ment, and one seeking an entry and infeftment in order to extinguish, renounce, or validly convey, seeing the debtor in this last case requires it for his own security. *3tio*, The Lords thought, that though cautious and wary creditors did insert a clause in their rights, that the granter should enter them *gratis*, and that when any casualities of life-rent-escheat, non-entry, or the like, fell in their hands, as superiors, they should dispone the same to the vassal, yet that was only adjected *ad majorem cautelam et ex superabundanti*; and therefore the plurality found, that the superior here being debtor, he was bound to receive this adjudger *gratis*. No. 55.

*Fol. Dic. v. 2. p. 409. Fountainhall, v. 2. p. 145.*

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1760. *July* 10.

LOCKHART of Carnwath *against* SIR ARCHIBALD DENHAM.

No. 56.
Heirs of entail, though not heirs of line to the last infeft, must be entered as heirs, not as singular successors, the superior having acknowleged the entail by a charter and infeftment.

Sir William Denham, in the year 1711, executed an entail of his estate of Westshiells, in favour of himself, and a certain series of heirs, under strict irritant and prohibitive clauses *de non alienando*, &c.

In 1726, Sir Robert, the first institute, having neglected to insert the provisions and irritant clauses of the entail in his general service, was found, by decree of the Court of Session, to have incurred an irritancy, and to have forfeited all right to the estate, for himself and his descendants.

In consequence of this decree, Sir Archibald, the next substitute, served himself heir of tailzie to Sir William; and as a part of the estate held of Mr. Lockhart, he took a charter from him, which contained a clause, That every heir of entail shall be obliged to pay a year's rent for his entry, unless he be at the same time heir of line to the person who died last vest and seised; and accordingly Sir Archibald paid £.200 Sterling to Mr. Lockhart, as a composition for a year's rent.

The decree of the Court of Session was reversed upon an appeal, and the estate was adjudged to Sir Robert Denham, son to the former Sir Robert, who likewise took a charter from Mr. Lockhart, containing the same clause; and the composition money paid by Sir Archibald was allowed to him at accounting with Sir Robert.

Sir Archibald again succeeded to the estate upon failure of Sir Robert and his descendants; and Mr. Lockhart brought a declarator of non-entry against him; in which the following question occurred, Whether Mr. Lockhart was bound to give a charter to Sir Archibald, who was not heir of line to Sir Robert, the person last vested and seised, without payment of the year's rent, in terms of the two charters containing the clauses above noticed?

Pleaded for Mr. Lockhart: Relief is a well established casuality of superiority, as old as feudal rights themselves. When a superior receives the new vassal, he has from the beginning been entitled to a year's rent. As this casuality was due even when the heir of the former vassal was entered, much more was it claimable

No. 56. when a stranger was received into the feu. In course of time, as the heir was understood to have a more favourable right than a stranger, this casuality, in the case of an heir, has been restricted to a lesser sum, according to the nature of the holding; but no such restriction has ever taken place in the case of a stranger. This is a casuality inherent in the nature of a feu, and which has been confirmed by the constant practice of Scotland. When the heirs of the vassal succeed, nothing is paid but a year's feu-duty; but when a singular successor claims to be entered, he pays always a full year's rent as a composition.

This right is understood to be so well established in the superior, that the vassal can do no deed to hurt or impair it. Thus a superior cannot be obliged to receive a body corporate as his vassal, because there can be no hopes of any future casualities. Upon the same principles, a superior is not obliged to enter a vassal under a strict entail, unless his former rights and casualities are reserved. By such entail the property is locked up; all singular successors are for ever debarred; and the superior loses his casuality of relief. He is well entitled, therefore, to reserve in the charter which he grants, all his rights and casualities as they formerly stood; that is, a full year's rent when any one who is not heir of line to the last person in the feu, is called by the will of the entailer. The pursuer has made such reservation in both the charters above-mentioned.

The statute 1685, which authorises entails, provides, "That it shall not prejudge his Majesty as to confiscations, or other fines; or his Majesty, or any other lawful superior, of the casualities of superiority which may arise to them out of the tailzied estate." This puts the matter past all doubt, as it provides, that every casuality which would have been competent to the superior before the entail, shall, notwithstanding thereof, remain unhurt.

Agreeable to this, the pursuer, in both the charters above mentioned, reserved expressly his right to this casuality; and his vassals, particularly the defender, accepted of the charters with this clause; and therefore the defender is barred *personali exceptione* from objecting to its having effect.

Answered for the defender: The present question does by no means concern the casuality of relief. That casuality only took place when heirs were to be entered; for by the old feudal law there was no method of compelling superiors to receive singular successors into the feu. In process of time, however, when vassals came to be considered as proprietors, various methods were devised for compelling the superior to admit of such alienations, for payment of the vassal's debts, or transmitting the estate to such heirs as he thought proper. For this purpose the act 1469, anent apprisings, and the act 1672, anent adjudications, oblige superiors to receive apprisers and adjudgers, upon payment of a year's rent, not as a relief, but as a composition for changing the former investiture. As the grounds of debt upon which these apprisings or adjudication proceeded, might be devised to what series of heirs the creditors thought proper, the charter which the superior was compelled to grant, behoved to be in favour of that series of heirs; and when the apprising or adjudication became a title of absolute property, the superior could not refuse

No. 56.

to admit any of the heirs upon whom the estate was settled in the charter, upon pretence that they were singular successors. The same method was introduced by the statute 1690, in the case of purchasers of bankrupt estates. From an analogy of the statute 1649, trust-bonds were introduced, by which vassals had it in their power to settle the succession of their estates in what manner they thought proper.

This matter was made still more easy by the act of the 20th of George II. concerning ward-holdings; by which it was provided, That in all cases superiors should be obliged to receive disponees, in terms of the procuratory of resignation; and therefore it is now understood, that no superior can refuse to grant a charter in favour of any person who has obtained a disposition and procuratory of resignation of lands, whether it is in favour of the disponee, and his heirs whatsoever, or any other series of heirs whom he has thought fit to call to his succession. To this purpose Lord Bankton gives his opinion, Book 3. Tit. 2. § 10.

The demand made by the pursuer is most unprecedented; and no instance can be condescended on in which such a composition has been found to be due. It is evident, therefore, that when once a tailzied succession is established by a new investiture, the superior cannot demand the composition of a year's rent from the successive heirs, under pretence that they are singular successors, as not being the heirs of line of the person last infeft. An heir of the investiture can by no means be looked upon as a singular successor; and therefore, as the defender is heir of the last investiture of the estate granted by the pursuer to Sir Robert Denham, he is entitled to be entered as an heir, and not as a singular successor.

The statute 1685 cannot alter the case: 1*mo*, Because this is not a casuality of superiority, but only a personal right competent to the superior, for which he can neither enter into possession, nor poind the ground, as in other casualities; and, 2*do*, Because the superior's right is only reserved as it stood before that statute; and it is certain, that at that period he would not have been found entitled to the composition now claimed.

The two charters founded on can be of no weight; for the one, taken by the defender himself, was totally set aside by the decree of the House of Lords; and the other, taken by Sir Robert, cannot bind the defender, who represents him in no other way than as an heir of entail.

"The Lords found, That in respect the pursuer had acknowleged the entail, by granting charter and infeftment thereupon, to the late Sir Robert Denham, he was obliged to enter the defender as heir of entail, and not as singular successor."

Act. *Wa. Stuart.* Alt. *Miller.* Clerk, *Justice.*

*P. M.* *Fol. Dic. v. 4. p. 314. Fac. Coll. No. 231. p. 423.*