No 53.

grims, and were sworn to it; and by the abolition of popery, must now belong to the King; And Stair, book 4. tit. 24, ranks them with other kirk-lands; and Pope Adrian IV. exeemed their lands from payment of teinds. Yet *vid. supra*, 12th February 1698, Duncan, No 21. p. 5140, *voce* GLEBE. At last the LORDS found, that temple-lands were not kirk-lands, nor annexed to the Crown.

Fol. Dic. v. 1. *p.* 531. *Fountainhall, v.* 2. *p.* 94.

1714. *June* 9.

The GOVERNORS of HERIOT'S HOSPITAL *against* ROBERT HEREURN of Bearfoot.

No 54.
Though a vassal had taken charters from the Lord of Erection for the space of 40 years, this was not found to import his consent to become vassal for ever, or that he might not thereafter return to the King. Reversed on appeal.

THE Governors of Heriot's Hospital pursue a declarator of non-entry of certain lands as held of the Hospital.

Bearfoot, by way of defence, repeats a declarator that he has right to hold the lands libelled of the Crown, in as far as the Hospital is in the place of the baron of Broughton, who was a Lord of Erection; and the defender's lands do now hold of the Crown, by virtue of the several acts of annexation, especially the 14th act Parl. 1633, and the 53d act Parl. 1661.

It was *answered* for the pursuers, That they are not in the common case of Lords of Erection, because the Earl of Roxburgh having right to the erected barony of Broughton, entered into a contract with King Charles I. in the year 1630, whereby he resigned in the King's hands *ad remanentiam*, and the King granted a wadset of these lands to the said Earl, whereby the erection was extinguished, and the lands therein mentioned wadset by a private contract for a most just and onerous cause.

2*do*, The 13th act of the Parl. 1633, anent regalities of erection, bears, in the end thereof, an express clause decerning and ordaining the lands and barony of Broughton, mentioned in the infeftments granted to Earl of Roxburgh in the year 1630, not to be comprehended in the said act, excluding the same utterly therefrom, to remain with the said Earl and his heirs after the form and tenor of the infeftments made to him and his authors of the same.

3*tio*, As to the 53d act Parl. 1661, the same is only a ratification of the act 1633, which is specially therein narrated and ratified; and albeit there be a new annexation *per verba de præsenti* in ample terms, yet the same act contains a clause near the end of it to this import, viz. that the said act 1661 is with the whole exceptions and reservations contained in the acts made in *anno* 1633, which are thereby holden as repeated and expressed therein; so that the foresaid exception in the act of Parl. 1633, doth preserve the right of the Earl of Roxburgh, the Hospital's author, entire to the full extent of his infeftments, and the same exception is repeated in the annexation act 1661 as aforesaid.

No 54.

It was *replied*, 1*mo*, No regard to the speciality of the Earl of Roxburgh's resigning *ad remanentiam*, in respect the King did at the same time wadset all that was resigned, property and superiority, and the posterior annexation 1633 does annex the superiority of all church lands to the Crown in most ample and general terms, by whatsomever title the same was possessed.

2*do*, The clause in the act of Parl. 1633, is only an exception from the annexation mentioned in that act, entituled 'Anent regalities of erection,' which concerns only jurisdiction, and neither property nor superiority; and the 14th act does annex the superiority of all church lands without any exception or reservation, and by virtue of the exception in the 13th act, the jurisdiction of the regality of Broughton has always been and still is continued.

It was *duplied*; 1*mo*, The said 13th act anent regalities of erection, does not only concern jurisdiction, but every thing that is contained in the charter of regality, seeing a regality is a higher designation than a barony, containing more ample jurisdiction; and as under a barony is understood to be comprehended not only the jurisdiction, but every thing else that makes up the barony, so it is to be understood in this case of regality of erection; so that the reservation in favours of the Earl of Roxburgh reserves his right entire; and albeit there be separate acts both of property and superiority, yet it is to be observed, that all the acts contain ample annexations, so that each would comprehend the substance of the whole.

But 2*do*, The last clause of the said act is not only by way of exception from the preceding rule, but further, does declare the Earl of Roxburgh's right to remain with him and his heirs after the tenor of his infeftment.

3*tio*, Albeit the 14th act, which is posterior, doth amply annex all superiorities of kirk-lands, without repeating the said exception or reservation, yet it cannot be understood to derogate from the act immediately preceding, because all the acts upon the subject of the annexation being prepared and concerted at the same time are to be considered as different clauses and articles of the same act, and it cannot be supposed that the 14th act, passed doubtless the same day with the former, was intended to take off the force of that ample reservation and provision in favours of the Earl of Roxburgh. It is also remarked by Sir George M'Kenzie, in his observation upon the 10th act, that it is wrong placed, and that it ought to have been posterior to the 14th act, and indeed the 14th act by the order of nature should have been first of all.

