

No 20.

have patience till the whole persons called before him be exhausted? The latter is no doubt the natural construction; for a man must be whimsical who would chuse to have the succession to his estate governed by chance. A man, for example, dies leaving a daughter born, and a son *in utero*. He certainly intends not that the daughter in this case should succeed more than if he had survived the birth of his son. According to this construction, there is no place for a substitute while there is a nearer in hope, though not existing. And the same rule, founded on the same presumption, obtains also in successions *ab intestato*. This rule, however, must yield to the constitution of the feudal law. A superior is entitled to have a vassal, and if none offer, he is entitled to have back his land. Hence it is, that with a view to the superior, and not the point of right, the next heir in existence when the succession opens, is entitled to serve. But then, he can be considered in no other light than as a fiduciary heir, holding the estate for behoof of the nearer heir. Upon the principles of the feudal law, he is entitled to the rents for his service while he acts as vassal; but he is not proprietor in any view so as to have the power of alienation or of contracting debt. For he is in effect but a trustee; and in that character he is bound to surrender the estate to the nearer heir. See SUCCESSION.

*Sel. Dec. No 108. p. 153.*

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1758. January 27.

KING'S COLLEGE of Aberdeen *against* LORD FALCONER of Halkerton and Others.

No 21.

Heritors subjected to parsonage teind, are not bound to carry it to the titular.

LORD HALKERTON and other heritors of the parish of Marykirk, being charged to make payment to the King's College of Aberdeen, titulars of the teinds of that parish of certain quantities of teind-corn, the College *insisted*, That the heritors were bound to make their tenants transport the corn to any place at the option of the titulars, provided it be at no greater distance than the tenants by tack or custom are bound to transport the farm-corn payable to their landlords. The heritors having the victual ready to be delivered upon the ground, but refusing any carriage, the matter was brought before the Court of Session. The point of favour was chiefly *insisted* on for the chargers, That it would be a small matter to the heritors to carry their teind-corn to the next port, but great charge and trouble to the College. The heritors, on the other hand, *contended*, That if this claim were well-founded, they themselves must be at the expense of carriage, their tenants not being bound to carry any corn but what belonged to their landlords. They observed, that there is no difference betwixt payment of money and payment of corn: A debtor by a bond of borrowed money, wanting to make payment, must indeed carry the money to the creditor; but if the creditor demand payment, he must apply to the debtor, and take the money where the debtor resides. The case is the same in the payment of corn. If the heritors want to get free of the teind corn, they must carry it to Aber-

deen; but if willing to wait till a demand be made, the titulars must take delivery upon the ground.

No 21.

The charge accordingly was suspended, the COURT being of opinion, that the heritors were not bound to carry the teind-corn.

It is clear, that the corn must be delivered either where it grows or where the titular lives. If the latter, the heritor runs the risk of carriage, whether by sea or land. There appears no foundation for subjecting him to such a burden. *2dly*, A titularity is a subject of commerce, and the College of Aberdeen may acquire right to the teinds of a parish in Galloway. At that rate, heritors might be subjected to an intolerable burden. The chargers, it is true, confine their demand to the same carriage that the tenants perform to their landlords. But this voluntary concession cannot enter into the argument. If they have a right to any carriage, it must be to Aberdeen, where the titulars have their residence. The tenants are not bound; and there is no law for subjecting the heritors. See TEINDS.

*Fol. Dic. v. 3. p. 306. Sel. Dec. No 144. p. 200.*

1781. December 20.

SIR CHARLES PRESTON *against* The EARL of DUNDONALD.

IN 1745, Sir George Preston feued out a small piece of ground to Mr Cochran of Culross, absolutely and irredeemably. In 1750 Mr Cochran, by bond, obliged himself and his heirs, 'that, whenever he or they should think fit to dispose of this subject, they should offer it to Sir George, or his heirs, for the sum of L. 307 : 13 : 4d Sterling.'

The estate of Culross, together with this pendicle, upon the demise of Mr Cochran, devolved to the Earl of Dundonald; and his affairs having gone into disorder, Sir Charles Preston, son and heir of Sir George, commenced different processes for making the above mentioned obligation effectual. They concluded for having it declared, *1mo*, 'That the lands had been in non-entry since the death of Mr Cochran; *2do*, That the Earl of Dundonald, as his representative, and his successors legal and voluntary, were obliged to make up titles thereto, so as to make this right of pre-emption effectual against singular successors, by inserting it in their charters and infeftments; and, *3tio*, That the Earl of Dundonald and his foresaids were obliged to subscribe a new deed *verbatim*, in terms of the obligation sued on, with the clauses proper for enabling the pursuer to register the same in the register of reversions, within sixty days from its date, according to the prescription of the statute 1617. c. 12.'

Against the two last conclusions the Earl.

No 22:

A superior granted a feu of ground absolutely and irredeemably, and the feu afterwards granted a bond obliging himself and his heirs, whenever he should think fit to dispose of the subject, to offer it to the superior at a stated price. Found, that the feu must insert the tenor of this back-bond in all the subsequent investitures of the ground, so as to make