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

wanted a reduction; and at this rate there should never be a decreet in absence but it might be sought to be turned into a libel; and he was not bound to consent to it, or accept the expenses of his decreet, but he *mordicus* adhered to it.

Some Lords would not have stuck to have reponed her; but Newton, who is *strictissimi juris*, affecting *Scævola et Africanus* religious severity in following the law closely, refused, though there had been a reduction, since there was no probable cause alleged for purging her contumacy.

Advocates' MS. No. 653, *folio* 307.

1677. *November* 14. WILLIAM HALIDAY *against* JOHN CHRYSTIE.

WILLIAM HALIDAY, servitor to Sir A. Ramsay, charges John Chrystie to pay 400 merks, contained in his bond. He suspends,—That the charger, with some other of his creditors, had subscribed a letter, (which he also produced,) declaring they were content to accept a disposition from him to his lands in Culross, &c. in satisfaction of their sums; which condition he accepted, and was willing to give them a disposition, and consigned it.

ANSWERED,—The words are nowise obligatory, and being in a matter of heritage there was *locus pœnitentiæ* aye till the writs were drawn, signed, and delivered; and they had *de facto* resiled upon very rational grounds; which see deduced *ad longum* in the information. See Stair's Decisions in *July*, 1663, between *Skelmurly* and *Brown*. Stair's System, tit. 10, p. 99.

This case being reported to the Lords on the 20th of November, they found the letter not obligatory upon the charger, unless the other creditors, subscribers thereof, were willing still to adhere, and give the said debtor-suspender the benefit of that same offer; and allowed him to produce, betwixt and the 20th of December next, a declaration under their hands, intimating their willingness to abide at the contents of that letter. And he not having procured any such testificate betwixt and the day assigned, the Lords thereafter found the letters orderly proceeded simply.

Advocates' MS. No. 654, *folio* 307.

1677. *November* 14. FORBES of Waterton *against* The BISHOP OF ABERDEEN.

THE declarator anent the patronage of the kirk of Ellon was debated betwixt the Bishop of Aberdeen and Forbes of Waterton. See a little of it, No. 608, [Historical Volume, 19th July, 1677]. On the occasion of this competition, many lawyers were of opinion, that it were most conducive and expedient that the King had all the patronages of churches in Scotland; and the bishops, in their respective dioceses, to have the presentation and filling of them as his Majesty's deputies, and keepers of his conscience in this particular.

This case was my Lord Harcours his Innerhouse trial.

The Lords having advised it on the 21st of November, their interlocutor resolved in an act before answer, ordaining all parties to produce what writs or other