No. 66. of declarator of non-entry was competent to the superior; for, otherwise, he could have no compulsitor upon the vassal to take a charter; and that if, in such process, the vassal should obstinately lie out, the non-entry would be incurred; but if the vassal was willing to take a charter, the superior would be obliged to discharge by-gones.

As to the effect of such clause against a singular successor in the superiority, *vide* No. 87. p. 10276, *voce* PERSONAL AND REAL.

Kilkerran, (CLAUSE) *No.* 3. *p.* 121.

1742. *February* 27. COUPER *against* STEWART.

No. 67.
Whether a year's rent be due to the superior for receiving an adjudger of an heritable bond?

Pyper of New Grange having granted an infeftment of annual-rent on the lands of New Grange to Simpson, and the annual-rent having been adjudged from Simpson by Gilbert Stewart, he charged Mr. David Couper, now proprietor of New Grange, as superior in the annual-rent, to receive him.

Mr. Couper suspended the charge; and, at discussing, the question being, Whether or not the superior was entitled to a year's rent of the subject adjudged? that is, a year's interest; it was, on the one hand, said, that as, by the statute in the reign of James III. *anno* 1469, which first obliged the superior to receive an appriser, the superior was thereupon to get a year's rent of the subject apprised, so the same was, by act 1669, declared to take place in adjudications; and as there was nothing in any statute insinuating that, in any case, the superior was to receive the adjudger of any subject, without getting a year's rent of the subject adjudged, it did not occur from whence the exception could be inferred in the case of an adjudger of an heritable bond; the rather, that, at the date of the act 1669, the modern infeftments of annual-rents were as much in use as they are now, and yet the act is general, which must therefore be understood to comprehend those as well as the annual-rents of the ancient form. True, where the superior is granter of the annual-rent, as it is in such case usual to throw in a clause, obliging the superior to receive the heir of the vassal *gratis*, so, where it is omitted, it may be presumed omitted *per incuriam;* and, for that reason only, that the superior was debtor in the annual-rent, the Lord Fountainhall observes it to have been found by plurality of voices, February 13, 1702, Seton *contra* Seton, No. 55. p. 15046, that the superior was bound to receive *gratis;* adding, at the same time, that it was the opinion of the Court, that if the superior had been singular successor to the first granter of the right, there would have been no doubt but he would have been entitled to exact a year's rent.

It was, on the other hand, said, that as, without doubt, the statute of James III. could only be understood to comprehend the ancient form of annual-rents, which were proper feudal rights, and not the annual-rents now in use, which are but modern inventions for security of money, not then known; so, when the act 1669 came to declare, that the superior of lands, annual-rents, and others adjudged,

No. 67.

should not be holden to grant any charter for infefting the adjudger, till such time as he be paid of the year's rent of the lands and others adjudged, in the same manner as in comprisings, it was not thereby intended to make an extension of the law, but only that the superior should have the same demand against the adjudger as formerly he had against the compriser: And that such has been the notion the lieges have entertained of this matter, is clear from this, that there is no instance where ever an adjudger of an heritable bond was found liable to the superior in a year's rent.

It was *separatim* observed, that, in this case, the superior, who was proprietor of the lands, as well as superior of the annual-rent, could not redeem, without paying the annual-renter all that was due to him, and consequently the damage sustained by him through paying this year's rent of the annual-rent, should he now be found liable in it; it were therefore absurd to make him pay to the superior what the superior would be obliged to repay to him in case of redemption.

The Lords "found the superior not entitled to the year's duty of the annual-rent, and repelled the reason of suspension."

Fol. Dic. v. 4. p. 314. Kilkerran, No. 5. p. 529.

1769. *February* 2. MAGISTRATES of INVERNESS *against* DUFF and Others.

No. 68.
Clause for doubling the feu-duty on the entry *cujuslibet hæredis vel assignati.*

The Magistrates of Inverness had granted feus of certain lands and fishings, belonging to the burgh, in favour of the original vassals, and their heirs and assigns whatsoever, with a clause of reddendo in these words:

"Reddendo inde annuatim prefatus , heredes sui et assignati antedicti nobis, nostrisque successoribus, summam 13 solid. et 4 denar. monetæ Scotiæ ex unaquaque dicta acra, ad duos anni terminos, nec non duplicando dictam feudifirmam primo anno introitus cujuslibet hæredis aut assignati ad dictas terras, aliaque præscripta, prout usus est feudifirmæ duplicatæ, pro omni alio onere," &c.

The feus having come into the persons of singular successors, a declarator of non-entry was pursued by the Magistrates, in which the question arose, Whether the defenders were liable in a year's rent for their entry, or if they were entitled to be entered for payment of double the feu-duty, in terms of the above clause?

Pleaded for the defenders: Whatever may be the rule of law as to the extent of the composition payable by singular successors, it is lawful for the superior to restrict it by voluntary agreement. And, in this case, the composition is plainly restricted to the duplicando of the feu-duty. The feus are granted *hæredibus et assignatis quibuscunque.* Under this clause, the Magistrates may be compelled to receive all singular successors of the vassals, voluntary or legal. And if the term *assignati* be understood in that sense, in one part of the charter, it cannot receive a different explanation in another part of it.