No 81. he remained year and day at the horn, especially if the rebel retained possession. It was also found, That a gift granted by King James III. under his Great Seal, *in anno* 1474, to John Stewart of Craigiehall and his heirs, that whensoever his lands of Lowchald holden by him of Barnbougall, who held them ward of the King, or his lands of Craigiehall holden by him of Lord Seton, who held them ward of the King, should fall in the King's hands by the ward of his vassals, the same ward should pertain to the said John Stewart of Craigiehall and his heirs heritably; that that gift was now expired and null, and could only serve, at the most, during the lifetime of the King, giver thereof.

Fol. Dic. v. 2. p. 68. Haddington, MS. No 1776.

1679. *November* 19. The Lady BLACKBARONY *against* BORROWMANS.

No 82.
A clause in a feu-right discharging the feu-duties in all time coming, found not effectual against a singular successor in the superiority.

THE Lady Blackbarony being infeft in liferent, and her son John Murray in fee in the lands of Cringltie, pursues improbation and reduction against Borrowmans, of a feu-right of the said lands granted to them by umquhile Blackbarony, in which feu there is a clause, "discharging the feu-duties in all time coming," whereby the feu became null as wanting a *reddendo*, at least it ought to be declared, that the foresaid discharge could not be effectual against the pursuers, who are singular successors to Blackbarony, who disponed the superiority to Mr William Burnet, from whom it was apprised and adjudged, whereunto the pursuers have right and stand publicly infeft. The defenders *alleged* absolvitor, because the dicharge being contained in the body of the feu-right becomes a condition of the feu, which therefore becomes in effect blench; and though provisions in infeftments, to grant gifts of escheat *gratis*, be not effectual against singular successors, being but personal obligements, yet this discharge is no obligement, but a present passing from the feu-duty in time coming. It was *answered*, That if the discharge were effectual, it would necessarily annul the feu, which cannot subsist without a *reddendo*, nor can it be equivalent to a blench, which hath always a *reddendo*, *si petatur*.

THE LORDS found the discharge of the feu-duty contained in the feu, did not annul the same, but found that it was not effectual against singular successors, and that the pursuers had right to the feu-duty since they acquired right to the superiority notwithstanding thereof.

Fol. Dic. v. 2. p. 68. Stair, v. 2. p. 707.

No 83.
A discharge of 20s. Sterling payable yearly to a

1679. *December* 9. Lord HALTON *against* The TOWN of DUNDEE.

THE Lord Halton, treasurer-depute, being infeft in the estate of Dundee and Constabulary thereof, *cum feodis et emolumentis ejusdem*, pursues the Town of

No 83.
Constable with a perpetual renunciation thereof, not relevant against the Constable's singular successor having right by apprising.

Dundee to make payment to him of the sum of 20s. Sterling allowed to them in their Æque to the Exchequer in part of their burgh-mails, which Æque bear expressly this 20s. "*consuetis solvi annuatim* to the Constable of Dundee, or Lord or Viscount of Dudhope." The defenders *alleged* absolvitor, *1mo*, Because the pursuer produces no special constitution of this 20 s. as a part of the emoluments of the Constabulary, for the Æque bearing "a sum to be paid to the Lairds of Dudhope," it might be another right of pension, but not as Constable, neither can the generality of the infeftment be made special by payment; for, though the Æque bears, "that this is accustomed to be paid yearly," yet that doth not import that it was truly paid, but it is only a designation of its being once paid to the Constable or Laird of Dundee; but the Town having gotten constant allowance of it, they have prescribed right thereto; *2do*, The Town produceth subscribed articles betwixt the Constable and Town of Dundee, whereby the Constable "renounces all right he had to this annuity." The pursuer *answered* to the *first*, That the emoluments of offices are ordinarily general, and possession doth only make them special; and here possession is clearly proved, in that the King doth yearly allow to the Town this annuity, "as used to be paid to the Constable of Dundee," who did pretend no other title thereto during all their payments, neither was it for any use for the Exchequer to call for the Constable's discharge, it being a constant annual allowance to the Constable, which if the Town had not paid, they were liable for it to him; and, as to the discharge, it could have only effect against the granter or his heirs, seeing no real right *aut jus fundi* can be transmitted by a discharge, which is only personal, and reacheth no further than the granter and his heirs, who being obliged to warrant the same, cannot come against it; but it hath no effect against singular successors, as is ordinary in superiors discharging of feuduties, but especially in this case where this annuity is due to the Constable by his office, and cannot be separated from the office without the King's consent; for if for any fault the Constable lost his office, his discharge would not be effectual against any other Constable not being his heir, nor doth it import that the Æque doth bear "sometimes the Lairds of Dudhope or Dundee," for unless a right could be shown to them distinct from the Constabulary, or that they got it when they were not Constables, law will ever presume that they had it as Constables, however they were designed in the Æque; for it being used to be paid to several generations of them, it cannot be presumed to be a pension, which is only personal, not reaching heirs; and though the words "used to be paid to the Constable" might have at first imported a designation, yet here it is constantly so continued, and sometimes bears *debitis et consuetis*, and doth not bear "of old, or some time due, or used to be paid to the Constables."

