No 14. creditors, equivalent to his entry, and thereupon they did subscribe a charter; and Mr John Elies having written to the Duke, pretending that he would suffer great prejudice if he were not infeft, the Duke did write the foresaid letter, and did consent that he should be infeft, but the charter was to lie in Robert Hamilton's hand, who was the Duke's ordinary writer, before the defender should procure the composition to the Duke from these English creditors; and the defender not having performed his engagement in getting the compositions to the Duke from English creditors, the Duke did justly cancel the charter.—THE LORDS repelled the first defence; and, before answer to the second, ordained Robert Hamilton to depone if the charter was delivered to him for the behoof of the defender, or on what terms the same was delivered to him, or if he did ever deliver the same to the defender, or back to the pursuer,

Sir P. Home, MS. v. 1. No 531.

No 15.

1687. *July.* LAIRD of POWRIE *against* MARGARET SMITH, &c.

IN a declarator of non-entry against a compriser, it was *alleged* for the defender, That he had charged the pursuer to enter him, and he suspended; and the land must be reputed full since the charge.

Answered; The defender ought to have offered a charter, with the bygone feu-duties, and a year's rent as a composition.

THE LORDS found the answer relevant.

Fol. Dic. v. 2. p. 5. Harcarse, (NON-ENTRY.) *No 736. p. 209.*

1713. *July* 24.

The UNIVERSITY of GLASGOW *against* JAMES HAMILTON of Dalziel.

No 16.
An adjudger having charged the superior to infeft him, and made offer of a charter with a year's rent, this was found to put the superior *in mora*, and to make him liable for the full rents, he being in possession by a declarator of non-entry.

THE University of Glasgow having acquired from Bessie Herbertson an adjudication, led at her instance against Mungo Nisbet, of the lands of Shiels, charged Dalziel, superior of the lands, (who was in possession by a declarator of non-entry,) to enter them, and offered him a charter with a year's rent; and, upon his refusal, pursued a mails and duties against the tenants. In which process the superior compearing, *alleged*, That he was not obliged to receive the University for a vassal; because, through that community's not dying, he should be deprived of the casualties of non-entry, escheat, *&c.* arising from the death or delinquency of a private vassal, which cannot be taken from any superior, without his own consent, by the single deed of his vassal.

Answered for the University, The act 36th of King James III. 5th Parliament, ordains the overlord to receive a creditor, or any other buyer, tenant to him, paying to the overlord a year's mail, as the land is set for the time; and,

failing thereof, that he take the land to himself, and undergang the debts; so that law doth not distinguish communities who are creditors, from singular persons. Which distinction could not be made, without putting a stop to all mortifications, and prohibiting commerce to societies: Whereas, *Collegia licita* can, as any single person, contract, acquire, buy and sell, borrow and lend; and, consequently, may use legal diligence, as well as others, for securing and making their debts effectual; 2*do*, If an University can apprize for debts owing to them, they can, in consequence, oblige the superior to receive them, according to the rule, 'Concesso jure, omnia concedi videntur, sine quibus jus illud 'expediri non potest;' seeing if you deny the means, you take away the end. No 16.

Replied for the superior, The brocard, 'Ubi lex non distinguit, non est di-'stinguendum,' hath many exceptions, arising from the nature of the thing, and other concurring presumptions. 'In lege multa quamvis non excipiantur, 'intelliguntur; scriptum legis angustum est interpretatio diffusa; Seneca 4. 'Controv. 27.' The words of the law afford a presumption; but where the strict observance thereof would involve injustice, or cross what appears to have been the mind of the lawgiver, it is a circumvention of the law. The precise words of the cited statute, indefinitely expressed, import that each of several creditors should pay a year's mail to the overlord for his entry; but equity hath otherways explained it; and, since the words of the law are over-ruled by justice against the superior, why not also for him? He is expressly appointed to enter a creditor, upon payment of a year's rent; but a creditor or buyer, such as the former, who doth not prejudice the superior more as the other, is tacitly implied. It cannot be denied, but Universities and incorporations may purchase, but a general law in the matter of vassalage, is not understood to include them, unless expressed; in the same manner as a cautionry obligation, or the like, is not understood to fall under a general discharge. Obliging the superior to such an entry as this, is a manifest injustice done to him, and *æque rem æstimanti nimis grave;* because, 1*mo*, It deprives him of his property, without his consent, or crime, or any equivalent given for it; 2*do*, It is inconsistent with the feudal contract, whereby the superior gives off his land to his vassal, with a certain view of benefit by the emergent casualties stipulated, which bring sometimes more profit to the superior, than the whole property of the fee would, as the marriage of a ward vassal. When King Malcolm distributed all his lands among his men, reserving nothing to himself but the Royal dignity, and the ward and relief of the heir of each Baron, for his sustentation, would not the Prince have been well sustained, had his vassals next day disponed their lands to incorporations, who neither marry nor die? The vassal should no more have liberty to disappoint the superior of his casualties, than the superior to defeat his right of the fee; and what cannot be done directly, ought not to be allowed to be done indirectly. As the superior cannot interpose another betwixt him and the vassal, to render the latter's condition worse without his consent, so neither can the vassal, by any deed of his, prejudice

