1775. *February* 14. JOHN AITCHISON of Rochsolloch *against* THOMAS HOPKIRK and OTHERS.

SUPERIOR AND VASSAL.

A year's free rent is exigible for the entry of a singular successor, either in lands or houses, where such entry is not taxed.

[*Faculty Collection, VII.* 29; *Dictionary,* 15,060.]

HAILES. If we listen to the plea of the defenders, we shall cut deep into the rights of almost all the subjects-superior in Scotland. It is impossible to resist the argument from custom. All the instances produced show, that subject-superiors exact sometimes less sometimes more, but constantly more than the double of the feu-duty. If they can exact more than double the feu-duty, it is plain that they can exact a year's rent, otherwise all superiors would be extortioners, and all vassals would be willingly oppressed. *This* explains the meaning of the phrase *lands*, if it were doubtful. It has been said, that all houses in Scotland are either houses in boroughs, or farm-houses, or fortalices: that the *first* two do not pay any composition, and that the *last* cannot, as being part and pertinent of the lands. In order to prove that all houses other than houses in boroughs and farm-houses are fortalices, reference is had to a decision mentioned by Craig, *tit.* 2, *dieg.* 9, § 18, *Murray of Hallyards* against *Earl of Morton*; but that decision only proves that the Court found that a house having two storeys was in so far to be considered as a *fortalice* as that a warning on six days might be allowed for removing the possessor from it. Craig calls this *benignior sententia.* Whether it was a right judgment, I inquire not. It is certain that Craig knew the difference between a *fortalice* and *a common house for habitation*; *l.* 2, *dieg.* 8, § 3. It is also certain that our forefathers were so exact as to distinguish between *fortalicia* and *forceletta*, great and small fortalices. It is therefore impossible that they could have failed to distinguish between *fortalices* and common houses for habitation, though neither in boroughs nor on farms.

KAIMES. I inclined to be against the superior, not on law, but for reasons of expediency. Now I see a very general practice which confirms the law.

GARDENSTON. On considering this case, with the analogy of law in royal boroughs, I was against the superior; but, after hearing the cause and seeing the instances given of practice, I am for supporting the right of the superior: but I would vary the interlocutor so far as to allow a deduction of the expense of repairs *communibus annis*, that the superior may not get more than the vassal reaps. I would not open a door for the rapacity of superiors.

MONBODDO. I had little doubt of the interlocutor when I read the papers; still less when I heard the pleadings. The rule must be the real rent for one year. How can we determine that it should be one-third or two-thirds? It is

impossible to fix one general rule from the condescendences, for the practice of superiors varies. I can give no other deductions than for repairs and public burdens. It is impossible to go back to examine the original value of the subject 100 or 200 years ago. Were I sitting here as a legislator, I might listen to many of the arguments urged by the feuars: *here*, I must say what *is* law, not what *ought* to be law.

COALSTON. We are not at liberty to alter this feudal law. The superior is entitled to a year's rent of the subject at the time of the entry; but he can have no more: deductions must be made of public burdens and feu-duty, and also of a reasonable allowance for repairs. There are two or three cases where the Court did use liberties, in favourable circumstances, with the statute; but nothing of this sort occurs here.

On the 14th February 1775, "The Lords found the pursuer entitled to demand a year's rent from singular successors, as the subject is set, or may set, with deduction of public burdens and feu-duties, and a reasonable allowance for repairs;" adhering to Lord Alva's interlocutor in substance.

Act. R. M'Queen. *Alt.* A. Crosbie. Hearing in presence.

1775. *February* 21. JAMES WILSON and OTHERS, *against* JOHN STORY and The MAGISTRATES of PAISLEY.

COMMUNITY.

The Magistrates and Town-Council of a Burgh found entitled, for an adequate consideration, to sell the liferent of a superiority, without setting it up to public roup, although informed of an intended competition.

[*Faculty Collection, VII.* 38; *Dictionary*, 2529.]

HAILES. There was nothing wrong meant or done by the Magistrates. They got a fair price for the liferent superiority; as much, or more than they would have got from the pursuer, Wilson. Besides, it was natural for them not to choose to give the vote to the agent of the family that, in 1759, had got the town of Paisley turned off the roll: this would be giving their *new* vote to the persons who deprived them of their *old* one: this could not be expected.

COALSTON. Magistrates of boroughs are not proprietors; therefore they cannot alienate gratuitously, but they may for onerous causes. They are under no obligation to put up the subjects to public roup: If the Magistrates had not been interpelled, this would have been a good sale, for the offer made by Wilson was not so good as that made by Story; but the difficulty arises from Wilson's letter before the sale, desiring to be informed of the time of the sale that he might be put upon an equal footing. In such cases, magistrates must always take the most that can be had.