1670. *June* 15.

SCOT of Thirlestoun *against* The LAIRD DRUMLANRIG.

No. 52.
The act 1669 allowing superiors an year's rent for receiving adjudgers, which they had before for receiving apprisers, found to have no retrospect.

Scot of Thirleston having adjudged certain lands, charges Drumlanrig, superior, to receive him, who suspends, and alleges he ought to have a year's rent, conform to the late act of Parliament 1669. It was answered, that this and all other acts have effect *ad futura*; but not only this adjudication was led before the act, but Drumlanrig was charged before the act, and having no just reason to disobey the charge when he was charged, he cannot claim the benefit of a subsequent law. It was answered, The tenor of the act was declaratory, and bore a general clause, that adjudications should be in all things as apprisings.

The Lords found, that seeing the act did not expressly relate to by-gones, it could not extend to any adjudication, whereupon a charge was given before the act.

*Fol. Dic. v.* 2. *p.* 409. *Stair, v.* 1. *p.* 680.

*** Gosford reports this case:

The Lord Drumlanrig being charged to enter Thirlstoun, his vassal, to the lands of Brakenside, which he had adjudged from the apparent heir of his vassal, did suspend upon this reason, That he behoved to have a year's rent before he should subscribe the charter, conform to the late act of Parliament anent adjudications. It was answered, That the adjudication was led, and the superior charged before the late act of Parliament, which did only respect *futura sed non præterita*. To this it was replied, That the act of Parliament, as it was conceived, was *declaratoria juris*, bearing in the narrative, That there was *par ratio* that the superior should have a year's rent from adjudger's as well as comprisers.

The Lords, notwithstanding, did find the letters orderly proceeded, seeing the statutory part of the act did bear only that adjudgers should be in all things in a like condition with apprisers, which did import that it should only take place *ad futura*.

*Gosford MS. p.* 113.

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1672. *December* 3.

MR. HENRY HAY *against* His TENANTS and The LAIRD of EARLSTOUN.

No. 53.
An appriser found not to be bound to pay an year's duty till he insisted for infeftment.

Mr. Henry Hay being infeft in the lands of Glen, which is a part of the lands and Barony of Earlstoun, pursues his tenants for mails and duties. Compearance is made for Earlstoun, who alleged, That the pursuer hath no right, being only infeft upon Mr. John Hay his brother's disposition, whereas, by his production it appears, that Mr. John was never infeft, but only served heir to his father Mr. William, who apprised the lands, and was never infeft. It was answered, That the pursuer, though he had only the right of apprising, and neither he nor his authors presently

No. 53. infeft, might pursue for mails and duties, according to the ordinary custom. It was replied, That if the pursuer produced a sufficient progress of rights denuding the Barons of Earlston of the lands of Glen, and did instruct possession, either by him or his authors, he might continue that possession, albeit the person who was last infeft was dead, and the infeftment not renewed in his person; yet here he does not produce an original right from the Barons of Earlstoun, nor can he pretend a possessory judgment, because Earlstoun is in possession. The pursuer duplied, That he produced a progress of infeftments by the space of 40 years, and offered to prove, that his authors, by virtue of these infeftments, had possessed 40 years without interruption, which gave them as good right by the act of prescription, as if he could produce the original infeftments from the Barons of Earlstoun.

The Lords found that it was sufficient for the pursuer, either to instruct that they had the benefit of a possessory judgment by seven years possession, or that he should produce the original right, and a progress therefrom, or that he instruct 40 years possession by virtue of a progress, or 40 years infeftments standing together.

