The appellant made objection, that if this were a real burden upon the eſtate, it could not go to the executor. But the intereſt of all real debts goes to executors, and ſo do annuities, and yet they are real burdens and really ſecured: And the Court of Seſſion in 1680, after finding this debt of 8000 merks to be a real burden, decreed the right thereof to the executor; and it is *jus tertii* to the appellant to make this objection, ſince the heir does not queſtion the conveyance.

This debt being by the Court of Seſſion in 1678 found to be a real debt upon the eſtate, preferable to all the debts of James the ſon, Lord Burleigh, who was a conſiderable creditor, was neceſſarily obliged, in order to ſecure himſelf, to purchaſe this debt. It would be to render the decrees of the Court of Seſſion very precarious (which are at preſent looked upon to be the beſt title for a purchaſe) if they were to be overturned, after almoſt forty years poſſeſſion under them.

Journal, 2 September 1715.

After hearing counſel, *It is ordered and adjudged that the ſaid interlocutors of the 5th and 19th of February* 1714, *and ſo much of the ſaid interlocutors of the* 11*th and* 30*th of June* 1714, *as affirms thoſe interlocutors of the 5th and 19th of February be reverſed; and that the decree of appriſing of the 25th of April* 1671, *obtained by the appellant's father, and the appellant's demand in reſpect of the annuities granted by the deeds of the 24th of May* 1666, *ought to have preference of and be ſatisfied out of the eſtate in queſtion before the* 8000 *merks claimed by the reſpondent.*

For Appellant, *Spencer Cowper. Rob. Raymond.*
For Reſpondent, *J. Jekyll. Will. Hamilton.*

Caſe 40. Fountainhall, 27 March 1707. Forbes, 24 July 1713.

James Hamilton of Dalziel Eſq. - - *Appellant;*
The Principal, Maſters, and Profeſſors of the Univerſity of Glaſgow, - - *Reſpondents.*

9th *May* 1716.

Superior and Vaſſal.—Act of Parliament 1469, c. 36.—An univerſity having acquired righ to an adjudication of lands, held in ward, for a debt due to them, the Court found that the ſuperior muſt enter the univerſity, or pay the debt to the extent of the value of the lands: but upon appeal the judgment is reverſed; and it is ordered, that the ſuperior ſhould admit ſuch proper perſon for vaſſal as the univerſity ſhould nominate.

Bona fide Poſſeſſion.—The ſuperior, notwithſtanding the reverſal, is obliged to account for the rents ſince the charter was offered to him by the univerſity, he having deduction of his caſualties as if the old vaſſal then entered.

Coſts and Expences.—Expences of the Court below, and 30*l.* coſts of appeal, given to the *appellant*.

ON the 9th of June 1687, Elizabeth Herbertſon, widow, obtained a decreet of adjudication of the lands of Shields and Burngrains, belonging to her creditor Mungo Niſbet, who held theſe lands of the appellant in Ward holding. Mrs. Herbertſon after-

afterwards gave the appellant a charge to enter her as his vaſſal, but ſhe never did enter in that capacity, and the appellant, in December 1696, obtained a decree of declarator of non-entry againſt her. In May 1697, Mrs. Herbertſon being debtor to the reſpondents in certain ſums of money, for their payment and ſatisfaction aſſigned over to them her ſaid debt due by Mungo Niſbet, and alſo conveyed to them the ſaid adjudication obtained by her over the lands of Shields and Burngrains.

In July following the reſpondents tendered to the appellant as ſuperior a year's rent and a charter to be executed by him, to admit the reſpondents as his vaſſals in the premiſes; but the appellant refuſed to admit the reſpondents, alleging that he was not obliged to admit an univerſity as his vaſſals, becauſe he would thereby be deprived of his caſualties of entry, non-entry, and other caſualties incident to ward-holding.

The reſpondents in 1707 brought an action before the Court of Seſſion to compel the appellant to receive them as his vaſſals; and the cauſe being heard before the Lord Ordinary, his lordſhip, on the 25th of March 1707, "found that the appellant was not "obliged to enter the reſpondents as his vaſſals."