It was *triplied*; *Exceptio est de regula*, The rule was an annexation of the erected regalities which comprehend only jurisdiction, and not property or superiority, which are annexed by separate acts.

2*do*, The last part of the clause in favours of the Earl of Roxburgh, viz. that the same shall remain to him and his heirs after the tenor of his infeftments, is still annexed to the exception, and imports no more, but that, for any thing contained in that act, the right should remain to the Earl entire; yet neverthe-

No 54. less the same right might be quarrelled upon any other ground of law, or act of Parliament.

3*tio*, The acts are to be considered according to the order as they are inserted, and the posterior act does fully annex the superiority, otherwise it might be pleaded, that the Crown could not in this case claim the benefit of redeeming the feu-duties. But further, suppose that all the acts were but several paragraphs of one act, the case would be the same; for the exception in favours of the Earl of Roxburgh would only relate to the clause anent regalities of erection, and the annexation of the superiority of kirk-lands would have its full effect according to the tenor of the subsequent act or clause, if all had been digested in one act.

"THE LORDS found, that the clause in the 13th act Parl. 1633, in favours of the Earl of Roxburgh, did not exeem the superiority of the Earl's lands from the annexation in the 10th and 14th acts of the said Parliament."

The pursuer further founded on the last clause of 53d act, Parl. 1661, ratifying the act of Parliament 1633, anent the annexation of his Majesty's property; by which clause it is declared, that any who have got or shall get new infeftments of superiority of kirk-lands, the same shall stand good as to such vassals who have given their consent to the superiority, in regard that such a consent as to his Majesty is of the nature of a resignation of their property in favours of the superior, to be holden of the King, &c. Which clause imports, that any deed of the vassal importing his consent to hold of the Lord of Erection, does entitle the said Lord of Erection to that superiority in all time coming, and the vassal can never return to hold of the Crown; and here the defender's predecessors consent is clearly made out, by their taking charters to be holden of the Hospital and their authors, and that both by resignation in the hands of the superiors, and by retours to be holden of them, and that during all the years of the prescription, and from the first annexation, have never held of the Crown.

It was *answered*; That the clause founded on was not relevant, unless there had been an express consent of the vassal to hold of the Hospital only, and not to return to hold of the Crown; and so this act has been generally understood by lawyers, who have always judged that a vassal might freely return to the Crown at his pleasure. And this is fully expressed by Sir George M'Kenzie in his observation on the said act of Parliament, for good reasons therein mentioned; and in the case of the Duke of Hamilton against Weir of Blackwood, determined the 14th and 28th of July 1669, No 48. p. 7976. "THE LORDS did find that Weir of Blackwood was obliged to become vassal to the family of Hamilton Lord of the Erection." But the ground of that decision was a bond granted by Blackwood's father, obliging his son to become the Marquis of Hamilton's vassal; which was regarded, albeit the estate did not descend by the granter of the bond, yet in respect of the circumstances of the case, and especially that the granter of the bond procured and settled the right of the estate

to his son then an infant, and the taking an infeftment from the Lord of erection was not found to import the vassal's consent in the terms of the said act; and if the taking one single infeftment did not tie down the vassal to hold always of the Lords of erection by a voluntary choice, it remains still to the vassal at his pleasure to recur to the Crown, though infeftments for more than the course of prescription should be taken the same way, because if one act imply not a consent, neither can a second, third, or fourth, &c. as in the case of double holding the obtainer of a base infeftment may confirm and hold of the superior after 100 years holding base. No 54.

"THE LORDS repelled the allegeance on the foresaid act of Parliament, and also upon prescription."

Fol. Dic. v. 1. *p.* 531. *Dalrymple, No* 104. *p.* 145.

*** This judgment was reversed upon appeal.

*** Forbes reports this case.

The Gubernators of Heriot's Hospital, and their treasurer, having pursued a declarator of non-entry against Robert Hepburn of Bearfoot, as vassal to the Hospital, for the lands of Lochbank, &c,

Answered for the defender, That he ought to be assoilzied, because the lands in question were church lands, whereof the superiority is annexed to the Crown by the act 14th of the Parliament 1633; upon which ground, he hath raised a declarator, that it ought to be found and declared, that he has right to hold of the Crown, and consequently is not liable to answer at the instance of Heriot's Hospital, except for the feu and other constant duties, whereof the rights are reserved to the Lords of erection by the foresaid act 1633 and the act 1661.

