

No. 63. &c. he had comprised, was never infeft himself in these lands; and also, that he ought to have a year's duty of the lands; and it being answered by the compriser, that his debtor had obtained decret against the said Walter Murray, decerning him to infeft the said Sir James, so that he now coming in Sir James's place, by his comprising from his son, as charged to enter heir, he ought to be entered; and as to the year's duty acclaimed of the lands, he ought to pay no more than the annual-rents of the money for which he was comprised, for the duty of the land was exorbitant; the Lords found, That the defender should infeft the compriser; as becoming in Gallashiels' place, sicklike as if he might have been compelled to infeft himself upon the foresaid decret, or Gallashiels' heir, if any had entered to him; and found, That it was not enough to give the superior the annual-rent of the money for which he had comprised, for an year, seeing he had comprised the land, and not an annual-rent out of the lands; but the Lords modified the duty to be paid to the superior to 300 merks, albeit the lands were worth yearly 800 merks at least.

Fol. Dic. v. 2. p. 410. Durie, p. 844.

1639. March 9. LORD ALMOND against HOPE of CARSE.

No. 64.

A compriser of feu-duties and superiorities from an immediate superior, who had granted sub-feus, without the consent of his superior, after act 1606, is liable to pay an year's rent, though he acquire right only to the feu-duties.

The Lord Almond having comprised from the Earl of Linlithgow certain lands, which he had set in feu to some feuers, for a certain small feu-duty yearly, and which lands were holden by the Earl of Linlithgow of the L. of Carse, by wardholding; upon which comprising Sir Thomas Hope, successor to the L. of Carse, in his heritable right of that superiority to the Earl of Linlithgow, being charged to receive the compriser; who suspending, that he was content to receive him, having received a year's duty of the lands for his entry, as use is; and the Lord Almond, compriser, alleging, that he was content to give him a year's feu-duty, contained in the feu-infeftment granted by the Earl of Linlithgow to the feuers, which ought to be found all that he ought to pay, seeing, by his comprising, he can have no right but to that which pertained to the Earl, from whom he hath comprised, and that was only the right of the superiority, and the feu-duty payable to him by his feuers, which was £.10 yearly; and no reason can compel him to pay for his entry to the superior more than a year's duty of that which he acquires by his comprising; the other answered, That he ought to have a year's duty, as the lands are worth by the year, seeing the lands are feued since act of Parl. 1606, which declares all feus null *ope exceptionis*, which are made without consent of the superior: This feu whereof the year's duty is now offered is in this case, being let in feu by the Earl of Linlithgow, since the year 1606, without consent of the L. of Carse, superior, and consequently cannot defend against the superior, to exclude him from the casuality of a year's duty of the lands. And the compriser answering, That he ought not in this place to dispute, especially by way of exception, upon the nullity of another heritor's right, who is not party,

nor called in this process, for that were very summary and unjust; but it is enough for him to say, that the lands are feued, and that he can have no more by his comprising but the yearly feu-duty contained in the feuers' charter; neither can the feu be found null for the alleged defect of being let since the year 1606, without consent of the superior; for as the granter of the feu could never have been heard to quarrel the feu upon that ground, being his own deed, which he is held to warrant, no more can the compriser, who is a singular successor, succeeding only in that right which he had; the Lords found, That the compriser was held to pay a year's duty, according to the worth of the lands, to the superior, and that the offer of a year's duty of that which was contained in the feu-charter sufficed not, in respect that the feus are let since the act of Parl. 1606, which declares the feus thereafter let, without consent of the superior, to be null *etiam ope exceptionis*; which the Lords found must necessarily militate in favours of superiors, against any objecting such feus against them, whereby they may be prejudged in their superiorities, or of the casualties belonging thereto, as this duty of the entry was; albeit, so far as concerns the feuers, their rights were not prejudged by this interlocutor; but that they remained good *prout de jure*, as against the letters; so also against the comprisers of the letters' right; but the Lords declared, that they would, after trial of the yearly avail of the lands, reserve the modification to themselves, which they declared should be very moderate, in respect of the compriser's small benefit.

Act. Stuart.

Alt. Præsens.

Clerk, Hay-

Fol. Dic. v. 2. p. 409. Durie, p. 881.

1715. July 27. GOVERNORS of HERIOT'S HOSPITAL against HEBURN.

A vassal, who had greatly improved his feu lands, being to pay his entry, the Lords found, That the present rental (not that which was when the purchase was made) must be the rule.

Fol. Dic. v. 2. p. 409. Bruce. Dalrymple. Forbes.

* * This case is No. 54. p. 7986. *voce* KIRK PATRIMONY.

1740. December 17. NAESMITH against STORY.

Where, by a clause in a feu-charter, the superior had obliged himself, "When any casualties should fall by reason of non-entries, life-rent escheat, or any other way, to renounce and dispoise, *et per verba de præsenti*, renounced and dispoised the same, and all profits thereof, in favour of the vassal, his heirs and successors," it was thought, though there was no occasion to give judgment on it, that still action

No 64.

No. 65.

No. 66.
Effect of a
clause in a
feu-charter
discharging
the superior's
casualties.