1672. *June* 28. MENZIES *against* LAIRD of GLENURCHY.

No. 79.
A superior is bound to infeft his vassal or sub-vassal, whatever right he may have in his own person, which is reserved to him by a clause *salvo jure suo*.

Umquhile Mr. William Menzies of Shian, being infeft in the lands of Shian, *in anno* 1631, by the Laird of Lawers, James Menzies, his son and heir, being retoured heir to him therein, and having raised precepts out of the Chancery against Lawers, to infeft him; upon his disobedience he now pursues Glenurchy, Lawers' superior *supplendo ejus vices*, to infeft him. Glenurchy alleged absolvitor, because he denies to be superior to Lawers, but that the land belongs to him in property, and there is no right from him or his predecessors to Lawers shown. The pursuer answered, That vassals seeking infeftment upon retours against a superior's superior, which is matter of course, cannot be put to instruct their superior's right, which is in the superior's own hand, no more than an appriser craving infeftment from his debtor's superior, is obliged to instruct his debtor's right, but the infeftment in either case is *periculo petentis*, and *salvo jure*, even of the superior himself;—and here the pursuer produced discharges granted by Glenurchy's grandfather of the feu-duties of these lands. It was replied, That receipts of feu-duties cannot instruct the feu, much less constitute the same, even against the receiver himself, further than as to the years contained in the receipts, much less against his singular successor. *Ita est*, Glenurchy hath right by disposition from his grandfather, his father being living; 2*do*, Glenurchy hath reduction depending both against Lawers and this pursuer, of any pretence of right they have, which is prejudicial, and ought to be first discussed.

The Lords repelled the defences, and decerned Glenurchy to infeft, reserving his own right and reduction as accords, seeing the pursuer has been so long in possession, and the event of the reduction is dubious.

Fol. Dic. 2. *p.* 410. *Stair*, *v.* 2. *p.* 93.

*** Gosford reports this case:

Shian's father being immediate vassal to the Laird of Lawers when he died, his son being served heir, and having obtained decreet against Lawers, and, upon his refusal, having charged Glenurchy to enter him, he did allege, That he could not be decerned, because he was infeft in the property of the said lands. It was replied, That they offered to prove that Sir Duncan Campbell, Glenurchie's goodsir, from whom he derived right, had received payment of the feu-duties of the said-lands from the Lairds of Lawers, or Lairds of Shian. To which it was duplied, That Glenurchie not being apparent heir when he was infeft by Sir Duncan, his father being yet in life, he was in the case of a singular successor, who cannot be prejudged of the right of property upon an allegeance of payment of a year's feu-duty to his author.

The Lords did repel the defence and duply, and found, That as on a charge by a compriser against the superior, who pretends right to the property, they are in use to decern them to enter, but prejudice of any right they themselves can pre-

No. 79. tend to the lands; so, in this case, they decerned Glenurchie to enter Shian reserving all his own right of property, and reduction of Shian's right at his instance, which they declared to be unprejudged by his entry.

Gosford MS. p. 264.

1795. *November* 19.

The DUKE of ARGYLE *against* The EARL of DUNMORE.

No. 80.
A superior having refused to grant a charter on an entail, unless it contained a clause acknowledging his right to a year's rent, whenever the substitute taking up the estate should not be heir-male or of line to the vassal last entered, the Court found him only entitled to have a reservation inserted in it, keeping the question open for discusssion when the case should occur.

The trustees of the late Earl of Dunmore purchased certain lands, of which the Duke of Argyle is superior, and entailed them on the family of Dunmore, and others, as directed by the deed under which they acted.

In a declarator of non-entry brought by the Duke of Argyle against the present Earl of Dunmore, the institute in the entail, the defender was willing to pay a year's rent for his entry as a singular successor; but the pursuer further insisted, that the charter should contain a declaration, that he should not be obliged to enter such of the substitutes as were not heirs-male or of line to the vassal last entered and infeft, without receiving a year's rent from them, as singular successors also.

The defender, while he objected to this clause, offered, that all the casualities of superiority should be reserved in the charter; and, in particular, that it should be declared in it, "That the said Duke, by granting this present charter, does not exclude himself or his heirs from any claim which he or they may have at law to a full year's rent of the lands herein contained, wherever the heirs of entail to whom the succession shall open shall happen not to be the heir of line of the person who was last entered and infeft by the said Duke, and his foresaids."

The pursuer maintained, that until an entail is acknowledged by the superior, in questions with him, every substitute who is not heir of line to the last vassal is to be held a singular successor, and must pay a composition as such for his entry: That his being willing to put such of them as might be heirs-male of the last vassal in a different situation, was merely *ex gratia*, and from its being his wish to be equally indulgent to the defender as to his other vassals, to whom it had been the practice of his family to grant charters upon similar terms: And that it was necessary for the Court to determine the general question at present; because, after acknowledging an entail, by granting a charter upon it, although it contained the reservation proposed by the defender, the pursuer would be precluded from making his present claim, 10th July, 1760, Lockhart against Denham, No. 56. p. 15047.

Answered: It is imposing an unnecessary hardship on the defender, to oblige him to discuss a general question of law, the decision of which cannot affect the interest of himself, or of his descendants, who will fall to be entered as heirs, though the charter be made out in the terms proposed by the pursuer: The reservation offered leaves the point open for discussion, when a case occurs, where