THE LORDS found the pursuer's title valid by his infeftment, and made particular by the use of payment instructed by the Æque; but found that the Town's possession, qualified by their Æque, could import no prescription,

No 83. except for the years preceding 40; and found that the Constable's discharge was not effectual against the pursuer a singular successor, having right not only to his gift of *ultimus hæres*, but by several apprisings.

Fol. Dic. v. 2. p. 68. Stair, v. 2. p. 718.

*** Fountainhall reports this case:

IN the action Lord Halton, as Constable of Dundee, against the Town of Dundee, for payment of an heritable fee for many years bygone; *alleged*, They had a discharge of it from the Earl of Dundee. *Replied*, He was but an administrator, and could not prejudge his successors in the office; so that it may be drawn to a general point, whether one that has an heritable office (for in a temporary office, such as the Provostrie of Edinburgh, there will not be much doubt they cannot,) with a fee annexed thereto, (such as a Bishop's heritable Bailie or the like) can grant a valid renunciation and discharge of the fee of all years to come? "THE LORDS, after much debate, found he might discharge it, so as to prejudge himself or his heir, but not a singular successor deriving right from him; or who has apprised or adjudged it." And that, albeit an office is *jus incorporeum*, and is conveyed by a gift without any sasine or infeftment following thereupon. See in another law MS. the case of Montgomery of Langshaw, where the LORDS found a superior's discharge of feu-duties for years to come did not militate nor subsist against his singular successor *. Yet it may be *alleged*, Halton is an heir, coming in by his *ultimus hæres*, only he will call himself now a singular successor, and cloath himself with the apprisings; but he should not be permitted to invert the title by which he entered the possession, which was *qua* donatar to the *ultimus hæres*. Then it was *alleged* for the Town, That they could not be liable for that L. 20 of burghmail acclaimed by Halton as due to the Constable for his fial, *quoad* bygones, because they were *in bona fide* not to pay it, in respect of the former Earl of Dundee's discharge, and so they were *fructus bona fide percepti et consumpti*. "THE LORDS found they were not *bona fide possessores*; and therefore decerned for bygones."

Fountainhall, v. 1. p. 67.

No 84. A superior by a writ under his hand, renounced and discharged in favour of the vassal all feu-duties and casualties.

1699. *December* 8. PRINGLE of Greenknow *against* The Earl of HOME.

CROCERIG reported Pringle of Greenknow against the Earl of Home, mentioned 20th Jan. 1698, *voce* SUPERIOR & VASSAL. Greenknow claimed absolvitor from the 17 merks of feu-duty paid out of the lands of Rumbletonlaw and West-Gordon, and other emoluments of superiority due to the Earl as over-lord, and to be free from attending his courts and being thirled to his mill, because, by a writ un-

* *See* APPENDIX.