No 16. the superior, when the fee becomes open to him. Nor is there any difference in this case, betwixt an adjudication for the vassal's debts, and a voluntary disposition by him; seeing an adjudication carries no more than what was in the vassal's person, and as in it; 3*tio*, Is it to be supposed, that the Parliament, consisting mostly of persons interested in superiorities, would, at a time when vassalages were so much in request, that the affection of changing the vassal was valued to the superior at a year's rent, have made a law to lop off all the casualties of superiorities, without valuing them according to their different natures, and giving some equivalent to the superiors, or security against the attempts and purchases of burrows? No, sure; it was *casus incogitatus* never in the view of the lawgiver; 4*to*, As immemorial forbearance to put this law in execution, in favour of incorporations, doth plainly argue them to be an exception from the rule; so the generality of laws providing against a sub-vassal's alienating his lands, without the superior's consent, to his prejudice, does strongly enforce it; 5*to*, Our Lawyers, as Craig and the Lord Stair, are clear against entering of incorporations. And so is the law of other places; particularly England, where it is not lawful to any to give his land, without the superior's consent, to a religious house, 9th H. III. c. 36. or to make feoffment thereof in mortmain, or to sub-feu, 18th Edw. I. 5. This is no restriction of commerce, but what naturally ariseth from the paction implied in feudal contracts, which incorporations should be aware of, and not contract with vassals without the superior's consent; and, if they do, it is at their peril. Besides, any small inconveniency that might happen to commerce, by excluding incorporations from purchasing lands, being of the nature of these things, *quæ raro et per accidens eveniunt*, falls not under the consideration of law.

Duplied for the University, The argument drawn from the origin and nature of a feudal contract, whereby neither a superior can be obtruded upon a vassal, nor a vassal upon a superior, without mutual consent, is of little weight; for that as feudal rights being now generally granted for a certain price, have everywhere much deborded from their first constitution, when lands were feued freely for military service; so the plain statute, introducing this rule, dispenseth with what is inconsistent in the nature of a feudal contract. And the acts of a sovereign independent nation are not *strictæ interpretationis*, but to have force according to the full intendment of the legislator. Now, it should be a greater disadvantage to the nation, to abridge societies of the benefit of this general law, than could be compensated by any advantage in gratifying superiors to the others prejudice; 2*do*, As superiors must undergo the law, whatever be the inconveniency, and private must always yield to the public good; so they have an equivalent, *viz.* a year's rent of the lands determined by the Parliament; and whatever pactions be now made, formerly much more was not exacted for a sale of the superiority. But next, all yearly prestations are salved to superiors; casualties of superiority arising *ex delicto*, which are not presumed to fall, are little regarded in law; and those purely casual, as ward and relief, which

may chance not to occur in an age, came little under the view of the legislators, who regard only *quod plerumque fit*. So that, upon the whole, seeing inconveniencies cannot in all cases be shunned, and the law doth plainly bar no creditor, it is no heresy to adhere to the letter of the law. No 16.

THE LORDS found, That Dalzell the superior must either enter the university of Glasgow, or pay the debt due to the value of the lands adjudged, as the said value shall be determined by the Lords upon a probation thereof, And found, That the university must transfer their right and debt to him, upon his paying the said value of the lands, with absolute warrandice for the sum they receive; reserving always to them their right against the common debtor, in so far as they shall not be satisfied by Dalziel, in regard the debt due to the University is more than the value of the lands. And found, that Dalzell must be accountable for his intromission with the rents of the lands, or annualrents of the value thereof in his option, from the time the university did first charge him to enter them, and made their offer of a year's rent to him.

