and pursuing for mails and duties, the Earl compearing as superior, did exclude him, till he paid a year's duty; which decision the Lords resolved not to follow.

No. 53.

Fol. Dic. v. 2. *p.* 409. *Stair*, v. 2. *p.* 123.

*** Gosford reports this case:

Mr. Henry Hay being infeft in the lands of Glen, having pursued the tenants for mails and duties, compearance was made for Earlstoun, who alleged, that the pursuer being only infeft base, and by his infeftment it being clear, that he did hold the said lands of Earlstoun as a part of that Barony, the lands were in non-entry; as likewise, until there was a year's duty paid to Earlstoun, the pursuer could not enter to the possession. It was replied, That the pursuer and his authors having been in possession for many years, his right ought to be sustained *in hoc judicio possessorio*, and though Earlstoun might pursue a declarator of non-entry, yet upon that pretence, or for want of a year's duty for the entry, he could not be debarred from possession.

The Lords did repel the defence *hoc loco*, reserving to Earlstoun to pursue a declarator of non-entry as accords, and found, that a year's tack duty for the entry of the vassal could not be craved *hoc ordine*; but when the superior shall be charged to enter; seeing until that time he may pursue for the non-entry, and recover the whole duties of the lands.

Gosford MS. p. 282.

1680. *June* 25. The LAIRD of BLAIR *against* The LORD MONTGOMERY.

No. 54.
The superior found obliged to receive a donatar of forfeiture, in virtue of Act 2. Parl. 1584. without paying a year's composition.

The Laird of Blair being donatar to the forefault right of the wad-set lands which did belong to Ker of Kerseland, and were by him held of Montgomery of Haslehead, and having obtained presentation from the King, he pursued Haslehead, his heir, to enter him vassal, and for non-obedience, obtained decreet against him, declaring that Haslehead, his heir, had lost the superiority during his life; and now pursues my Lord Montgomery as Haslehead's superior *supplendo vices* to infeft him; who alleged that he ought not to enter him till he pay a year's rent, for by the presentation he being obliged to receive a stranger vassal, he ought to pay a year's rent, in the same way as if it had been an apprising or adjudication. 2*do*, Haslehead being several years in non-entry, he is not obliged to receive the donatar in his place, till he pay the non-entry duties, as he would not be obliged to receive Haslehead's heir upon precept out of the Chancellary, till he pay the non-entry duties. It was answered for the donatar, that by the 2d Act, Parl. 1584, it is declared, that the King has right to dispose of the heritable right of his sub-vassal forefault, by presentation, which therefore obliges the sub-vassal's superior to receive him, and yet mentions no year's rent for his entry; likeas, none was due in

No. 54.

adjudications till the late act of Parliament, and a year's duty is only due in apprisings by the statute of King James the Third, anent apprisings; and as to the non-entry duties; *1mo*, By the foresaid act 1584, donatars are declared free of the feu-duties, due by forefault persons; *ex paritate rationis* they must be free of non-entry duties; *2do*, As in apprisings or adjudications, superiors must enter summarily, only with reservation of the non-entry duties, which must be known and liquidated by the extent of the debtor's lands; so the same must hold no less in this case.

The Lords found that there was no year's rent due upon presentation, but that the superiors, mediate, or immediate, were obliged to receive them *gratis*, by virtue of the act of Parliament 1584, and that that act of Parliament could not be extended to liberate the donatar from the non-entry duties, but that they could not stop the entry; and therefore ordained the Lord Montgomery to receive the donatar, but prejudice of his non-entry duties by way of action against the donatar.

Fol. Dic. v. 2. *p.* 409. *Stair, v.* 2. *p.* 777.

1702. *February* 13. Creditor of Seton *against* Seton.

No. 55.
Where the superior is debtor, he is bound to receive the adjudger *gratis*.

George Seton of Barns having granted an heritable bond for 5,000 merks to Robert Seton in Tranent, forth of his lands, whereon Robert was infeft; and a creditor of his having adjudged this right from his son; he pursues the said George Seton of Barns, the debtor, to make payment; who alleged, you cannot validly renounce, nor dicharge, not being infeft. Answered, The right being base, holden of the granter, I am content for capacitating me to accept a charter and be infeft. Replied, You being an adjudger, and so a singular successor, I am willing to receive you; but, by the act of Parliament 1469, and act 1669, you must first pay me a year's rent of the subject and sum adjudged. Duplied, This is good law, and is due *ex natura feudi*, if you were not the debtor and personally liable, and bound to infeft me, my heirs and assignees; and though you got it, I could repeat it again by your personal obligement to pay, *et frustra petis quod mox est restituendum;* and by the civil law, the creditor had the *actio contraria pignoratitia*, by which he recovered all the expenses he wared out in the thing impignorated. Triplied, The obligation to receive assignees is only understood of the assignee to the bond before the cedent has taken infeftment, which is clear in ward-holdings, where that clause will not exclude recognition, if the vassal should infeft one base without obtaining the superior's consent; and if a creditor in a personal bond die, his heir or executor cannot uplift the money without a service or confirmation; neither will he force the debtor to repay him the expense he gave out in making up his title. The Lords considered, if the superior were a singular successor to the first granter of the right, there could be no doubt but he might exact a year's rent; but here the debtor in the annual-rent continued superior. Next, some made a difference between his seeking a charter in order to continue the infeft-