The superior, Earlstoun, further alleged, That albeit in a competition with others, the pursuer's author's rights might prefer him, albeit not established in his person by infeftment; yet where the question is with the superior, who now offers to infeft him and his authors, upon payment of the non-entry duties, since the death of the vassal last infeft, and upon payment of a year's duty to the superior for entering him upon the apprising, he cannot crave access to the mails and duties until these be performed. It was answered, That the pursuer ought to continue in the possession of his authors, which cannot be hindered upon pretence of non-entry, which was never sustained by way of exception, but necessarily requires a declarator; neither can the pursuer be hindered to possess and uplift mails and duties till he should pay the superior a year's rent for the entry, because it is in the appriser's option, either to make use of the naked apprising, which hath the effect of an assignation to the mails and duties, without either infeftment, or a charge, or to crave infeftment of the superior, who can only crave a year's duty if he be charged; for if the appriser shall now possess by the apprising, all the casualities are competent to the superior by the death of the former vassal. It was replied, If this allegeance should be sustained, superiors might be frustrated of their entries during all the time of the legal, whereas they get a year's rent, albeit the lands should be redeemed, and the old vassal infeft the next year or month.

The Lords repelled the defence upon non-entry, and reserved the same by way of declarator, and did also repel the allegeance, upon the composition for the entry of the appriser, unless the appriser were insisting for infeftment; and found that he might possess by the apprising, as equivalent to an assignation to the mails and duties, so long as the person against whom the apprising was led was not denuded by infeftment, albeit they were remembered that in the case of one Mitchel Johnston against the Earl of Dumfries, who having apprised the lands of Auchincross,

and pursuing for mails and duties, the Earl compearing as superior, did exclude him, till he paid a year's duty; which decision the Lords resolved not to follow. No. 53.

*Fol. Dic. v. 2. p. 409. Stair, v. 2. p. 123.*

*** Gosford reports this case:

Mr. Henry Hay being infeft in the lands of Glen, having pursued the tenants for mails and duties, compearance was made for Earlstoun, who alleged, that the pursuer being only infeft base, and by his infeftment it being clear, that he did hold the said lands of Earlstoun as a part of that Barony, the lands were in non-entry; as likewise, until there was a year's duty paid to Earlstoun, the pursuer could not enter to the possession. It was replied, That the pursuer and his authors having been in possession for many years, his right ought to be sustained *in hoc judicio possessorio*, and though Earlstoun might pursue a declarator of non-entry, yet upon that pretence, or for want of a year's duty for the entry, he could not be debarred from possession.

The Lords did repel the defence *hoc loco*, reserving to Earlstoun to pursue a declarator of non-entry as accords, and found, that a year's tack duty for the entry of the vassal could not be craved *hoc ordine*; but when the superior shall be charged to enter; seeing until that time he may pursue for the non-entry, and recover the whole duties of the lands.

*Gosford MS. p. 282.*

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1680. *June* 25. The LAIRD of BLAIR *against* The LORD MONTGOMERY.

No. 54.
The superior found obliged to receive a donatar of forfeiture, in virtue of Act 2. Parl. 1584. without paying a year's composition.

The Laird of Blair being donatar to the forefault right of the wad-set lands which did belong to Ker of Kerseland, and were by him held of Montgomery of Haslehead, and having obtained presentation from the King, he pursued Haslehead, his heir, to enter him vassal, and for non-obedience, obtained decreet against him, declaring that Haslehead, his heir, had lost the superiority during his life; and now pursues my Lord Montgomery as Haslehead's superior *supplendo vices* to infeft him; who alleged that he ought not to enter him till he pay a year's rent, for by the presentation he being obliged to receive a stranger vassal, he ought to pay a year's rent, in the same way as if it had been an apprising or adjudication. 2*do*, Haslehead being several years in non-entry, he is not obliged to receive the donatar in his place, till he pay the non-entry duties, as he would not be obliged to receive Haslehead's heir upon precept out of the Chancellary, till he pay the non-entry duties. It was answered for the donatar, that by the 2d Act, Parl. 1584, it is declared, that the King has right to dispose of the heritable right of his sub-vassal forefault, by presentation, which therefore obliges the sub-vassal's superior to receive him, and yet mentions no year's rent for his entry; likeas, none was due in