Replied for the pursuers, 1*mo*, Such an exception is not competent, nor his declarator relevant or receivable summarily; because, 1*mo*, Albeit the acts of annexation declare all deeds of alienation of the annexed property to be void, and even allow the Crown to resume without process; yet, by the genius of our law, such nullities, though they be *juris*, do not take place summarily, but the rights whereupon seven years possession hath followed must be reduced, and the nullity declared *via actionis*. And the Hospital hath been many years in possession of this superiority by granting charters and infeftments to the defender and his authors. 2*do*, The declarator is not receivable *incidenter* in this case, because the conclusion, that the defender ought to hold of the Crown, requires the officers of state to be called; and if it conclude nothing against the Crown, then it has the force of a reduction against the pursuers, and cannot be insisted in, even at the King's Advocate's instance, without a special warrant from her Majesty; for though the Sovereign has a right to revoke and reduce such deeds, yet it is presumed, that her Majesty continues in the

No 54. same mind, unless the contrary appears by a special warrant. 3*tio*, Suppose the Crown might quarrel the pursuer's titles, the defender cannot; for, though a singular successor may make use of the title of his author or predecessor, because *jus auctoris accrescit successori*, yet the right vassals have to hold of the Crown is but a faculty, and till a charter be actually granted, there is no communication of the Crown's title to the vassal. 4*to*, The exception of nullity can be effectual only to the vassal from the time he became vassal to the Crown; because, seeing we have no allodial lands, all must be held either of the Crown immediately, or of a subject superior, and the casualities of superiority must belong to the superior, by whose charters and rights the lands are possessed. Hence it necessarily follows, that the non-entry incurred by the death of the last vassal before any charter has been obtained to hold the lands of the Crown, must belong to the Hospital, the pursuers. 5*to*, The defender's author's last infeftment is from the Hospital, as all the preceding rights up to the time of the erections, which immediately followed the Reformation. Here then is a standing feudal contract betwixt the Hospital, as superiors, and the heritors of the lands in question, as vassals, which still stands, and must continue, in the same state, till it is reduced in the ordinary way.

Duplied for the defender, 1*mo*, There is not the least shadow of ground to refuse his declarator by way of defence, as is done in other cases, to shun the multiplying of pleas; especially considering, 1*mo*, That both the acts of annexation contain a clause that deeds to the contrary shall be null by way of exception or reply. And here is no necessity of any declarator, without which, the defence against non-entry might be sustained, viz. that there can be no declarator of non-entry, which hath *tractum futuri temporis*, where it is optional to the vassal immediately to take his holding of another superior. 2*do*, No law requires her Majesty's concourse in this case, for the church vassals may prosecute the *jus quæsitum* to them by the acts of annexation, as their proper right, without such concourse; any vassal pretending to hold of the Crown, may, by himself, carry on his declarator for that effect, in a competition with any subject. Indeed, by a special statute, no titular, or Lord of erection, can insist in a process of reduction and improbation against the church vassals, without special allowance from the Sovereign, which is an argument against their superiority introduced in favour of these vassals; but it was never before pleaded, that the vassals could not, by themselves, defend or declare their right. 3*tio*, It is but a strained view of the case to assimilate the taking of charters from the Lords of erection to a feudal contract betwixt superior and vassal, which can be no otherwise understood than by an express and positive deed.

Replied for the pursuers, 2*do*, to the answer made by the defender, That the barony of Broughton, whereof the lands in question are a part, were excepted from the act of annexation 1587, cap. 29, not by way of simple exception only, but by way of exception and confirmation in favour of the then heritors; and

the act 14th Parliament 1633 is not to be understood to comprehend those exceptions in the act 1587, or extended in prejudice of property secured by a public law in manner foresaid; for no general words of resumptions in a posterior law or general clauses rescissory can be deemed to comprehend a special case determined and established by special statute; *in omni jure generi per speciem derogatur, et illud potissimum habetur quod ad speciem directum est L.* 80. *D. De regulis juris.* 2*do*, The said act 14th Parliament 1633 declares, that his Majesty shall have good right to all lands, baronies erected into temporal Lordships, before or after the general annexation 1587; but there is not a word of such baronies as are deliberately confirmed in the said annexation, and declared to belong to private parties by authority of King and Parliament. 3*tio*, It appears from the history of the surrenders and submissions, as plainly deduced in the 12th act 1633, that the revocation was only of unlawful deeds without consent of Parliament; the reduction that followed and produced the submission and decreet arbitral, and the act resuming the superiority of church lands, do expressly refer to these. 4*to*, The Parliament 1633, not having thought fit specially to rescind that part of the act 1587, excepting the barony of Broughton, is presumed to have left it *in eodem statu* as formerly; for how can it be imagined, that the King and Parliament, who, at that time, did provide an equivalent to the submitters, whose titles were quarrellable, as directly contrary to the act 1587, intended to take away the private right of parties established and confirmed by that annexation, and liable to no legal ground of reduction, without any equivalent, or without so much as naming them? 5*to*, The general words of the act 1633 are not to be extended to the case of such lands as had been resigned in favour of the King upon any civil and onerous contract, as the lands in question were; for albeit the King had intented reduction, *anno* 1627, against such as were reckoned to have quarrellable gratuitous titles; yet the Earl of Roxburgh having acquired the title of the barony of Broughton long before that time, the King, in the year 1630, after the surrender and decreet arbitral, entered into a contract with the Earl for purchasing the barony of Broughton, comprehending the lands in question, whereby the Earl, for the sum of 20,8000 did resign in favour of his Majesty *ad remanentiam*, and the King re-disponed the lands by way of mortgage or wadset to the Earl, to be held of his Majesty, under reversion to the King and his successors, on payment of the said sum, whereby the property and reversion was vested in the Sovereign. Afterwards, in the year 1637, the Hospital having paid the sum in the wadset to the Earl, and L. 8,300 Sterling, as the price of the reversion, to the King, there was a contract betwixt the King and the Earl on the one part, and the Hospital on the other, whereby the lands and barony of Broughton, with the superiorities and jurisdiction thereof, are disponed to the Hospital; which contract 1637 was ratified in the Parliament 1641; and albeit the acts of that Parliament were

