

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 infestment 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

him a full right to the lands as effectually as an instrument of resignation from the vassal.

---

M'LEOD of CADBOLL *against* ROSS of PITCALNY.

MR ROSS of Pitcalny, by his original charter from Cadboll, became bound to deliver a certain quantity of victual, in name of feu-duty, or a trifling conversion in lieu of it. This conversion had been omitted in the after investitures; whereupon Cadboll, the superior, brought an action for delivery of the *ipsa corpora* of the victual, or for the value thereof, according to the fiars of the county. But the Lords found, that Cadboll was bound to accept of the conversion mentioned in the original charter; and, upon an appeal, the decret was affirmed with costs.

---

WALTER FERGUSON *against* The GOVERNORS of HERIOT'S HOSPITAL.

JOHN Cleland, gardener at Canon-milns, feued, from Heriot's Hospital, five acres of lands near Broughton Loan, and in his feu-charter was inserted a clause, declaring, "That it shall not be leisome to him, and his foresaids, to dig for stones, coal, sand, or any other thing within the said ground, nor to use the same in any other way than by the ordinary labour of plough and spade, without the express consent and liberty of the Governors of the Hospital, had and obtained to that effect." Walter Ferguson, writer, became purchaser of a part of this feu, which lying in the neighbourhood of the extended royalty, he proposed to build a small square upon it, but was opposed by the Governors of the Hospital, who apprehended that it might interfere with the interest of the city in feuing their grounds in the new extended royalty. They presented therefore a bill of suspension to stop his building: but the bill was refused by Lord Auchinleck; afterwards by the Court; and these judgments were affirmed on appeal. In consequence whereof, Mr Ferguson had permission to build.

---

DUNDAS of QUARROLE *against* MRS DRUMMOND of BLAIR DRUMMOND.

MR Dundas of Quarrole insisted against the heirs of Mr Drummond of Blair, to make up titles, in order to save him from paying a year's rent for entering with the superior as a singular successor. The Lords found, that no such claim lay: If the heir inclines to enter, he may, upon paying what is due upon that occasion; but the singular successor cannot compel him, neither can he claim in his right.

And this decision was approved 9th December 1778, *Hamilton of Westport against Earl and Countess of Lauderdale.*