This action was not further proceeded in till 1713, and at a hearing of the cauſe on the 16th of February that year, the reſpondents inſiſted upon the act of parliament 1469. c. 36. that the appellant was obliged either to enter the reſpondents as his vaſſals, or to pay the debt due to them. The Court, on the 24th of July 1713, "found that the appellant the ſuperior muſt either enter "the univerſity of Glaſgow, or pay the debt due to them to the "value of the lands adjudged, as the ſaid value ſhould be deter- "mined by the Lords upon a probation thereof; and found that "the ſaid reſpondents muſt transfer their right and debt to him "upon his paying the value of the ſaid lands, with abſolute war- "randice for the ſum they received, reſerving always their right "to them againſt the common debtor, in ſo far as they ſhould "not be ſatisfied by the appellant in regard the debt due to the "reſpondents was more than the value of the lands, and found "that the appellant muſt be accountable for his intromiſſions with "the rents of the ſaid lands, or intereſt of the value thereof, in "his option from their offer of a charter and year's rent to him, "and remitted it to the Lord Ordinary in the cauſe to call and "hear the parties, procurators, and apply the interlocutor, and "determine or report." 1469, c. 36.

Before the Lord Ordinary the appellant made ſeveral objections to the offer of the charter made by the reſpondents to him; and his lordſhip, on the 28th of the ſaid month of July, "found the "appellant accountable for the rents or intereſt of the value of "the lands from July 1697, the time the charter was offered to "him," and granted commiſſion to both parties to examine witneſſes as to the value of the premiſes.

The appellant preſented a reclaiming petition to the Court, complaining particularly of that part of the interlocutor obliging him to account for the profits ſince he was in poſſeſſion, by virtue of

of a decreet of non-entry, and contending that he was a bona fide poſſeſſor till the univerſity ſhould obtain judgment that the appellant was obliged to receive them as his vaſſals; and he likewiſe made ſome objections to the charter offered him by the reſpondents. (*a*) After anſwers for the reſpondents, the Court, on the 31ſt July 1713, "adhered to their former interlocutor, and "refuſed the deſire of the ſaid petition, reſerving to the appel- "lant his objections againſt the reſpondents' charter offered to "him." The appellant preſented another reclaiming petition againſt theſe interlocutors, and praying that his objections againſt the charge given him by the reſpondents to receive them as his vaſſals, might likewiſe be reſerved to him. After anſwers, the Court, on the 18th of November 1713, "adhered to their "former and the ſaid Lord Ordinary's interlocutors, and refuſed "the deſire of the petition." The appellant proteſted for remeid of law againſt the interlocutors already pronounced; but his appeal was not entered in the Houſe of Lords till other poſterior interlocutors were pronounced.

A proof was afterwards made of the rental and value of the ſaid lands; and after conſidering the proof, the Court, on the 9th of July 1715, "found that the ſaid lands held ward of the ap- "pellant, and that the ſame were worth 16 years purchaſe; and "that the value and price of the ſaid lands extended after deduc- "tion of the teind to 1744*l.* 14*s.* 4*d.* Scots money; and found "that the appellant ought to make his election whether or not "he would accept of the ſaid lands at the value and price afore- "ſaid, (the univerſity of Glaſgow transferring their right to him "with abſolute warrandice for the ſaid price and value), and pay "to the ſaid univerſity the ſaid price, or enter and receive the "ſaid univerſity as his vaſſal upon their adjudication, upon pay- "ment to him of a year's rent of the ſaid lands."

The appellant (reſerving a liberty of appealing) by his counſel made his election to purchaſe the lands; and thereupon the Court (*b*) "decerned the appellant to pay to the reſpondents 1744*l.* "14*s.* 4*d.* Scots, with intereſt, from the 15th of July 1697, the "date of the offer of the charter, the reſpondents tranſmitting "their right to the appellant." The appellant petitioned againſt this interlocutor, as being thereby deprived of an opportunity of making his objections againſt the charter offered to him in terms of the interlocutor 31ſt July 1713; and he ſtated that though he had petitioned againſt the other parts of that interlocutor, and inſiſted that he might be at liberty to except to the charge given him to enter the reſpondents his vaſſals, as well as to the charter offered to him, which petition the Court, on the 18th of November 1713, had refuſed and adhered to their former interlocutor; yet ſo far was that from taking away the reſervation, that the interlocutor whereby it was given was affirmed; and the appellant therefore prayed, that he might be heard as to theſe objections.