No 54.

No 54. rescinded, yet it was with a *salvo* of private rights. So that the title of erection of the barony of Broughton being extinct by the Earl of Roxburgh's resignation into the King's hands, no law hindered his Majesty from granting, or the Earl from accepting, *tanquam quilibet*, a redeemable security for money advanced, more than if any who had no concern in the erections had advanced the money, and upon the Earl's resignation, had taken this redeemable right.

Duplied for the defender, The act of annexation 1587 hath little concern with the present question; and the exception therein of the barony of Broughton is so far from making for the Hospital, that it confirms the defender's claims. For it was not only the grants of these superiorities to subjects before and after the act 1587, but also the many exceptions therein, that occasioned the submission and surrender of the titulars and lords of erection, with his Majesty's decreet arbitral therein *in anno* 1628, which are the foundations of the acts of Parliament 1633; so that one of the main reasons was even to bring back those exceptions in the act 1587; and the titular of Broughton is one of the subscribing submitters; so the tenor of the acts 1633 is so universal and express, without making any exceptions, that they must comprehend all superiorities, even those excepted in the act 1587. Therefore, it is needless to notice the opinion of lawyers upon general laws derogatory to special cases enacted before; seeing, as they are very unfixed upon that point, so here the intendment of the legislature is manifest, both from the design and tenor of those laws. There is a difference of correctory laws plainly framed for the policy of the nation, support of the nation, and redress of wrong, from those made in other cases. Whence it is plain, that the whole superiorities of church lands, whether onerous or not, are brought back to the Crown without distinction. It doth not alter the case, whether the superiority at the time was in the King's person, or not; for acts of annexation concern not only rights immediately restored to the Crown thereby, but also rights standing in the Crown, that they may not afterwards be alienated. And if the superiority of Broughton was in the 1633, standing in the King's person by the Earl of Roxburgh's resignation *ad remanentiam*, the exception in the year 1587 fell thereby, and the King could not afterwards give away that superiority to the prejudice of the vassal, and interpose another superior by the contract 1637. But farther, to shew that the barony of Broughton was not understood excepted, the Earl of Roxburgh, in the contract 1637, specially excepts from his warrandice the submission subscribed by him in the surrender to his Majesty. It is not to be regarded here what kind of conveyances were made by the King in favour of the titulars, and how by them returned to the King, and new grants, whether redeemable or irredeemable, made before the acts of annexation; but simply this is to be considered whether this was a kirk superiory at the 1633. As there is no difference betwixt the cedent and assignee; so the titular and Lord of erection are but names signifying the

possessors; and therefore in whose hands soever these superiorities came, or in what manner, they were still to come back to the Crown; seeing the word titular comprehends both primary and secondary titulars, and all grants of these superiorities, whether originally from the Crown, or by the interposition of another. Besides that, it may be obviously observed, that the Earl of Roxburgh's resignation was null and ineffectual, in respect of his antecedent surrender of the right to the Crown in the year 1627, which made the subsequent resignation to be *a non habente.* No 54.

Replied for the pursuers, *3tio*, To the *first* answer made for the defender, The Lordship and regality of Broughton, as is comprehended in the charter and infeftments granted to the Earl of Roxburgh *in anno* 1630, from whom the Hospital derives right by progress, are excepted from the annexations in the years 1633 and 1661. For, *1mo*, In the act 13th Parl. 1633, which caseth and annuls all right and title of ecclesiastical regality made to any person, and declaring the same to pertain to his Majesty, expressly excepts the lands and barony of Broughton, granted by his Majesty to Robert Earl of Roxburgh, *anno* 1630, and declares the same to remain with the said Earl, his heirs, and successors, after the form and tenor of the infeftments made to him and his authors of the same. *2do*, By the 53d act of Parliament 1661, any new infeftments of superiorities of kirk lands shall stand good as to such vassals who have given their consents to the said right of superiority, in regard, that such a consent is, as to his Majesty, of the nature of a resignation of their property in favour of the said superior to be holden of the King. In the terms of which law, the defenders and his authors, before the said act 1661, and after the said annexation 1633, as well as since the same, had obtained a series of charters and infeftments from the pursuers and their authors, whereby they have possessed without the interposition of any other superior, and have *rebus ipsis et factis* consented to the right of superiority, which is all that the forecited act of Parliament 1661 requires to establish the title of the superior.

