after. And, which is sufficient in the marriage of children, that the father dis-assent not. *L. 7, 12, et 13, D. de Sponsalibus.*—*L. T. C. De filiis-familias, et quemadmodum pro his pater teneatur, lib. 10.*

The Lords found the quality satisfied by his presence and subscribing *witness*, and that the same was equivalent to a solemn and formal consent. Which seems agreeable to that practise marked by Dury at the 26th of July, 1631, Bishop of