(*a*) It does not appear from the Appeal Caſes what theſe objections were.

(*b*) No date appears to this; and except it formed part of the interlocutor 9 July 1715, it does not appear to be appealed from.

The

The Court, on the 28th July 1715, " adhered to their former " interlocutor, and refuſed the deſire of the petition."

The appeal was brought from " an interlocutor of the Lords of " Seſſion of the 24th of July 1713, and from an interlocutor of " the Lord Polwarth, Ordinary in the cauſe, of the 28th of the " ſame month, and from that part of the interlocutor of the Lords " of Seſſion of the 31ſt of the ſame month affirming the ſaid for- " mer interlocutors and refuſing the deſire of the petitioner's ſup- " plication; and likewiſe from the interlocutors of the ſaid Lords " of the 18th of November following, and of the 9th and 28th " of July 1715." Entered, 11 Aug. 1715.

Heads of the Appellant's Argument.

The lands in queſtion hold ward of the appellant, and he is entitled to all the caſualties of ſuch tenure; particularly ward, relief, and marriage, which are part of the appellant's property. It cannot, then, be looked upon but as a very great hardſhip to deprive him of all theſe caſualties (which were the only conſideration for the original grant of the ſaid lands) without his conſent; but ſhould the reſpondents prevail, the appellant muſt loſe all theſe caſualties, ſince an univerſity or corporation can never marry or be under wardſhip.

However general the words of the act of parliament be, yet as there never was any inſtance of a ſuperior's having been compelled to receive an univerſity or corporation for his vaſſal, yet the purpoſe of the act, as it is humbly apprehended, can only be intended to compel a ſuperior to receive the creditor as his vaſſal, ſuppoſing he were of the ſame nature or condition as the former vaſſal. For it cannot be reaſonably thought that the legiſlature intended to put it in the power of a vaſſal to alter the tenure, and to deprive and diſappoint a ſuperior of his caſualties; and yet upon the foundation of this decree it will be in the power of every vaſſal to aſſign to a corporation whereby a ſuperior will entirely loſe his caſualties.

The reſpondents have an eaſy and ſafe way to prevent any prejudice to themſelves or being deprived of their juſt demand as creditors; for they may convey their right to a third perſon in truſt for them, and then the appellant, as ſuperior, will enter him as his vaſſal. And ſince, by this method, the reſpondents may be ſafe as to their demands, and the appellant ſtill be entitled to his caſualties, it would be a great hardſhip to oblige the appellant to do any thing ſo much to his prejudice as to forfeit his caſualties. Though the appellant ſhould be obliged to receive the reſpondents as his vaſſal, yet it is conceived to be unreaſonable to make him accountable either for the rents of the lands, or the intereſt of the value thereof, becauſe the appellant was certainly *bona fide* poſſeſſor of theſe lands; he had decree of declarator of non-entry againſt thoſe under whom the reſpondents claim, and the poſſeſſion thereof decreed to him. He had likewiſe the Lord Ordinary's interlocutor in his favour when this cauſe came firſt to be heard, and if the reſpondents

reſpondents ſuffered any inconvenience, it was their own fault for not commencing and proſecuting their action ſooner.

Though the appellant were accountable for profits, that could only be from the offer made of a charter from the reſpondents; but that not being done in a regular manner, nor according to the forms preſcribed for that purpoſe, that offer muſt be looked upon as void, and conſequently the appellant not chargeable with the profits of the ſaid lands.

Heads of the Reſpondents' Argument.