Duplied for the defender, *1mo*, The exception in the act, 13th Parl. 1633, is misapplied; for it is not an exception of the superiority of the lands, but only of the jurisdiction of the regality. For the matter of the superiority had been discussed before by the 10th and 14th acts of the Parliament 1633, which are misplaced, as Sir George Mackenzie observes; for the act 14th declaring the right of superiority of all the church lands to belong to the Crown, should have been first in order, before the 10th act that annexeth them. So that, had it been intended to except the superiority within the regality of Broughton, why was not the exception inserted in the said act 14th? Or, if the hospital will not allow the misplacing; the act anent the superiority of kirk-lands being posterior to the act anent the regalities of erection, and having simply declared all superiorities of church-lands to belong to the Crown, the words must be taken in the most general and extensive sense, so as to comprehend the superiority with-

No 54.

in the regality of Broughton. Now that the exception in the act concerns only the regality, appears from the rubric and statutory part of that law. 2*do*, The act 53d, Parl. 1661, doth not only ratify the act of annexation 1633, but amply rescinds and declares void all and whatsoever rights and infeftments of the said superiorities, made and granted by his Majesty, or his father, in any time bygone, since the surrender 1627, and only excepts from that act a right in favour of John Earl of Lauderdale, though that right had been excepted in the act of annexation 1587, which confirms the rule and sanction of the law in all other cases not excepted. 3*tio*, The consent required in the said 53d act of the Parliament 1661, to establish the superior's title, is the vassal's express consent to the said infeftment or right of superiority, that is, when the titular gets a charter from the Crown of the superiority, the vassal must consent to it, by his subscription to the signature charter, or by some other written declaration or bond under his hand, or by some such deed as is equivalent to the vassal's resignation of the property to the Crown, which is a deed of alienation. But the accepting of charters from the titulars is not that express deed plainly intended by the clause, but only a tacit one, by inference, and gathering the intention, which should not operate such a legal effect of a renunciation of so considerable a privilege, introduced by public law, where frequently these vassals had no thought of passing from it by their so doing, but only to use a temporary expedient, which they might alter thereafter; and no doubt many ecclesiastical vassals in Scotland, who at first took charters from the subject, do now hold of the Crown, whose holding it were a dangerous preparative to infringe. So Sir George Mackenzie (Observ. on the said act 53d, Parl. 1661) is of opinion, that no consent but a clear and express one is meant in this statute; and the Lord Stair, in the case of the Duke of Hamilton *contra* Weir of Blackwood, 28th July 1669, No 48. p. 7976. observes, that the single taking infeftment, from the Lord of erection, was found not to import the vassal's consent to become vassal for ever. And if the taking one charter will not infer this consent, neither will two or three, they being all of the same nature.

Triplied for the pursuers; 1*mo*, The words *regality*, and *title of regality*, signify the whole subject erected into a regality, comprehending the superiorities and properties, a regality being nothing else than a more noble denomination of a barony, with greater privilege and jurisdiction. This is clear from the dispositive words in the 2d sect. of the act 1633, compared with the reservation immediately following, of the regality of whatsoever lands or superiorities, which imports, that superiorities were understood to be comprehended in the dispositive, and from the clause excepting the lands and barony of Broughton. And if the words, *titles of regality*, were not homonymous, and of equal force with *lands and barony*, where lands and baronies are erected into regalities, there was no need for the reservation in favour of the Earl of Roxburgh; for the privileges of ecclesiastical regalities were annexed to the Crown by the act 1587; and, in the clause, which declares, excepts, and confirms in favour of

No 54.

