debite executed to the day, and so the term being circumduced against them for not proving; they gave in a bill to the Lords, bearing, that in case the pursuer had led no probation for proving his libel, they had no necessity to prove their defence that elided it; and that the pursuer had only on the very day of the act led his witnesses, so that they were secure till then; and that he had a diligence; therefore craved the day might be prorogued to him for proving his exception. The Lords granted them a farther day for leading their witnesses, providing they closed their probation before the pursuer's probation came to be advised, so that he might not be delayed; otherwise, the Lords declared, they would have no respect thereto. It seems, indeed, to be an error in our form, that where both a libel and exception are admitted to probation, one day should be assigned for proving of both; for there should be a longer day given to the defender in that case, to the effect he may first see whether the pursuer proves his libel or not; for if the pursuer prove it not, why should we burden the defender with the superfluous probation of his exception?

This action, and its probation, came to be advised in the Innerhouse on the 26th of February, 1678, (so that in the space of four months and less the haill process was carried on and the same advised by the course of the roll,) and the Lords found the pursuer's claim and furnishing, with the passive title of accepting a disposition, fully proven; and the defence upon the custom of the nick-sticks, &c. not proven; and therefore decerned. *Advocates' MS. No.* 651, *folio* 305.

1677. *November* 13 and 14. THE KING'S ADVOCATE and SOLICITOR *against* STRAUCHAN of Kinnaldy.

November 13.—THE Advocate, and Sir William Purves as his Majesty's Solicitor, pursues Strauchan of Kinnaldy for the casualty of ward and marriage, fallen by the decease of ——— Bannerman of Elsick, who stood last infeft as the King's vassal in these lands, and who had disponed them in favours of this Kinnaldy a little before his death. *Vide supra*, No. 571, *Alex. Arbuthnot* against *Barclay*, 14*th June*, 1677.

It was ALLEGED,—That no casualty was due by Elsick's decease; because he was denuded by disposition, whereupon resignation had followed in exchequer before his death; and so the King having accepted of his resignation in favours of a third party, Elsick was denuded and discharged of any thing could befal the King by his decease, and the other came to be in place of vassal. Whereunto it was

REPLIED for the King, by Sir George M'Keinzie, his advocate,—That the rule in law to know if those casualties of ward and marriage were befallen to the superior, yea or not, was, to consider whether the person by whose decease they are contended to be opened and devolved, stood last infeft, yea or not; or if he had infeft another publicly holden of the superior. And it impinges on the principles and foundations of the feudal law to assert, that a naked resignation, without any more following thereon, does so denude, as to intercept the casualties falling by the decease of the resigner; for however these casualties be odious, and so not to be extended, yet this is no stretch, but a most natural and genuine consequent of feudal rights; by which a resignation is an incomplete step, and gives no real right to the property,

till it be perfected and consummated by infeftment; and affords no more but a personal action at the instance of him in whose favours the resignation is made, against the superior, to grant a charter upon his acceptation of the resignation; so that the *jus in re*, or *dominium*, stays with the resigner till the resignation be perfected by infeftment following thereon; and till then the resigner is never fully divested. Whereof this is an unanswerable demonstration, that if the resigner make a second resignation in favours of another person, and he perfect his resignation by passing infeftment before the first, he will be preferred in law to the other party, in whose favours the first resignation was made and accepted. And that this is undoubted law, and never questioned till now, appears from Craig, whose opinion is of no small authority. He, page 318 *et seq.* tells us, a resignation consists *ex tribus partibus*,—the act of resignation,—the superior's acceptation,—and, lastly, the charter, and the tradition and investiture given to him in whose favours the fee was resigned; and he adds, *Nihilque operatur resignatio donec totus absolvatur actus, nec resignans interea dominio privatur;* than which there can be nothing more expressly positive and clear.

On the 14th of November, 1677, the Lords advised this debate, after it was resumed by my Lord Pitmedden as his trial in the Innerhouse, conform to the act of sederunt, before his admission, and that he had given his judgment in it first. The Lords sustained the summons of declarator, and repelled the defence, in respect of the reply; and found the naked resignation did not stop the falling of those casualties upon the resigner's death, unless infeftment had been expede on the resignation likewise before his death.

Sir George Lockhart, though he was for the defender, yet wondered if the Lords could make any stop and demur on so clear a case, as to give it a large hearing in their own presence; and remembered a stronger defence than this was repelled in *December* 1668, or *January* 1669, in the declarator *Duke of Hamilton* against *David French and the Tenants of Milneburne;* which *vide supra*, at great length, [Vol. II, page 450;] viz. that one having apprised his debtor's land, charged the superior to enter him, who delayed; *medio tempore* the debtor dies; the lands holding ward, and the superiorac claiming the ward. It was contended by the appriser, that the charging the superior was equivalent to an infeftment, and so behoved to stop the ward, as it would have done; and yet the Lords repelled this.

Advocates' MS. No. 652, folio 306.

1677. *November* 13. THOMAS SIBBALD *against* MARGARET RIDDOCH.

THOMAS SIBBALD, writer in Edinburgh, obtains a decreet against one Margaret Riddoch, before the Bailies of Edinburgh, holding her as confessed, upon the maill and duty of a house possessed by her, and whereunto he had right by apprising. This decreet was suspended on this reason, that she being only a tenant, and holden as confessed on an exorbitant quantity, it was craved she might be reponed to her oath, at least they might be put to prove her libel, she being a widow woman, and ignorant. ANSWERED,—The decreet is opponed, bearing her to have been personally apprehended, and the rent decerned for was but small, and she