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.

Croceric 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.

der the Earl's father's hand, he had renounced and discharged all these casualties. *Answered* for the Earl, None of these obligements can tie me, unless I represent my father, the granter; neither is a perpetual discharge of a feu-duty a *habilis modus* to extinguish it, nor is it real *contra fundum*, but merely personal upon the granter and his heirs; yea it is against the nature of a feu to discharge the recognizance and acknowledgment which the vassal owes to the superior; and it is *inter essentialia feudi* to have a *reddendo;* and to discharge it *in perpetuum* is equivalent as if it had none at all; yea, it will not so much as militate against the granter's successor for any years, but allenarly so long as the granter continues to have right to the superiority; for if he be legally denuded, then his singular successor may claim the feu-duty; neither will the discharge exclude him, reserving their recourse against the granter and his heirs. *Replied*, The Earl must be presumed to be heir, unless he instruct by what singular title he possesses; and till then he cannot quarrel his father's discharge. THE LORDS found, that *affirmanti incumbit probatio*, and seeing they libelled and replied on his representing, and that being their *medium concludendi*, they must prove it. If the Earl were pursuing his vassal, he behoved to shew his title; but in this process of declarator against him, he needed say no more but deny his representation, and if they succumbed, he would be assoilzied from this process; for the LORDS unanimously agreed that the foresaid perpetual discharge of the feu-duties and other casualties and astriction were merely personal, and only binding during the granter's lifetime, or his right, but could not operate against a singular successor.

No 84.
Found that this was merely personal, and binding only during the granter's life.

Fol. Dic. v. 2. p. 68. Fountainhall, v. 2. p. 72.

1731. *December* 11. Lady CASTLEHILL *against* Sir JAMES STEWART of Coltness.

No 85.

A PROPRIETER having disponed part of his barony, holding blench of himself, became obliged, under a penalty, to enter the heirs *gratis*, and likewise to dispone *gratis* the liferent escheats of his vassals in these lands, so oft as the same should fall into his hands; this clause was not found real against singular successors in the superiority.

Fol. Dic. v. 2. p. 68.

1734. *July* 24. GARDEN of Bellamore *against* Earl of ABOYNE.

No 86.

IN an original feu-charter, though woods were disponed along with the lands, there was this remarkable restriction laid upon the vassal, "That it shall not be leisom for him or his heirs to cut, sell, or give away, any of the trees, but allenarly for their own particular use and their tenants;" but this clause did not