certain lands of erection, there is no mention of an exception of the right of regality, which yet comprehended it. The argument taken by the defender from the order of these acts, and their titles, is very precarious; for the order has been inverted, and the acts concerning the King's property, and the annexation of church-lands, make but one law, and the several acts are but distinct *capita*, for settling matters that had been in agitation, and first determined by the King's decreet-arbitral; and, therefore, it matters not which of these acts be considered as first or last, so the exception in favours of the Earl of Roxburgh being noticed by the Parliament in any part of that great settlement, it is not to be imagined they meant to overturn the same in the very next words. As a farther confirmation, that the declaration contained in the act 13th, Parl. 1633, in favour of the Earl of Roxburgh, was intended to be an exception from the whole heads of the annexation, the King himself, in the contract 1637, declared, that it was so meant and promised *in verbo principis*, to have it accordingly declared in the next Parliament, which was done and ratified in the Parliament 1641. 2*do*, The act 53d, Parl. 1661, doth noways strike against the hospital's right; for both the title and body of the act relate, in every part, to the lands, superiorities, and rights, that were annexed by the acts 1633, and the barony of Broughton being in a separate case from the superiorities then annexed, it is not comprehended in the act 1661, which was made only to remove gratuitous and abusive alienations of such things as fell under the King's revocation and reduction, and the surrender; and cannot be extended either to the alienation of rights, which were in his Majesty's private patrimony, or rights to which King and Parliament had so often and so solemnly consented; or to rescind onerous and fair contracts entered into deliberately, and appropriated *ad piam causam*; all which characters concur in the pursuer's right. And though it were admitted, that the exceptions mentioned in the act 1661, confirmed the general dispositive words thereof in the restricted sense aforesaid, it doth not follow that they would extend the disposition of the act beyond that sense. Nor doth the special reservation, in favour of the Duke of Lauderdale, afford any argument in this case; for the Duke was anxious to have a reservation, because he thought he needed it to supply in part his titles and writs that had perished, or because the act of annexation 1633, contained no special reservation in his favour; the purchasers of the barony of Broughton, who had no such need of a reservation, might well reckon themselves secure without. 3*tio*, The foresaid last clause of the act 1661 plainly supposeth, that the titles of erection are capable of being made good, without any deed of the Crown, by the bare consent of the vassal; and consent, in our law, is, in this case, probable, not only *scripto*, but by other acts, such as the taking of charters held of the subject superior, when the option was competent to the vassal; as, in other cases, where consent is required, as to legitimate a deed on a death-bed, a presumptive consent of the heir, inferred from circumstances of fact, useth to be sustained.

No 54.

Replied for the pursuers, 4*to*, As to the *first* answer made for the defender, Whatever pretence there might have been to quarrel the right of the superiorities, as now established in the hospital, upon the annexations 1633 and 1061, yet any action is now excluded by prescription of 40 years. For the pursuers and their predecessors, have been in possession of the superiority in question, for the course of above 150 years, from the giving of the Lordship of erection to Ballenden of Broughton, till within these few months, when the defender raised his declarator; and the defender's authors having made their election, to take charters from, and hold their lands of the hospital, and continued to do so for a long tract of time as the law sustains to transfer property, this serves to take off what is alleged from the decision betwixt the Duke of Hamilton and Blackwood, where the vassal was tied down only by a single charter, taken in his minority by his tutor.

Duplied for the defender; Prescription cannot take place in this case; because, 1*mo*, The contract 1637, with the charter following thereon, was rescinded and declared void by the act of Parliament 1661, yea it was null *ab initio*, for being granted without a previous dissolution in Parliament; and though the King promised to procure a dissolution in Parliament, that was never done; for, to found prescription, there must be a title *habilis ad transferendum dominium*. And, though the title of prescription is always defective, upon the account it proceeds *a non domino*, it must not be a title reprobated in law, but habile of its kind to transfer the property. 2*do*, The subject is not prescriptible, it being *res meræ facultatis*; for the church vassals do not lose their privileges of holding of the Crown by forbearing to claim it for never so long time, no more than one's forbearing to enter heir for 100 years would exclude him from entering afterwards, or 40 years going one way would tie a man not to go another, or going 40 years to a mill would import an astriction. So where the option is given to a purchaser to hold of the disponer, or of his superior, his taking a base infeftment would at no time, no not after 40 years, hinder him to use a resignation, or procure a confirmation, because the purchaser has it in his power to apply his option this way, or that way, *quandocunque*.

Triplied for the pursuers; Though the taking of a right holding of the Crown be *facultatis* to the vassal, it is not *meræ facultatis*; and there is a very great difference betwixt these two cases, *e. g.* Suppose any person have a good title to claim an estate enjoyed by another, by some colourable title, it is *facultatis* to the party having the better right, whether he shall insist at any time within the 40 years or not; but it is not *meræ facultatis*; these things being properly *meræ facultatis* which depend upon a man's own liberty, or belong to him as a man or citizen, wherein he may act without the assistance of a judge or third person, which is not the case in question; for if the defender, or his authors, had thought fit to have made their election to hold of the Crown, it must have been done by application for a charter, before another party had, by long prescription, acquired an exclusive title. It was not *meræ facultatis* in them to take a

charter or not to take it; for since all the lands in Scotland (udal lands excepted) must be enjoyed by charter and infeftment, they behoved to take a charter from one superior or other; and, if they neglected to use their option for 40 years, it was both a plain acknowledgement or homologation of the superior's right, and a derelinquishing of the option, which is as capable of prescription as other rights that concern real estates. The argument from a disposition containing two manners of holdings, where the election of one doth not hinder the acquirer to betake himself to the other at any time, comes not home to the the case; for the granter of such a disposition has no title to make the accepter restrict himself to the base holding; and every act of possession by the disponer is so far from excluding his right, who got the disposition, that it accrues to him, his right and faculty, to hold of the Crown, being derived from the granter of the disposition. But it is not so in the present case; for, *1mo*, The hospital had a right to demand of the defender's authors to hold of them; *2do*, The defender's authors' faculty of holding of the Crown was not derived from the hospital, and therefore the hospital's deeds, and acts of possession, were exclusive of that faculty. No 54.