The words of the act 1469, c. 36. are, "And alſo the over-lord "ſall receive the creditour or any uther buyer, tennent till him "pay—and to the over-lord a yeire's maill as the land is ſet for the "time, and failzieing thereof, that he take the ſaid land till him-"ſelf, and undergang the debtes." This act makes no manner of diſtinction what ſort of creditors the ſuperiors muſt receive, whether a body corporate or an individual; ſo that the law being indefinite and general, making no exception, the application muſt be ſo likewiſe, eſpecially ſeeing all corporate bodies, and particularly univerſities, who have all the favour the law can allow, may purchaſe and contract debts. But if they cannot ſecure their debts and purchaſes in the ſame manner that the law allows to other creditors, they would be entirely deprived of the benefit of any dealings or improving their ſtock; becauſe, by the law of Scotland, lands and ſecurities upon lands cannot be effectually conveyed without ſaſine, which the ſuperior muſt always give in the caſe of adjudications; ſo that to allow the ſuperior the liberty of refuſing, is in effect to deny the benefit of real ſecurity to incorporated bodies on their debtor's lands. And as to the pretended inconveniences that might happen to a ſuperior, by an univerſity's being received as a vaſſal, they are very little to be regarded; for although they were ſuch as ſtated, yet the act of parliament being general, it muſt take place, and inconveniences in certain particular caſes muſt always yield to a more univerſal good: and the ſuperiors have got by the law a recompence, which is a full year's rent, and which is thought equivalent for the exchange of the vaſſal.

The appellant can ſuſtain no loſs by this, for long before the offer of a charter, and ever ſince he has been in poſſeſſion of all the rents and profits of the ſaid eſtate, and by the interlocutors appealed from he is decreed to pay no greater price than 16 years' purchaſe, which is very moderate, and it was the appellant's own particular choice, rather to pay that price than to quit the property of theſe lands and retain the ſuperiority only. Beſides, it is moſt reaſonable that the appellant ſhould be obliged either to be accountable for his intromiſſions, or the value of the lands and intereſt ſince the ſaid 5th of July 1697, becauſe he received the rents and profits *ſine titulo*; and his poſſeſſion was a plain uſurpation upon the vaſſal, for the ſuperior is only entitled to the full rents during the vaſſal's wilful non-entry. But ever ſince the ſaid 5th of July

1697

1697 the vaſſal has not been wilfully in non-entry, that being the time of the univerſity's offering a charter and a year's rent to the appellant to enter them as his vaſſals. With this he ought in law to have complied, whereby the lands would have been full; and ſo they muſt be held to be as to the appellant, agreeably to the rules of the civil law. "In omnibus cauſis pro facto accipitur id, "in quo per alium moræ fit quo minus fiat." Digeſt. de reg. juris. 39. And "In jure civili receptum eſt quotiens per eum, "cujus intereſt, conditionem non implere, fiat, quominus im- "pleatur, perinde haberi, ac ſi impleta conditio fuiſſet." Ibid. 161. Digeſt. l. 50. tit. 17. De Reg. Jur. 39 & 161.

As to the pretence of the charter's being irregular, that is entirely groundleſs, the ſame being in the preciſe words of the charters granted by the appellant's predeceſſors of the ſaid lands to the former vaſſals. And although the appellant made ſeveral objections to the ſaid charter ſo offered by the univerſity, and though theſe objections were reſerved to him to be proved; yet upon the appellant's application to the Court in relation thereto, and the univerſity's anſwer, theſe objections were fully cleared, as appears by the interlocutor of the 18th November 1713, as well as by all the ſubſequent interlocutors made in this cauſe. The reſervation of theſe objections therefore cannot be conſtrued to entitle the appellant to the property of all the rents and profits of the eſtate received by him, ſince theſe objections have been ſince over-ruled by what the Court did afterwards.