Albeit it was *alleged* Dalziel, That the expedient of allowing the superior to be free of such a vassal, by paying the debt to the value of the lands, would afford no relief to those superiors who most need, and are in a special manner under the care of law; superiors that are poor and unable to purchase must lose their right; the Crown will not purchase; and the tutors and curators of minor-superiors cannot purchase with safety. Now, law ought to be equal to rich and poor, and every condition of life. *2do*, A vassal hath indeed been forfeited for the superior's fault; no instance can be given of a superior losing his right of superiority for paying debt, which is effectually done by obliging him to enter an incorporation, at least in ward and blench-holdings, where there is no yearly income. In this the feu superior is in a better condition than the ward, the former having something, and the latter nothing: and yet hitherto the wardhold holding hath been thought most beneficial to the superior. *3tio*, Was ever any person obliged *per modum pœnæ* to purchase, or to lose his own right, without getting any equivalent? This is evidently done to Dalziel; and if he purchase, he must do it *tanquam quilibet*, without getting a year's rent; so that in all events, his superiority is sunk to him without his own fault or fact.

It occurred to some of the Lords at advising, that the charter might be qualified by inserting in it the name of some interposed person, by whom and his heirs the casualties might be determined, according to the Viscount of Stair's proposal, Instit. lib. 2. tit. 3. § 41. But it was not thought fit to go into this overture: Because, *1mo*, There being no law for appointing such a trustee, it could not be done judicially without consent of parties: *2do*, It was doubted if the expedient would answer the design: For the interposed person and his successors being to be liable in the first place, and left to seek their relief from the University; one would hardly be found to undertake such a lasting inconveniency upon him and his posterity. And it might be incommodious and pre-

No 16. judicial to the community to oblige the interposed person's heirs to serve and enter, and grant procuratories for that end; who might possibly prove backward to do that, though upon the charge of others, whereby they could expect no profit. Besides the fee might come to be forfeited, through the delinquency of the trustee; and so the cure prove worse than the disease.

One of the Lords thinking that it would not be so hard upon superiors, to be thus cut off from the expectation of casualties that may or may never belong to them, as to be deprived of those that sometimes will certainly be due, as the *duplicando* of the feu duty at the entry of heirs, or what ariseth from the nature of a feu, upon the vassal's death; his Lordship proposed that those more certain casualties should take place against incorporation-vassals every 50th year, as the common period of an ordinary man's life, in the opinion of the doctors; since law determines the age of the longest liver to be 100 years, and a vassal, though he may live that long, he may die sooner. *See* Superior and Vassal. *Fol. Dic. v.* 2. *p.* 5. *Forbes, p.* 710.

1771. *January* 23.

Magistrates of Inverness *against* William Duff, and Others.

No 17.
Mode of computing non-entry duties, and legal deductions therefrom.

The Magistrates of Inverness having brought a declarator of non-entry against the vassals in certain lands and fishings, a question arose, Whether the defenders, who were singular successors, were liable in a year's rent, or in payment of double the feu-duty? The clause founded on by the vassals was the following in the *reddendo*; 'Nec non duplicando dictam feudi firnam primo 'anno introitus cujuslibet hæredis, aut assignati, &c.;' and the Court, (Fac. Col. February 2d 1769, *voce* Superior and Vassal,) found the defenders liable in a full year's rent upon getting an entry.

This general point being settled, some others required to be adjusted—As to which, the defenders, in a reclaiming petition, *maintained*;

1*mo*, That the pursuers were not authorised to exact a full year's rent; for in the year 1739, an act of council had been passed, whereby it was ordained that no charter should be granted in favour of singular successors, 'till such 'time as the person entering, if he is a burgess residing within this burgh, 'bearing Scot, lot, &c. shall pay the half of a year's free rent of the subject; 'or if the person entering be not a burgess, &c. that such person shall pay be-'fore signing of his charter a full year's free rent, or three-fourths thereof, as 'the Magistrates shall think proper.' That the practice accordingly had fixed this composition at one half or two-thirds of the year's rent, and that they had a *jus quæsitum* to be received upon these terms.

2*do*, The defenders had been found liable by the Lord Ordinary in the full mails and duties of the subjects from the period of citation in the action, which