THE LORDS found it competent to the defender to repeat his declarator by way of defence, without the concourse of the Crown; and found, that the clause in the 13th act, *anno* 1633, declaring, 'That the lands and barony of Brough-'ton, comprehending the town and lands, burgh of barony, mills, and others, 'mentioned in the infeftments granted by his Majesty, under his Highness's 'great seal, to Robert Earl of Roxburgh, in *anno* 1630, shall not be compre-'hended therein, excluding the same, all utterly therefrom, to remain with 'the said Earl, his heirs and successors, after the form and tenor of the infeft-'ments, made to him and his authors of the same,' do not exempt the superiority of the lands from the annexation in the 10th and 14th acts of the Parliament 1633; and repelled the allegeance founded upon the last clause of the 53d act of the Parliament 1661; and likewise repelled the allegeance proponed for the hospital, founded on prescription; and therefore assoilzied from the declarator at the hospital's instance; and decerned and declared in the declarator at Bearfoot's instance.

Forbes, MS. p. 48.

*** A decision similar to the above was given, 24th January 1730, in the case of the Earl of Dundonald against Fullarton, *see* APPENDIX.

*** Bruce reports the sequel of the case of Herriot's Hospital against Hepburn of Bearfoot:

1715. *June* 24.—IN a declarator of non-entry, at the Hospital's instance, against Bearfoot, he repeated a declarator, that his lands, by the several acts of annexation of the superiority of church lands, were annexed to the Crown, and that therefore it should be found he was the Crown's vassal, and therefore not

No 54. liable in non-entry to the hospital; the LORDS, after full hearing, did, upon the 13th February 1714, find, 'That the clause in the 13th act, *anno* 1633, declaring 'that the barony of Broughton, &c. should remain with the Earl of Roxburgh, 'his heirs, &c. after the tenor of his infeftments, did not exempt the superiori-'ties of the lands from the annexation, in the 10th and 14th acts of that same 'Parliament, and repelled the allegeance founded on the last clause of the 53d 'act of Parliament 1661, as also the defence of prescription; and therefore as-'soilzied Bearfoot from the declarator at the Hospital's instance, and decerned 'and declared in the declarator repeated by the defender.'

This cause having come in by way of appeal before the House of Peers, they, by their decree upon the 2d instant, ordered and adjudged that the foresaid interlocutor was reversed, and declared that the superiority of the lands in question should belong to the Hospital the appellant.

Upon the Hospital's application, That this decree might be applied by the Lords, and that they would declare the said Hospital the only superior of these lands, and the defender to be their vassal, and decern the defender in the quantities libelled, or allow them a term and diligence for proving their libel,

The defender *answered*, That as to the first part of the petition, the Lords could now declare nothing; for if the House of Peers had only reversed the Lords sentence, then, indeed, the Hospital behoved to proceed as if that sentence had not been given. But since the House had ordered and declared, 'That the superiority of the lands in question,' &c. the matter is not now before the Lords as to the point of declaring, but the Hospital must take their sentence as they have it. *2do*, As to the second part of the bill, *answered*, That there can be no decerniture in the non-entry, because the lands hold feu, which is the retoured duty, and is ready to be paid at the bar. No decerniture for the full mails and duties, because the interlocutor of the Peers being only pronounced upon the 2d of June instant, and that Bearfoot had a very probable title, viz. the Lords' sentence and former decisions, such as that betwixt the Earl of Lauderdale and Castlebrand, 22d January 1706, *voce* NON-ENTRY, and that there was not a term run, in regard of the defender's offer to take a charter from the Hospital.

THE LORDS decerned in the declarator at the Hospital's instance, with this quality, purgeable on payment of the bygone feu-duties preceding Whitsunday last, and a year's rent, as a singular successor, at the time of his entry; and in case of his neglect to obtain himself entered, found him liable for the whole mails and duties.

1715. *July* 27.—IN the declarator of non-entry at the instance of Heriot's Hospital against Bearfoot, (wherein a decision, 24th of June last, is already marked), it came at length to one single point, viz. Whether Bearfoot should pay one year's entry for a charter, conform to the rental it was at when he made the purchase, or conform to the present rental, the lands having been consider-

ably improved since the purchase? And the hospital *alleged*, That the superior must have a year's rent of the lands, as they are at the time the charter is granted. No 54.

