position to four daughters ought not to be viewed in a different light from a disposition to four sons or to four strangers. Here the daughters are not disponees, but substitutes. The counsel for Mr Rocheid incautiously admits that, if James Rocheid, younger, had had daughters, the eldest would have had a right to *præcipuum*. I cannot see this: it seems fatal to the plea on Mr Rocheid's part.

KENNET. The difficulty here arises from the accident of the same persons being both substitutes, and having the right of blood. If Sir James Elder had called his daughters as heirs whatsoever, a recompense would have been due; but they are called *nominatim*. If James Rocheid, elder, had had afterwards a fifth daughter born to him, she would have been excluded from the succession. This points out a material difference between the right of the four daughters by blood and by destination.

On the 16th February 1773, the Lords found that, in this *case*, no *præcipuum* is due, as in the case of heirs-portioners *ab intestato*; reserving to parties to be heard to whom the capital messuage shall be adjudged to belong.

Act. H. Dundas. *Alt.* A. Lockhart.

Reporter, Coalston.

Diss. Kaimes, Pitfour, Gardenston, Alva, Monboddo. Mr Cathcart reclaimed: his petition was appointed to be answered. He afterwards adjusted matters with Mr Rocheid.

1772. *November* 17. ALEXANDER, DUKE of GORDON, *against* JAMES, EARL of FIFE.

SUPERIOR AND VASSAL.

[*Dictionary*, 15,096.]

HAILES. The docquet subjoined to the charter, 1686, is null by the statute 1681. It mentions not the name and designation of the writer: the names and designation of the witnesses are not inserted in the body of the writ: but, independent of this, the docquet seems misunderstood by the pursuer. "Upon the condition above expressed," does not mean that David Stewart was to hold for ever of the lord of erection. *Tenend. in feudifirma et hæreditate in perpetuum*, is a constant clause in feu-farm charters, and means that the superior had alienated to the vassal as in property, and without reversion. This is not a condition by which the vassal agrees to hold. There is no occasion for a man interposing his assent to hold a perpetual property instead of a casual. The only meaning of the condition above expressed must be, that the vassal was willing to perform

the military service, which is here, in a manner somewhat uncommon, inserted in a charter of feu-farm. This did not astrict David Stewart to the lord of erection as his superior, if he could, in any future time, make another bargain with the crown, the natural superior.

[Mr A. Lockhart, whose ignorance in this matter is well known, denied the proposition that *in perpetuum* was a common clause in feu-farm charters. I understand that Mr Archibald Campbell, who has drawn more feu-farm charters than Mr Lockhart can read, acknowledges the observation to be just in style.]

AUCHINLECK. The acceptance is nowise published. This scrap of writing could not cut out a man from resorting to the crown as superior. The consent here is not of the nature of a resignation: which the Act, 1661, requires.

MONBODDO. The cause stands where Lord Auchinleck put it. A bargain with the lord of erection is requisite: here was a consent to take a charter. The consent appears not on record: it is not good against a singular successor: *i. e.* a purchaser; for Innes was such, as being an adjudger in implement. My only difficulty is, that the vassal possessed for forty years on the charter from the lord of erection, and that a consent is thereby prescribed to hold of the Lord of erection in all time coming.

JUSTICE-CLERK. My difficulty is from the words of the statute, 1661. If the vassal consented to hold of the lord of erection, he renounced the benefit of the statute. Upon this view of the statute I examine the charter and docquet, 1686. The law, from tenderness to the vassal, would not hold the mere taking of a charter as a consent binding on the vassal for ever. The only question is, Whether did David Stewart, with his eyes open, accept of the lord of erection as his superior. In the case of the *Duke of Hamilton*, the Court even admitted of presumptions, in order to prove a consent. I do not see that the law requires any notification to a singular successor. The statute was public law, known to David Stewart; and his rights showed how his title stood. The singular successor ought to have adverted to this; but I observe that the docquet is no probative writing, and therefore not good.

KAIMES. The purchaser, before his purchase, might have brought an action against Lord Dunfermline, for having it found and declared that he was to hold of the crown.

COALSTON. The Act, 1661, provides that the vassal shall be cut off from holding of the crown, if he consented to hold of a subject-superior or the lord of erection. The question is, Have we sufficient evidence that David Stewart did so consent? All depends upon the docquet. That is no stronger than taking infeftment, which would not be sufficient.

PRESIDENT. In 1679, David Stewart took a charter and infeftment from the crown; in 1686, from the Lord of erection: 1762, Lord Fife's author, upon a purchase from the heir of Stewart, adjudged in implement, and afterwards took a charter from the crown. The docquet, 1686, can scarcely bear any other sense than that the vassal meant to continue vassal of the lord of erection. But then Lord Fife's author was not bound to know this consent, nor was he thereby bound. It was in the chartulary of the superior, but not in the vassal's charter or infeftment. As to Lord Monboddo's difficulty, there are no *termini habiles* for prescription: David Stewart had a feudal right from the crown as

well as from the lord of erection. There was no possession by the lord of erection upon the charter 1686, because he would have drawn the feu-duties independent of that charter, and although David Stewart had continued to hold of the crown.

