

No 49.

\* \* Gosford reports this case :

IN an improbation pursued at the instance of the Earl of Nithsdale, as infeft in the barony of Holywood, against the vassals, it was *alleged* for them, That they were not obliged to take a term to produce their evidents, because the Earl's predecessors were infeft in the said barony, as Lords of Erection, and upon their submission and surrender of their superiority the same was annexed to the Crown, *anno* 1633, whereby all the Lords of Erection are declared to have right to the feu-duties of the vassals, ay and while they be redeemed, which can be no title to the Earl to pursue an improbation of the vassals' evidents and rights. It was *replied*, That the Earl and his predecessors standing heritably infeft in the said lands, had good right to pursue an improbation against the vassals, because their right being improven, he himself will remain vassal to the King, and obtain the property; likeas the King's Advocate concurs in the pursuit, for his Majesty's interest. THE LORDS did sustain the defence, notwithstanding the reply, and found that the pnsuer's title, being nothing but a right to feu-duties, he could not thereupon pursue an improbation which were of a dangerous consequence, against the whole feuars of kirk lands; but they did sustain the same as an exhibition of their charters, to the effect he might know the quantity of the feu-duties to which he had right; and found likewise, that a general concurrence of the King's Advocate was not sufficient, but that he ought to pursue an improbation at the King's instance, if he intended to question the vassals' right.

*Gosford, MS. No 554. p. 298.*

1682. *March.*FINDOURY *against* TOWN of BRECHIN.

No 50.

FOUND, that although superiors of erection, by the act 10th Parliament 1633, were not formal superiors, (having only the feu-duties, and not the other profits of the superiority) yet hospital lands, or *maison-dieus*, fell not under the annexation 1587; cap. 29. and that such continued superiors, as being excepted from the annexation.

*Fol. Dic. v. I. p. 531. Harcarse, (SUPERIORITY.) No 939. p. 264.*

\* \* Sir P. Home reports this case :

1682 *February*.—THE Laird of Findourie, as having right by progress to the lands of Coldhame, from the Chaplains of Coldhame, having pursued a declarator against the Town of Brechin, for declaring his right and property of the said teinds, and that he holds the same feu of the King, who has right to the superiority by the act of annexation in the year 1587, and that the Town of Brechin had no right thereto; *Answered*, That the King having granted a

gift of mortification to the town of Brechin, in the year 1572, for the use of the poor, of all rents, duties, annuities, tenements, and others, which formerly belonged to any chaplainry or alterage, founded within the cathedral church of Brechin, whereof the lands of Coldhame are a part, the town, as now come in place of the chaplain, has right to the superiority of these lands. *Replied*, That the gift of mortification cannot be sustained, because no infeftment followed upon it, and it is a certain principle in law, that *nulla sasina, nulla terra*, whereas the pursuers stand infeft by a right flowing from the chaplain, and confirmed by the King; and albeit the town's right could be sustained, yet they could only have right to the feu-duty, as in the case of the Lords of Erection; and albeit by the act of annexation the superiority of all kirk lands is annexed to the Crown, yet the King cannot dispose of the superiority without consent of Parliament; neither can the King, or any other superior interpose a vassal betwixt them and their vassals; and by the act of annexation in the year 1633, the superiorities of kirk lands are declared to belong to the King both before and after the annexation 1587, and that the Lords of Erection had no farther right to the superiority but to retain the feu-duties, and in an action of reduction and improbation formerly intended at the instance of the town against the pursuer, the LORDS found that the town was in the case of a Lord of Erection, had no right to pursue any such action, but only an exhibition as not having right to the superiority, but only that the vassal may exhibit these rights, that it may be constant what was the feu-duty; and even as to the feu-duty the town could have right, because they had not subscribed the surrender; the privilege of retaining the feu-duties being only granted by the act of Parliament 1633 to those that should subscribe the surrender; as also the pursuer and his authors had prescribed a right by holding of the King by 6 or 7 public infeftments under the Great Seal, since the year 1583. *Duplied*, That this being a gift of mortification in favours of the poor, it is *habili modo* conveyed and established by a charter under the Great Seal, without a sasine, just as the right of the benefices of the said chaplainries and alterages might be conveyed by a right or provision without infeftment, and all gifts of the rents of any chaplainry or alterage granted to royal burghs for the use of the poor are granted after the same manner, by a gift under the Great Seal, without any infeftment; and the town of Brechin, as to this mortification, is altogether in a different case from the Lords of Erection, for the act of annexation in the year 1587, annexing the superiority of kirk-lands to the Crown, bears an express exception of all lands, profits, tenantries, annual-rents, and commodities whatsoever, granted before the date thereof, by his Majesty or any of his predecessors, or by whatsoever other persons, to any hospital within the kingdom, for the use of the poor; so that the first gift of this mortification being before the act of annexation, and the second gift, which is a confirmation of the first, bearing a novodamus, being that same year, falls under the exception of the act, and consequently, likewise, does not fall under the act of Parliament 1633, annexing the superiority of kirk lands to the Crown,

- No 50. which declares that the King has right to the superiority of all kirk lands erected in temporal Lordships, at or before the annexation of kirk lands in the year 1587, reserving to the Lords of Erection the right to the feu-duties ay and while they be redeemed, which does not in the least concern or prejudice mortifications or poor donations, which falls under the exception contained in the act of annexation; and the pursuer could not prescribe a right holding of the King, seeing he and his predecessors were always in use to pay these feu-duties to the town. THE LORDS, in regard the pursuer was infest upon the charter granted to him by the King before any infestment in favours of the Town of Brechin, upon the gift of mortification to them, found and declared that the pursuer holds of the King, and that the Town of Brechin has only right to the feu-duties as patrons of the chaplainrie of Coldhame.

*Sir P. Home, MS. v. 1. No 167. p. 248.*

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1686. *January 15.*

SIR WILLIAM HOPE of Craighall *against* WATSON of Ethernry.

No 51.

ETHERNY holding some kirk-lands of Craighall, which were of old a part of the Abbacy of North Berwick, and having given bond for L. 600 Scots as the composition for his entry; he suspended on this reason, that by the 10th act 1633, annexing the superiority of kirk-lands to the Crown, the King only was his superior. *Answered*, That Sir John Home had resigned these lands to be holden of the Lord of Erection; and that, by the 53d act 1661, a consent of the vassal to hold of an interposed superior is sufficient; *ergo*, a resignation must be declared much more so. *Replied* by the King's Advocate, for the King's interest, That the close of that 53d act reserves to the King all his casualities; *ergo*, the entry is still his. THE LORDS found the reservation in the end of the said act, was only of the King's right of redemption of the feu-farms and casualities at nine years purchase, but not of the casualities themselves during the not redemption, for that would have been *repugnans in adjecto*, and a clear contradiction to the rest of the act; and therefore found the letters or. deily proceeded in favours of Craighall.

*Fol. Dic. v. 1. p. 531. Fountainball, v. 1. p. 392.*

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1688. *July 19.* LORD DUNFERMLINE *against* SIR ROBERT DUNBAR.

No 52.

IN the reduction and improbation at the instance of the Earl of Dunfermline, as come in place of the prior of Pluscardin, against the vassals of the priory,