

1748. July 14. M'VICAR *against* COCHRAN and KER.

No. 97.

A superior cannot pursue both for payment of by-gone feu-duties, and a declarator of irritancy *ob non solutum canonem*, but must be content with the one or the other.

Fol. Dic. v. 4. p. 316. Kilkerran, No. 7. p. 531.

* * D. Falconer's report of this case is No. 9. p. 4180. *voce* FEU.

SECT. XXIII.

Act anent Annexations of Crown Property.—Grant from the Crown of the Casualties on the Estates of its Vassals.

1665. February 22. MARQUIS of HUNTLY *against* GORDON of LESMORE.

No. 98.

In a process at the Marquis of Huntly's instance, as donatar to the forefaulture of the Marquis of Argyle against the Laird of Lessmore, for removing from certain lands disposed to him by Argyle, and which lands were old wadsets of the Marquis of Huntly's estate; the Lords decerned in the removing against Lessmore, because the wadsets were not confirmed by the King before Argyle's forefaulture.

Newbyth MS. p. 27.

* * Stair reports this case:

The Marquis of Huntly, as donatar to the forefaulture of the Marquis of Argyle, as to the estate of Huntly, obtained decret of Parliament against Gordon of Lesmore, for payment of the mails and duties of certain lands, and for removing therefrom. He suspends, on these reasons, *1st*, That the decret was null, not proceeding upon lawful citation, but far fewer days than are appointed by law, and that he was absent, and now alleges, that his right to the lands in question was by excambion with the Marquis of Argyle, for lands holden of the Marquis of Huntly, which he had possessed thirty or forty years before, and therefore, if the pursuer were dispossessed of the lands in question, he behoved to possess him in other lands; *2dly*, The decret is null, as not proceeding upon trial of an inquest, cognoscing the Marquis of Argyle heritable possessor five years before, conform to the act of Parliament; nor could that be cognosced, because the defender himself was heritable possessor these years; *3dly*, The defender's right from the

No. 99. Marquis of Argyle, albeit it was *post commissum crimen*, yet the crime was latent, proceeding upon missive letters of his, that were found out of the English hands, which the defender could not know.

The pursuer answered to the whole, That he opposed the decret of Parliament, which ought not to have been suspended by the Lords of Session, who are not judges to decreets of Parliament, who may dispense with the diets and solemnities of law; and the pursuer insists not upon the benefit of the five year's possession, but upon this ground, that the defender's rights from the house of Huntly, or from Argyle, were holden base of Argyle, and not confirmed by the King, and therefore by the forefaulture of Argyle, the superior, who, by his right, came in Huntly's place, these unconfirmed base rights fall;

Which the Lords found relevant; and, in the same process, mails and duties being but generally decerned, without expressing the quantities,

The Lords ordained the pursuer to condescend upon the quantities, and gave him a term to prove.

Stair, v. 1. p. 272.

1773. March 4.

ALEXANDER DUKE OF GORDON, against JAMES EARL OF FIFE, and Others.

No. 100.

Consent in terms of the act 53. 1661, not inferred from the circumstances that a proprietor of church-lands, after having been infeft on Crown-charter, recently took from the lord of erection a charter of the same lands, bearing the lands to be holden of him and his heirs *in perpetuum*, whereon he was infeft; and, adjecting to a copy of this charter, in the granter's chartulary, a

The lands of Over Mefts, (the superiority of which was the object of the present suit) were part of the ancient priory of Pluscardine, which, after the Reformation, was erected into the temporal lordship of Urquhart, in favour of Alexander Seton, afterwards Earl of Dunfermline. But, as these lands of Over Mefts, before the Reformation, were granted in feu by the Priory, the aforesaid grant, in favour of the Earl of Dunfermline, only carried the right of superiority; and which having again accrued to the Crown through the last Earl of Dunfermline's forfeiture, Jean Countess of Dunfermline, in 1698, obtained from the Sovereign a grant of the lordship of Urquhart, and was infeft on a charter under the Great Seal.

The lands of Over Mefts came by progress to belong to David Stewart of Newton, who was infeft in these lands in virtue of a charter under the Great Seal, granted in his favour, of date 14th February, 1679.

On 16th September, 1686, James Earl of Dunfermline granted a charter of the foresaid lands of Over Mefts, in favour of the foresaid David Stewart:—"Tenen. et haben. totas et integras dict. villam et terras de Over Mefts, cum terris molen-dinariis, et terris brueriis earund. et universis pertinen. jacen. ut prædicitur, præfat. Davidi Stewart, et Mariæ Meldrum, ejus dict. sponsæ, eorumque alteri diutius viven. in conjuncta infeodatione, et vitali redditu, et hæredibus inter ipsos legitime procreat. seu procreand.; quibus deficien. propinquieribus et legitimis hæredibus dict. Davidis Stewart, et assignatis suis antedict. hæreditarie, et irredimabiliter, de nobis, hæredibus et successoribus nostris, in capite, in feudifirma et hæreditate, in perpetuum, per omnes rectas metas," &c.