After hearing counſel, *It is ordered and adjudged, that the ſeveral interlocutors complained of in the ſaid appeal be reverſed; and it is further ordered and adjudged, that the appellant admit ſuch proper perſon for tenant as the reſpondents ſhall nominate, and that the appellant do account for the profits of the lands of Shields and others mentioned in the ſaid appeal, which he received or might have received without his wilful default, from the time the reſpondents offered the charter in the year* 1697, *deducting thereout the year's rent due for ſuch admiſſion and the appellant's coſts in the court below, and alſo* 30*l. for the appellant's coſts of this appeal; and further, that the appellant have allowance for all ſuch caſualties as have* (been) *incurred (if any) ſuppoſing Mrs. Herbertſon had been admitted vaſſal in the ſaid lands at the time of the offer of the aforeſaid charter in the year* 1697, *and the ſaid Court of Seſſion is hereby ordered to cauſe the ſaid account to be taken, and full coſts to be aſſeſſed ſuſtained by the appellant in the court below.* Judgment, 9 May 1715.

For Appellant, *Sam. Mead.* *Will. Hamilton.*
For Reſpondent, *David Dalrymple.* *Thomas Lutwyche.*

This caſe is in ſeveral reſpects worthy of particular obſervation; the judgment here reverſed ſo favourably for the appellant, as to allow him expences of the court below and coſts of appeal, is founded on in the Dictionary, vol. 2. p. 408. *Superior and Vaſſal;* and by Bankton, b. 2. tit. 4. § 11. It appears deciſive

of the point, that a ſuperior is not obliged to receive an univerſity adjudger as his vaſſal.

With regard to the collateral point of law, whether, in the caſe of an univerſity or corporation diſponee a ſuperior would be obliged to receive or not, Bankton ſtates, that no deciſion has been given; and he inclines to think that the act 20 Geo. 2. c. 50. as it contains no exception with regard to univerſities or corporations, would oblige the ſuperior to receive them. Erſkine, however, b. 2. tit. 7. § 7. inclines to the oppoſite opinion; and indeed the act laſt mentioned does not appear ſo ſtrong in favour of the univerſity or corporation diſponee, as the act 1469, c. 36. is in favour of the adjudger.

A ſimilar deciſion to that here reverſed, is given by Dalrymple, 11 December 1712, Maſter of Church and Bridge Work of Aberdeen, againſt the King's College of Aberdeen, where the deciſion of the Court of Seſſion in the preſent caſe is alſo mentioned.

Caſe 41. David Gregory of Kinnairdy, - - *Appellant*; James Anderſon Grazier in Aberdeen, - *Reſpondent*.

24th *May* 1716.

Donatio inter virumet Uxorem.—During the ſubſiſtence of a marriage a wife and her ſiſter, who have an equal right to a bond, convey the ſame to the huſband. He afterwards makes his will, appointing his wife executrix and univerſal legatee, for behoof of the grandchildren. After the death of the huſband, the grant formerly made by her to him was not revocable as a *donatio inter virum et uxorem.*

Preſcription—The preſcription of 40 years not to be counted, from the date of an aſſignment of a bond, but from the time of receiving the money thereon.

Onerous cauſe.—An aſſignment of a bond, bearing to be for onerous cauſe, from the circumſtances of parties as executrix and truſtee, found not to prove the onerous cauſe of the aſſignment in a queſtion near 50 years from the date thereof.

Truſt.—A diſcharge granted by an executrix to a manager for her under a will, who had a ſalary, of all his receipts and intromiſſions, in general terms, was not ſufficient to diſcharge him from the intromiſſion with a bond, which the deceaſed diſponed to the widow, his executrix, for the good of his grandchildren.

Coſts—30*l.* given againſt the appellant.

HUGH FRASER of Eaſtertyre, and Thomas Fraſer of Strichen, as his cautioner, being indebted by bond in the ſum of 1000*l.* Scots to Patrick Dyvie; the ſame was afterwards aſſigned to Dr. William Guild, Principal of the college of Aberdeen. Dr. Guild dying inteſtate, and without children, his ſiſter Chriſtian was confirmed his executrix, who with her ſiſter Margaret, in Auguſt 1661, aſſigned that bond to Thomas Cuſhney, the ſaid Chriſtian's huſband.

Thomas Cuſhney by his will and teſtament, in 1664, appointed his wife Chriſtian his executrix and univerſal legatrix of all his eſtate