

1754. *February 16.* SINCLAIR of ULBSTER *against* SINCLAIR of RATHAR.

[Elch. No. 16, *Superior and Vassal.*]

IN this case the Lords found, that an apparent heir, upon a proof of his apparentcy and possession, without any service, general or special, might pursue a declarator to have it found and declared that the superior could not, without his consent, split the superiority, and that such division was, with respect to him, null and void, so that he was obliged to acknowledge only one superior; because the Lords thought that such declarator was in some sort necessary for the entry of the vassal, in order that he might know of whom to take his entry: and it was compared to the case of an apparent heir reducing a deed on death-bed, or any other deed that might bar his entry or render it of no effect.

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1754. *February 27.* ——— *against* MINISTER of ARESKINE.

THE patron of this parish pursued a modification and locality of the stipend of this parish, which was a parsonage, and the minister in possession of the greatest part of the benefice.

The Lord President declared his opinion, that if it had not been a parsonage, the patron would have had no title to pursue a modification and locality, because in that case he would have had right to the tithes by the act 1690, and might have laid hold of them and kept them, leaving the minister to get a stipend modified for himself, so that he had no interest to pursue a modification; whereas by the act 1693, if the benefice is a parsonage, the minister is entitled to retain the tithes till he get a modified stipend, and therefore the patron has an interest to pursue for such modified stipend, that he may have the remainder of the tithes to himself; but he said he did not think that the minister, as parson, being in possession of the benefice was any reason for modifying to him a greater stipend than ordinary.

Lord Drummore was of opinion that the patron of any parish was entitled to pursue a process of modification, that he might know what belonged to him after deduction of the minister's stipend.

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1754. *March 6.* STIRLINGSHIRE ELECTION,—ARCHIBALD CAMPBELL.

[*Fac. Coll.* No. 105.]

THE question here was about the possession of a feu-superiority, of which neither the feu-duty nor any casualty of the holding had ever been uplifted by the present superior or his authors.

The Lords found, that the possession of a superiority was not properly by

uplifting feu-duties or casualties ; but if the vassal possessed upon a right derived from the superior or any of his authors, then his possession was, in the construction of the law, accounted the possession of the superior, in the same manner as a master possesses by a tenant to whom he has given a tack, though he uplifts no rents from him.

But what made the difficulty in this case was, that the vassal had taken a charter from the Crown, and had possessed the lands for several years without any challenge from the subject-superior : The question was, Whether his possession was by this means inverted, and whether or no the Crown was not to be considered in possession of the lands by its vassal, and not the subject-superior ? And the Lords thought not, and that the subject-superior still continued in possession, notwithstanding of this clandestine right taken from another superior.

Lord Elchies said, that, in a competition with a third party about this right of superiority, the years during which the vassal possessed upon the clandestine right from the wrong superior, would be imputed into the prescription of forty years, provided only that the vassal did not possess so long upon the new right as that the old was lost by prescription.

1754. June 19. LORD ADAM GORDON *against* GARDEN and GRANT.

IN this case it was OBJECTED to the division of a valuation, that the dividend or valuation to be divided was part of a *cumulo* valuation, which *cumulo* valuation was, in the year 1733, divided, and some part of it allotted to the lands of Pitfichie ; but this was done, not by a general meeting of the Commissioners of Supply, upon a proof taken, but by a private meeting, upon consent of parties.

To which it was ANSWERED,—That this division had been held to be a good division ever since it was made ; that the lands of Pitfichie had stood upon the cess-books as they were then valued, and the proprietor of them had always voted ; and if the valuation of these lands was rightly fixed, then the remainder of the *cumulo* valuation, which was the subject of the present division, is also rightly fixed.

To which it was REPLIED,—That standing upon the cess-book for any tract of years, and paying cess, will presume a regular division of the valuation, though none such appear ; but where the division appears, and is plainly irregular, then that presumption must cease : And this the Lords found, upon a division of six to five ; *dissent*. Kaimes *et* Drummore, who thought that a division of valuation by consent was a proper division, unless the objector would undertake to show that it was unfairly made.

*2do*, It was OBJECTED in this case, That the real rent, which was the rule for the division, was rated too high, in respect that the feu-duty payable for the lands holding of the Crown was not deduced, which ought to have been deduced, not being a subject of taxation, and which in fact never was taxed, as not belonging to the vassal but to the superior : And this objection the Lords unanimously sustained.