AITCHESON *against* HOPKIRK and OTHERS.

IN a cause, Aitcheson of Rochsolloch *against* Hopkirk and Others, this point occurred:—Mr Aitcheson's authors had feued out, to the authors of Hopkirk and others, small parcels of land in the town of Airdrie; and, by the feu-rights, a certain feu-duty was stipulated to the superior, to be doubled at the entry of each heir; but nothing was said as to singular successors. Upon these spots of ground the feuars raised houses to a considerable value: Mr Aitcheson insisted, that the present proprietors, who were singular successors, should take an entry, and pay a year's rent of land and houses; which being refused, he brought a declarator, in which Lord Alva, as Ordinary, found that Mr Aitcheson was entitled to his demand. The defenders reclaimed, and the cause was heard in presence. For the defenders it was pleaded, That, anciently, houses were not, properly speaking, the subject of feudal tenures in Scotland: that, to give the rent of houses to a superior, where small pieces of land had been feued out, upon which houses of great value had been built, as was the case here, would, in reality, be giving the superior, for the entry of a vassal, a sum greatly exceeding the value of the feu. It was answered, That the superior was entitled to a year's rent of both lands and houses; that the law made no distinction, and that the practice in similar cases had been, for superiors to exact the rent of houses, on the entry of singular successors. The Lords ordered an inquiry to be made into the practice; and, upon advising the whole, "Found that the superior was entitled to exact a composition for the houses as well as for the lands." What seemed chiefly to weigh with the Court, was the practice.

1777. *July* 8. JOHN MACKENZIE of DELVIN *against* SIR HECTOR MACKENZIE.

NOTWITHSTANDING the decision, 11 *New Coll.*, No. 231, it is still a doubt, whether a superior is bound to grant a charter upon a tailyie, containing prohibitory clauses, upon paying composition on entry as an heir, even though the immediate heir of tailyie is also heir of line. The point occurred in a case, John Mackenzie of Delvin, pursuer, *against* Sir Hector Mackenzie of Gairloch. In the information for Mr Mackenzie, the question was stated thus:—How far a subject superior, who has never acknowledged a tailyie made by a vassal, can be obliged to enter an heir, under a strict entail, without receiving the composition usually paid in like cases, where the heir of tailyie, demanding the entry, is also the lineal heir of the vassal last entered. The question, it was said, was new; and that the superior's right to exact such composition had never been disputed.

In the information for Sir Hector, it was stated thus:—Whether the defender is entitled to be entered on paying a *duplicando* of the feu-duty, in the character of an heir; or what other claim lies against him; whether is he to be

considered as a singular successor liable in a year's rent, or obliged to come in the superior's will to pay what composition shall be demanded;—the precise *quantum* not being defined, either by the right itself or in practice.

The question appeared to the Lords to be attended with difficulty, chiefly arising from the Act of Parliament 1685, allowing his Majesty's subjects to tailyie their lands and estates as they should think proper; for, if tailyies were lawful not only on the footing of that act, but at common law, it did not appear upon what footing superiors could refuse to enter upon an entail.

At the same time, no doubt entering upon an entail, if it could be avoided, was for the interest of the superior; and it appeared contrary to equity that a superior should be deprived of any part of the profits of his superiority, without his own act, by the mere deed of the vassal.

Difficulties occurring on both sides, and nothing fixed by practice, which appeared to be exceedingly various;—the superior, in some cases, when entering on a tailyie, receiving a year's rent, sometimes less, and sometimes even more; at other times, receiving only the *duplicando*, as in the common case of an heir,—the Lords seemed generally to agree, that, as Sir Hector was the heir of the former investiture, Mr Mackenzie, the superior, was bound to enter him, even upon the tailyie, as an heir, for payment of a *duplicando* of the feu-duty; and they found so. And several of them, particularly Lord President, thought that they should have stopt there, and gone no further; but others of them, in respect of the decision, 2d Fac. Coll., No. 231, inclined to add a reservation of the superior's claim, at the entry of any future heir of tailyie, not an heir of the former investiture; and such reservation was added accordingly,—reserving also to the heir his defences against the same. With respect to the above decision, 2d Fac. Coll., No. 231, several of the Lords doubted; and, at any rate, it is only a single decision.

The reservation in the Act 1685, as to casualties of superiority, was insisted on; but it appears to me, when carefully attended to, to mean no more than that casualties of superiority shall not be considered as debts falling under the irritancies in any tailyie; and consequently has no relation to this question.

The EARL of DUNMORE *against* MIDDLETON.

THE superior is, *ex facie* of his titles, absolute proprietor of the lands contained in them; and, if he possesses the actual right of property upon these titles for the period of forty years, his possession is available to produce a prescriptive right. The right of the vassal is lost by the negative prescription. Accordingly, in a late question between the Earl of Dunmore and Captain Middleton of Lethem Dalles, the Lords determined, that 40 years' possession by a superior, upon titles of superiority alone, gives a good prescriptive title, upon which a valid conveyance of lands may be made. It is therefore law, that the superior's infeftment in the *dominium directum* is a good title for prescribing a right to the property, and 40 years' possession of the *dominium utile* will vest in