ALVA. It does not appear, from the docquet, that David Stewart consented to hold for ever of the lord of erection.

On the 17th November 1772, "The Lords assoilyied."

Act. J. Montgomery, &c. *Alt.* R. M'Queen, &c.

Reporter, Alva. *Non liquet*, Gardenston.

4th March 1773.—JUSTICE-CLERK. I am still of the opinion of the interlocutor. The lords of erection resigned the superiorities, reserving their infeftments as titles to draw feu-duties. There is a proviso in the case of the consent of the vassal. The question is, Whether the vassal has given such consent as is required by statute. I will not hold the act of taking charters as sufficient to imply such consent. It would be dangerous to adopt such an inference. The law made the king superior of church lands as much as of lay lands: the anomalous right left with superiors led people to mistake, and to accept of charters from the subject-superiors. I will never overtake the vassals in this country, when they go to subject-superiors, and accept of charters from them, unless I see the condition fulfilled,—the consent of the vassal. There is no such thing here; nothing but a null docquet. I require evidence in a formal writing, obligatory on the vassal and his heirs.

AUCHINLECK. I have only to add, that the consent in the Act of Parliament does not mean by taking charters, but by a petition from the vassal of the church-lands. There are upon record writings of that nature, particularly in the case of the vassals of the Abbacy of Kilwinning.

MONBODDO. The first question is, Whether the charter to David Stewart, in 1686, binds him and his heirs from returning to the crown? *2d*, Whether this charter is binding on singular successors? As to the first, the taking this charter, and the acceptance, was binding on David Stewart and his heirs. The peculiarity here is, that David Stewart did once hold of the crown. After that he agreed to hold of the lord of erection. Consent was here adhibited: the vassal gave up the crown's charter. This consent is not the worse because not executed in a formal way: it is stronger, because done informally and *per saltum*. The docquet is not regular, but the infeftment remedies that. As to the second point, Whether this is binding on singular successors? I think that it is binding, because the singular successors might have seen the right of the subject-superior, both in the seasine and in the retours of David Stewart's heirs. There is much also in the plea of prescription. David Stewart consented to possess upon the posterior right. That was the title of possession. The case of *Heriot's Hospital* was a bad decision, even although it had not been reversed.

COALSTON. My only difficulty is upon the point of prescription. It is necessary that a clear consent be given: equivalents are not to be laid hold of. If the docquet is not binding, by what law can we make it effectual? The acceptance in the docquet is no stronger than an infeftment, which is a consent *rebus et factis*. I do not see how the singular successors can be bound: They did

not see the docquet; and, if they had, they would have only seen that David Stewart agreed to hold of the lord of erection. [In the course of the debate his difficulties as to prescription were removed.]

KAIMES. A man has a choice of two things: if he choose one thing for *ten* years, he may change his mind on the eleventh. My difficulty is, Whether there is a valid obligation on David Stewart? If he was once vassal of the Duke of Gordon, he could do no act or deed to disappoint the vassalage. But I doubt as to the validity of the docquet. It can only be supported as a relative deed.

GARDENSTON. As to the point of prescription; suppose the vassal had formally agreed to hold of the subject-superior, and had afterwards taken a charter from the crown, and had possessed on that charter for forty years—Would not the plea of prescription be good as to the vassal? We cannot make a distinction between the right of the vassal and the right of the superior.

JUSTICE-CLERK. David Stewart once had a charter, (in 1679,) from the crown. In 1686, he took a null charter from the subject-superior. Will you force him to ascribe his possession to a *null*, when he had a good title? There is no evidence that he possessed upon the *null* title. Besides, he died long before the lapse of the years of prescription; and no feudal title has been made up by his heirs upon the footing of the charter 1686.

AUCHINLECK. I doubt of the power of election, after that the king was once chosen for the superior. If a man desires to be entered vassal, he may take a charter from half-a-dozen superiors, and he may ascribe his possession to whichever charter he pleases.

ALVA. A consent must be such as to infer an abjuration of every other superior.

On the 4th March 1773, "The Lords repelled the reasons of reduction, and adhered to their interlocutor of 17th November 1772."

Act. A. Lockhart. *Alt.* R. M'Queen.

Reporter, Alva.

Diss. Gardenston, Monboddo. *Non liquet*, Kaimes.

N.B. The objection to the docquet had escaped the observation of the lawyers, and was accidentally discovered on the bench by Lord Hailes.

1773. *January* 19. JAMES SCOT *against* JAMES FRASER.

POOR.

Power of heritors sustained to lay on an assessment for maintenance of the poor by the real rent, although formerly levied according to the valued rent, as being an expedient alteration from the particular situation of the parish.

[*Fac. Coll., VI.* 124; *Dictionary*, 10,577.]

AUCHINLECK. If the rule of real rent, adopted by the heritors and kirk-ses-