

No 11.

and not to the non-entry falling by the resignation; though the fee be in the superior's hand during the ward, &c. yet not *jure proprietatis*, but *jure superioritatis* by a casualty of the superiority.

Fol. Dic. v. 1. p. 469. Stair, v. 2. p. 558.

S E C T. III.

Sasine within Burgh.

No 12.

A sasine within burgh was sustained, though given by a Sheriff-clerk, there being no Magistrates or Town-clerk in office at the time.

1666. July 19.

THOMSON *against* M'KITRICK.

FOUND, That a comprising may be deduced upon an heritable bond, whereupon infestment had followed, the same being payable without requisition; albeit a charge of horning does not precede, seeing there may be pointing upon such a bond: And there is *eadem ratio* as to comprising; and the denunciation is a sufficient intimation, that the compriser intendeth to have his money.

In the same cause, the LORDS having sustained a sasine of burgh-lands, whereto the Sheriff-clerk was notary, there being no Town-clerk for the time, by reason in the time of the English usurpation, the Magistrates and Clerk refused the tender; the LORDS found, that the said sasine being within burgh, though not under the hand of the Clerk, was not null upon that ground, that it was not registered; because, though the reason of the act of Parliament for registration of sasines, and the exception of sasines within burgh, be, that sasines within burgh are in use to be registered by the Clerks in the Town's books, yet the said reason is not expressed in the act of Parliament; and the act of Parliament excepting burghal sasines, the party was in *bona fide* to think that there was no necessity of registration.—See REGISTRATION.—LEGAL DILIGENCE.

Clerk, Hay.

Fol. Dic. v. 1. p. 469. Dirleton, No 22. p. 10.

* * * Stair reports this case :

1662. July 3.—THOMSON and M'KITRICK having apprised some tenements in Dumfries, M'Kitrick, the first appriser, insists for mails and duties. Thomson *alleged* M'Kitrick's sasine was null, as being within Burgh Royal, and not given by the Bailies and Town-clerk of the burgh, conform to the act of Par-

liament. The pursuer *answered*, That his sasine was given by the Provost, and by a notary, whom he employed as Town-clerk, not only in that, but in several other acts; and that because the Town-clerk was excluded from his office, for not taking of the tender; and, upon the same account, there was no Bailie; so that, to complete this legal diligence, he was necessitated to take infettment by the Provost, which is sufficient in such cases; because, though the act of Parliament mentions the Bailies of the burgh, that it is in opposition to Bailies in that part, but cannot be understood in opposition to the Provost, who has *majorem jurisdictionem, quia majori inest minus*; and offers them to prove that he was Provost, at least *habitus et reputatus* Provost, and that he did employ his notary, as Town-clerk for the time.

THE LORDS sustained the allegiance to prefer M'Kitrick.

1666. *July 21.*—MR JOHN THOMSON pursues M'Kitrick, for reducing of an infettment of some tenements in Dumfries, upon an apprising, on these reasons, *first*, That the apprising was null, proceeding upon a bond without requisition or charge; without which, the heritable bond could not become moveable. *2dly*, Infettment, being within burgh, was not given by the Bailies and Town-clerk. *3dly*, That it was neither registered in the Town-books, nor in the Register of Sasines of the shire. It was *answered* to the *first*, That the bond bore no clause of requisition, but bore, on the contrary, to be payable, without requisition, and so, as moveables, the defender might have pointed therefor, without charge, so might lands be appraised. To the *second*, There being no Magistrates, nor Town-clerk in office at the time of this sasine, and the defender being an appriser, necessitated to do diligence, took sasine by the Sheriff-clerk, which was necessary, and sufficient. To the *third*, The act of Parliament requires no registration of sasines within burgh; and, albeit they be ordinarily to be found in the Town-books, yet, if that should be neglected, they would not be null.

THE LORDS repelled the first reason, and found no necessity of a charge; and they had formerly repelled the second reason, in respect of the answer made thereto, and did also repel the third reason.

Stair, v. 1. p. 121. 400.

* * * This case is also reported by Gilmour.

1662. *June.*—MR JOHN THOMSON pursues a reduction of a sasine given to William M'Kitrick, of certain tenements in Dumfries, upon the act of Parliament, that it was not given by one of the Bailies, nor by the Town-clerk, and registered. It was *answered*, That the sasine was given in *anno* 1653, when the kingdom was under the power of the English, by Thomas M'Birnie, then holden and reputed Provost, who then made choice of Robert Neull, Sheriff-clerk, who was not only notary to this sasine, but to 15 or 16 more, in respect

No 12. James Cunningham, Town-clerk, had not taken the tender, conform to a public proclamation then emitted; and there is no necessity of registering sasines of burgh lands.

THE LORDS, in respect of the time, found the allegiance relevant, that M^r Birnie was reputed Provost for the time, who had made use of this notary as Town-clerk, not only in this, but in other cases. This also found in July 1666.

Gilmour, No. 44. p. 32.

1686. *February.* COUNTESS OF KINCARDINE *against* EARL OF MARR.

No 13.

THE LORDS found, that an infestment of burgage lands from the King was not from the right superior, though the Magistrates of Royal Burghs are reputed only the King's Bailies, and burgage holds of the King; and, therefore, preferred a posterior infestment from the Bailies and Town-clerk. *2dc.* They found that a few acres, bought by my Lord Kincardine from several heritors, being imparked, and so naturally united, and contiguous with some other parcels of his own land, a disposition, given by a subject, for taking sasine at the manor-place for all these acres and park, was sufficient, without a formal erection and union from the King.—See UNION.

Fol. Dic. v. 1. p. 470. Harcarse, (INFESTMENT.) No 604. p. 168.

* * * Sir P. Home reports this case :

1687. *June.*—IN the competition among the Creditors of Kincardine, it being *alleged* for the Lady Kincardine, That they ought to be preferred to the Earl of Marr, as to the lodging, yards, and parks of Culross, because the lodging, yard, and whole parks, are a part of the Abbey of Culross, and are within the erection of the burgh, as appears by the charters of erection, except 17 acres, which are particularly excepted in the erection; and which lands hold burgage of the town, and the Lady is infest, holding burgage; whereas, the Earl of Marr is infest under the Great Seal, holding of the King; so that he being infest by the wrong superiors, the Lady ought to be preferred: As also, the Earl of Kincardine acquired the house, yard, and several acres of land within the park, at different times, and from different authors, and was infest by several sasines, and the Lady is infest in the same manner; whereas, the Earl of Marr has only but one sasine for all, which can be extended no farther than the particular parcel of lands, in which infestment was taken, especially seeing there is no union or erection into a barony. *Answered* for the Earl of Marr, That he was infest by the same superior, and after the same manner that the Earl of Kincardine was infest, who, being the common