No. 37. but the King's Bailie, cannot, nor ought not to alter; but the receiving of one not burgess changes not the holding.

Act. *Mowat.*

Fol. Dic. v. 2. *p.* 408. *Durie, p.* 730.

1663. *February* 5. CARNEGY *against* CRANBURN.

No. 38. There being an original grant of ward-lands from the King, bearing, *hæredibus et assignatis quibuscunque*, this clause was found only to entitle the vassal to assign his right before infeftment; but, after infeftment, the vassal disponing his lands, it was found, that it did not save him from recognition.

Fol. Dic. v. 2. *p.* 408. *Stair.*

*** This case is No. 58. p. 10375. *voce* PERSONAL AND TRANSMISSIBLE.

A similar decision was pronounced, 29th January, 1673, Ogilvie against Kinloch, No. 65. p. 10384. IBIDEM.

1684. *February.* AITCHISON *against* DICKSON.

No. 39. The Earl of Roxburgh having granted a feu-infeftment to Adam Niven of a house in Kelso, and having disponed the same to John Dickson, who was infeft, to be holden base of the granter, and John Dickson having entered into a minute with James Aitchison, by which he was obliged to dispone the house, and to grant him a sufficient disposition, containing a procuratory of resignation and precept of sasine; and John Dickson being charged for granting of the disposition; he suspended, upon consignation of a disposition, bearing an obligation to infeft, and procuratory of resignation. Answered, That the suspender being infeft holding base of Niven, his author, the disposition was not sufficient, unless he should procure the base infeftment to be confirmed by the Earl of Roxburgh, superior. The Lords found the disposition sufficient, and that the clause of the bond obliging the suspender to grant a sufficient disposition, did not import that he should obtain himself infeft to be holden of the superior, or procure a confirmation of Niven's base infeftment.

Sir P. Home MS. v. 1. *No.* 563.

1685. *February* 24.

JAMES CLELAND, Merchant in Edinburgh, *against* MR. JOHN DEMPSTER of Pitlever.

No. 40. The Lords prefer Cleland, in respect the first citation is at his instance before the Lords, albeit Pitlever's decreet before the Sheriff of Fife be prior to Cleland's

decreet before the Lords; seeing Cleland was noways *in mora*, but only retarded by the course of the roll; and repel that allegeance, that, before Cleland's citation, Pitlever had presented a signature to the Exchequer, in respect the signature was on a voluntary right, and not in a course of diligence, by apprising or adjudication; and that, in voluntary rights, it is arbitrary to his Majesty, as it is to other superiors, to receive or not receive a vassal; yea, he may compone and take money, and might retard the other's signature. Pitlever gave in a bill against this; but it was refused. No. 40.

Fol. Dic. v. 2. *p.* 408. *Fountainhall, v.* 1. *p.* 344.

1709. *July* 8.

DAVID SPALDING of Ashintully, *against* NAPIER of Kilmahew, *alias* MAXWELL of New-wark, and COCHRAN of Kilmarnock.

No. 41.
The act 57. Parl. 1474, respecting tinsel of superiority, relates to apparent heirs of vassals, not to singular successors.

Ashintully having purchased the lands of Balmacreuchy from Maxwell of New-wark, and, by his lying out unentered, the Earl of Nithsdale, his superior, pursues a declarator of non-entry, and obtains a decreet; whereupon Kilmahew raises a reduction, on these two reasons, 1*mo*, That he offered to prove he was then minor, and his tutors and curators not called; 2*do*, New-wark is pursued to enter heir to his father, as he who died last vest and seised, whereas it appears, by the probation, it was his grandfather. Answered to the *first*, That though tutors are omitted in the narrative of the summons, yet they are mentioned in the conclusion and decerniture; to the *second*, "Father," in construction of law, is a general word, comprehending all our ancestors; L. 201. D. De verb. significat. Patris nomine avus quoque demonstrari intelligitur. Replied, The mention of tutors is not applied to Kilmahew in particular, but runs against all the defenders, if they any have; and the extension of a "father" to a "grandfather," however it may take place *in materia favorabili*, yet it can never support an odious casuality of non-entry. Ashintully having transacted with the Duke of Athole, who had purchased this superiority from my Lord Nithsdale, raised a process of relief and damages against Kilmahew, for not infefting himself, to stop the non-entry; but the Lords, by plurality, found the decreet of declarator of non-entry, whereon he founded his distress, null, on the two nullities foresaid, viz. the not mentioning the tutors, and the wrong designing the father, instead of the grandfather; and although Ashintully had pursued New-wark to enter, and obtained a decreet of tinsel of the superiority, for not obeying the charge, yet they found the 57th act, 1474, related only to the apparent heirs of vassals, charging their over Lords to enter, and not to singular successors, as Ashintully was; though, if he had adjudged, then he could have compelled Nithsdale to have received him.

Fol. Dic. v. 2. *p.* 408. *Fountainhall, v.* 2. *p.* 512.