1666. *June* 6. EARL of CASSILLIS *against* SIR ANDREW AGNEW.

No 3.
Passing from a declarator against a feuar's right, found not to be inferred by acceptance of two years' feu-duties after the declarator.

THE Earl of Cassillis, as superior of some lands holden of him, by John Gardiner, obtained declarator of his liferent escheat, and that a gift of the said liferent, granted by the said Earl to the said John was null, in so far as it contained a clause irritant, That if John Gardiner should give any right of the lands to any of the name of Agnew, the gift should be null, *ipso facto*; whereupon in *anno* 1650, the Earl obtained declarator of the clause irritant, by John Gardiner's giving right to Sir Andrew Agnew, and now insists for the mails and duties since that declarator. It was *alleged*, that the said Earl had accepted the feu-duty of several years, since the said declarator, and thereby had tacitly past from the declarator, and could not seek both the feu-duty and also the whole mails and duties by the escheat. It was *answered* for the Earl, that having both rights in his person, he might poind the ground for the feu-duty, and his donatar might pursue for the mails and duties; 2*dly*, his acceptance of the feu-duty, albeit it could not consist with the mails and duties, yet it would only extend to those years that the feu-duty was accepted, and to no others.

THE LORDS found the acceptance of the feu-duty relevant only for those years for which it was received; but it occurred to some of the Lords, that if it were alleged there were three consecutive discharges of the feu-duty, that these, as they would presume all bygone feu-duty paid, so they would extend to the mails and duties for all years preceding the discharges; therefore the defender was ordained to condescend if so many discharges were, and that this point might be debated.

Fol. Dic. v. 1. *p.* 430. *Stair, v.* 1. *p.* 373.

No 4.
A superior obtained decree of improbation against his vassal, and received the feu-duty of that same year, by a discharge posterior to the decree. Found, that the decree needed not be reduced, as being thereby *simpliciter* past from.

1671. *June* 6. GEORGE STEEL *against* HAY of Ratray

GEORGE STEEL pursuing an ejection against Hay of Ratray, as heir to his father, who was infeft in some acres of the Halkhill of Ratray, and in possession; it being *alleged* that the pursuer's father's rights were all improven by a decreet in *anno* 1624, after which Ratray's author did enter to the possession, and continued therein since that time; likeas, he did obtain a decreet of removing against the tenant, which ought to defend him against an ejection, both these decreets being standing unreduced; it was *replied* for the pursuer, That the decreet of improbation was past from, in so far as it being obtained at the instance of the defender's author, as superior of the said lands, he did receive the feu-duty for a year subsequent to the decreet; and for the decreet of removing, it was only against the tenants, the pursuer not being called. THE LORDS did sustain the reply to take away the defence, albeit the

discharge of the feu-duty was only for that same year that the decreet was obtained; and found no necessity to reduce the decreet of improbation, seeing that the same was only given for non-production, and that the pursuer did now produce a full and perfect right in the person of his father, against which nothing could be objected; but the lands being liferented, and the liferenter having quit the right upon an excambion, whereby Hay of Ratray did possess, and after her death did continue upon his decreet of removing for some years, they did assoilzie from all bygone mails and duties, and decerned only for time coming, and to re-possess. No 4.

Gosford, MS. No 345. *p.* 164.

*** Stair reports the same case:

UMQUHILE —— Steel having a feu of some acres of the barony of Ratray, Chancellor Hay, as superior and baron of the barony, pursued reduction and improbation against Steel and other vassals; and in July 1624 obtained certification. The Chancellor's right being transmitted to Doctor Patrick Hay, he accepts of the feu-duty, and gives a discharge of the year 1624; and thereafter, in *anno* 1628, having obtained decreet of removing against Steel's relict, he by a transaction with her passes from it, and gives her other lands in lieu thereof, but without any mention of the improbation. Steel's heir attains possession of the said acres of land, and Hay of Ratray, as now having right to the barony, pursues a removing against Steel's tenant, and obtains decreet of removing without calling Steel; whereupon Steel pursues ejection and intrusion against Hay of Ratray, wherein, in respect that Ratray's interest was by a sentence, though unwarrantably given, without calling the tenant's master,

THE LORDS restricted the letters to re-possession and ordinary profits; wherein it was alleged for Ratray absolvitor, because the defender's author having obtained certification in the improbation at Chancellor Hay's instance, produces the same, which did evacuate the pursuer's father's and predecessor's right.

The pursuer *replied*, 1*mo*, That the decreet of certification produced was not relevant, because it was not a certification in an improbation, which was not concluded by the summons, as they are expressed in the decreet, which bears, That the writs called for should be cancelled and declared null, but bears not that the same should make no faith, or should be declared as false, forged, or feigned; 2*do*, Doctor Hay the defender's author, by accepting of the feu-duty for a term after the decreet, did pass therefrom, and did acknowledge and homologate the pursuer's right, and did acknowledge the liferenter's right, by excambion therewith. The defender *answered*, that he opponed his decreet of certification, the decerniture whereof is expressly in the terms of an improbation; and likewise the beginning of the libel being both at the Chancellor and King's Advocate's instance, and at the compearance,

No 4. the pursuer insisted for improving the writs called for, so that the repetition of the conclusion of the libel hath been only through inadvertance not fully set down. And as to the discharge of the feu-duty, *1mo*, It is vitiated in the date. *2do*, It wants writer and witnesses; and albeit it were holograph, it cannot instruct the true date, and it can never import a passing from the improbation further than for the term discharged, especially seeing it was granted by Doctor Hay, who was singular successor to the Chancellor, and perhaps knew not of the improbation. The pursuer *answered*, That the certification being granted in absence, the obtainer thereof might frame it as he pleased; but it cannot be supposed to be truly better than as it stands; and though improbations being in absence, are very much adhered to, yet they are odious rights, and very reducible upon any defect or informality, seeing it is formality that gives them all their strength: And as to the discharge, the date of it hath been altered at the subscription by the subscriber's hand, as appears by comparing the date and subscription; *2do*, In the very body of the discharge, no ways altered, it bears to discharge the year 1624, after the certification, and the discharge as it stands, is in the ordinary way as discharges use to be given to tenants and vassals for small feu-duties, and therefore must be sufficient in a case so favourable for the pursuer, who has a clear right; and should not be elided by this dubious certification, which must be restricted to a certification in a reduction, which is only reducing the rights till they be produced, and so falls, they being now produced.

THE LORDS repelled the defence upon the certification, in respect of the reply and discharge produced, and decerned the defender to re-possess the pursuer; but assoilzied him from the bygone profits, seeing he possessed by a title, and had just reason to defend in a matter so dubious.

Stair, v. 1. p. 729.

1687. *December* 15. WILSON *against* SMITH.

No 5. THE LORDS found, in a case betwixt Wilson and Smith, that a subject superior's accepting feu-duties, after he knew a recognition was incurred, was a passing from that casuality. Albeit it was argued from Craig, that *argumentum a forisfactura ad recognitionem* was good; and yet the taking feu-duties from a rebel would not be a remitting of a forfeiture.

Fol. Dic. v. 1. p. 430. Fountainhall, v. 1. p. 490.

*** Harcarse reports the same case:

1687. *December* 16.—THE Laird of Dundas having feued out some acres of land, with an irritant clause *de non alienando*, which the feuer, notwithstanding