On the other hand, Bearfoot *contended*, That he was obliged to pay no more than a year's rent, conform as he purchased the lands; because, 1*mo*, The superior's casualty should be reckoned as at the time when the purchase is made; for it is the purchase that gives rise to the casualty; and if the superior had then given the charter, he could only have exacted the entry conform to the rental then, specially considering it was not so much as pleaded that Bearfoot was *in mora*. 2*do*, This appears in many parallel instances, *v. g.* in Titulars of Tithes, from whom there is always deducted what was necessarily expended in improving the rental; for, till the possessor be reimbursed of that, he cannot be said to have the improved rental free; so neither can Bearfoot be bound to pay for his improvements; for, in reality, he did not enter to such a rental, and as he entered to the rental, so should he pay. Another instance may be, where we build or repair another's house, and thereby increase his rent, though the house fall to him with all its reparations, yet he cannot use the benefit of the property, but with the restitution of the expenses of the improvement; so no more can the superior here have the adventitious emolument, but after allowance of what it cost the proprietor, especially after the casualty fell; for here is the rule, the time of the falling of the casualty, which was when Bearfoot made the purchase. *Lastly*, Suppose the case of an adjudger, that after leading the adjudication, he improves the lands before he gets the charter from the superior, certainly the year's rent would be only calculated as at the time of the adjudication; and indeed, as this would be very hard upon Bearfoot, so it should be a great discouragement to improvements. 'Tis usually long before subject superiors can be transacted with, and this should supersede all improvements in the mean time.

Answered for the Hospital, That the present rental must be the rule in this case, appears well grounded from the nature and design of all feu-rights, but especially those that flowed from the Church, which were given with a view for improvement; and the acts of Parliament touching the feus of ecclesiastic persons, do expressly mention that they should not be feued out, but for the improvement of the rental, that when the fee opens, the superior may have the advantage of the improvement. And 'tis to be considered, that if a decreet of non-entry were obtained, the vassal who was unentered could not pretend to diminish the yearly rents falling under the decreet, by deducting the annualrents of the sums he had given out for improvement; no more, then, can he now pretend to offer the rent of these lands with deduction of the improvements, as a composition to the superior. 2*do*, The *dominium directum et utile*, are convertible terms, and as far as the latter goes while the vassal is entitled to it, so far goes the former, when the superior comes to claim by that right; and so, if improvements were made by tenants, &c. of ward-lands, during the existence of the ward, not only will the rents as they increase be due to the superior, but if

No 54.

they should the last year of the ward be double of what they were at the superior's entry, the relief will be due according to the improvement, as the rents are the subsequent year; and, in general, *ædificatum solo cedit*, so that if the superior has any right at all to a year's rent, he must have it at the time it is payable; for, if upon pretence of improvements, we should look back, the same argument that would allow the rate to be imposed three or four years backward, might carry the defender to the rent that was payable out of the land, when it was originally feued out, which were very absurd. *3tio*, It is not the purchase that is the immediate cause of demanding the year's rent, but the entry of the new vassal, and for the superior's granting a new charter, and so the superior cannot compel the purchaser immediately to enter after the purchase, nor has he any access to the fee, but upon the death of the former vassal; and therefore the year's rent must be due as the rents are at the opening of the fee, which in the present case happened long after the improvements were made. *4to*, If the reverse of the case be considered, that is, if the rent of the lands should, for want of due improvement, &c. decrease, certainly the superior could not claim what they were the time of the purchase, but only the present rent; as was lately found betwixt the College of Glasgow and the Laird of Dalziel *, where the Lords did not regard the old rental, though instructed by tack, but proceeded upon the probation of the latter rental.

"THE LORDS found the present rental is the rule; but remitted to the Ordinary to hear parties procurators, whether the defender, who made the improvements, being in the natural possession, is only liable for a year's rent, as the same paid at his entry to the possession." See SUPERIOR and VASSAL.

Act. *Graham.* Alt. *Sir Walter Pringle.* Clerk, *Gibson.*

Bruce, v. 1. *No* 109. *p.* 135. *and No* 131. *p.* 173.

1758. *February* 4.

SPOTTISWOODE of that Ilk, *against* The CREDITORS of the deceased JAMES NASMITH of EARLSHAUGH.

No 55.
A person was infeft in lands which had belonged originally to an abbey. They were acquired afterwards by the Crown, and mortified for the use of a bishoprick. Found that

IN the ranking of the creditors of the said James Nasmith, a question occurred, Whether certain lands, which had belonged to him in property, called Howell, Balfier, &c. held feu of the Crown, or of Mr Spottiswoode of that ilk, who claimed the right of superiority?

Sir Robert Spottiswoode, Lord President of the Session, in 1624, was infeft, by a charter under the great seal, in the barony of New Abbey, containing the lands which had belonged to the abbacy of New Abbey.

In 1633, King Charles I. formed the design of purchasing from Sir Robert the foresaid lands of New Abbey, in order to mortify them for the use of the

* Examine General List of Names.