1777. *July.*

ALEX. PIERRIE of Threeburnfoord, *against* ALEX. HAY of Mordington.

No 4.
Particulars of the case referred to in the note under No. 229. p. 8852.

MR. PIERRIE complained to the Court, that the freeholders of Berwickshire had refused to enrol him at their last Michaelmas meeting, upon the following titles: "Disposition (12th May 1772) by Mr. Cuming Ramsay in fa- "vour of the claimant, of all and hail the lands of Threeburnford, &c.; Inst. "of sasine (18th May 1772) following thereon, duly registered; charter of "confirmation under the great seal, in which the Crown *virtute annexationis su-* "*perioritatis terrarum ecclesiasticarum ad Coronam*, confirms said infeftment and "the rights in the person of Mr. Cuming Ramsay; special retour of these "lands to a four pound land of old extent, (19th January 1628.")

Mr. Hay objected to these titles, that the charter of confirmation from the Crown does not infer the right to be public, since such charters have frequently no other effect than to validate the right granted to the sub-vassal as holding of the vassal, and such charters of confirmation are understood to pass in Exchequer *periculo petentium*, without being revised by the Barons. Besides, as that charter not only confirms the titles in the claimant's person, but also those in the person of his author Mr. Cuming Ramsay, unless these last were produced to the meeting, which had not been done, it could not be known whether Cuming Ramsay only held lease of his predecessor, or could grant procuratory or precept to hold of the Crown, and consequently whether the title flowing from them could be confirmed, so as to constitute a public right.

Answered by the claimant, That however questionable his title to these lands might be, in a reduction with another party producing a better right, yet it is entirely *jus tertii* on the part of the freeholders to enter into the discussion of a progress of which it is impossible they could ever be competent judges. To satisfy them, it is enough that the claimant produce a charter under the great seal, and infeftment thereon duly recorded. And so it was found, 26th February 1745, Sir Patrick Dunbar against Budge of Toftingall, No. 220. p. 8844; and in the late case of Sir John Gordon's vote in the county of Cromarty. See No. 257. p. 8874.

Objected by Mr. Hay: These lands formerly belonged to the Collegiate Church of the Holy Trinity, and had been, previous to the year 1585, granted to the Town of Edinburgh for the purpose, as mentioned in after charters, of sustaining the Ministry and Hospital; and as these lands are expressly excepted in the general acts of annexation and revocation 1587, C. 29 and 31, and

since held feu of the Magistrates of Edinburgh, the vassals cannot
ıtitled to revert to the Crown as their superior, either upon the act
14. or 1661, C. 53, as these statutes only annex to the Crown the
s of these lands "erected into temporal lordships, baronies, or

No. 4.

"livings, before or after the general annexation of church lands." But as these lands never were so *erected*, and were even specially reserved from the general annexation, and mortified to the town of Edinburgh as hospital lands, they could not be comprehended under these statutes. Moreover, as the vassal has an option by the act 1661, to hold of the titular, and as in this case the vassals have, for these two centuries past, taken out charters from the town of Edinburgh, the last of which to Mr. Cuming's predecessor contains even an express clause *de non alienando sine consensu superiorum*, they cannot now revert to the Crown as their superior.

Answered, The statutes 1633 and 1661, are general, extending to the superiorities of all church lands whatever, and never intended to be limited in any respect, as there could be no reason for making any exception, since they took away nothing else than the naked right of superiority, leaving the titulars the whole emoluments arising from their former grants. Although it was rendered optional to the vassal by 1661, either to hold of the Crown or the titular, yet the mere act of taking charters from the latter does not hinder the vassals from resorting to the Crown, as has been frequently found, and particularly so in Duke of Gordon against the Earl Fife, March 4, 1773, No. 100. p. 15096.

3*tio*, Objected, That by the act 1681, it is required that the retour of a £40 land of old extent, in order to qualify a person to vote, must be distinct from the feu-duties in feu-lands. The retours founded on by the claimant is the retour of one half of the lands of Threeburnfoord, and although the valent clause contains "et quod integra dict. terra val. £4," these words can only apply to all and whole the *half* of the lands, the only subject of enquiry for the jury. As therefore the feu duty of the whole lands payable to the Town of Edinburgh was £8, and the value of the one half of the lands declared to be £4, exactly the same with the feu-duty of the half, the old extent is not in terms of the above act sufficiently distinct from the feu-duty.

Answered, That the old extent is different from the feu-duty; as the valent clause finding these lands to be a £4 land of old extent, applies to the whole lands, according to the common practice in many cases, where only the service of the half was properly before the jury. It was necessary for the jury in this retour to answer as to the old and new extent of the lands, and the duty payable to the immediate superior: They accordingly declare, that the whole lands were liable in the blench duty of one penny to the immediate superior, then Lady Ann Kerr, that *integ. dict. terræ val.* £4, and that the half of the lands were in the hands of the superior. But it was unnecessary for them to specify the feu-duty payable by the immediate superior Lady Ann Kerr, to the one more remote, nor indeed had they even an opportunity of knowing what that feu-duty was. And even granting that the feu-duty and old extent coincided, it does not follow that the jury took the feu-duty for the old extent, as was decided in a late case, Douglas of Douglas against Aikman of Bromhilton, 1774, (not reported.) Further, the act 1681 does not apply to this case, where

No. 4. the feu-duty was not payable to the Crown, but was payable to the immediate vasal by the sub-vasal. The reason is obvious; for as by the acts 1661 and 1681, a privilege of voting was given to Crown lands, retoured at 40*s.* of old extent, it was provided by the latter, and indeed followed of course, that 40*s.* must be the true avail of such lands, distinct from the feu-duties paid out of the lands to the Crown, which so far from being part of the value of the estate, was a burden upon it: The feu-duties, however, payable to the Crown vassal, form the value of the estate: The act 1681, therefore, only applies to feu-duties payable to the Crown, and the feu-duties payable to the Crown vassal neither fall under the words nor the sense of that statute.

The Court, chiefly upon the first ground, dismissed the complaint.

For Mr. Hay, *H. Dundas, J. Swinton.* For Mr. Pierrie, *Ilay Campbell.*

D. C.

1800. *July* 11. The TRUSTEES of General Fraser *against* SIMON FRASER.

No. 5.
A copy of a retour inserted in the record-book of a Sheriff-court, along with other adminicles, held, incidentally, in the course of a process of cognition and sale, and without an action for proving the tenor, sufficient evidence of the old extent of the lands.

The trustees of General Fraser of Lovat, as authorised by act of Parliament, brought an action of cognition and sale against Simon Fraser of Foyers, and other heirs of entail of Lovat, for selling certain superiorities and feu-duties, as well as parts of the property of the estate, for payment of General Fraser's debts.

By the act of Parliament, the vassals were to have a preference in the purchase of the superiorities of their lands, on payment of a price to be fixed by the Court of Session.

The price afterwards fixed was twenty-five years purchase of the feu-duties, and £400 Sterling for each freehold-qualification.

Among other superiorities, the trustees proposed to sell those of the lands of Mussadies and Mellagies, belonging to Fraser of Foyers.

In the course of the process, they discovered, in the hands of a gentleman who had lately held the office of depute Sheriff-clerk of the county of Inverness, a book, bearing to be the record of the Sheriff-court from 1540 to 1594, containing copied into it various retours, and particularly one of Janet Fraser, as heir to her father in the lands in question, dated 6th October 1575, bearing, that the lands amounted to £3 of old extent.

With the view of obtaining the price of a freehold-qualification, the trustees presented a petition to the Court, craving that the record-book should be produced, delivered into Chancery, and considered as the proper record of the retour in question.