

1677. November 14. SIR WILLIAM PURVES *against* STRACHAN.

No 11.

Resignation
in favorem
does not de-
nude the
former vas-
sal; and, till
the new vas-
sal be infest,
the casualties
of superiori-
ty fall by the
resigner and
not by the
acquirer.

SIR WILLIAM PURVES as donatar to the marriage of the heir of the Laird of Elsick, who died last infest in the lands of Creichie, holden ward of the King, whose son is unmarried, and marriageable, pursues a pointing of the said lands for the avail of the marriage. Compearance is made for Strachan of Kinaldie, who *alleged*, That the lands of Creichie could not be affected with the marriage of Elsick, because his father was denuded by an absolute disposition in favours of Kinaldie, and a resignation made thereupon, accepted by the King as superior, whereupon there is a charter granted in Exchequer, ‘chang-
ing the ward with a *ново damus*.’ The pursuer *answered, non relevat*, unless Kinaldie had been infest before Elsick’s death, because Elsick continued vassal until he was divested, which a resignation *in favorem* could not do; it is true, a resignation *ad remanentiam*, which requires no more for its accomplishment, would fully denude the vassal, and consolidate the property with the superiority; but the acceptance of a resignation *in favorem*, doth import no more than the superior’s being willing to admit a new vassal, who could not become vassal till he were infest, and so the acceptance did only import an obligation upon the superior, whereby he might be obliged to infest the new vassal, which also might oblige that vassal to complete his infestment; but there is neither law nor practise to take from the superior, by this free deed of his accepting of a resignation, the whole casualties of his superiority, except only the non-entry, which reaches only the retoured duties, till it be declared; for the person in whose favours the resignation is made, till he be infest, is no vassal, and hath no real right, and so no casualty can fall to the superior by his ward or marriage, or his liferent-escheat; neither can the fee recognise by any deed of his, and therefore there being neither example nor rule to burden the new intended vassal, the old vassal remains vassal, and all the casualties fall upon his account; for the property remains in him, though it be in the superior’s hands by non-entry, in the same way as it is before the vassal’s heir be infest; and therefore an apprising against the old vassal, and infestment thereon before an infestment upon the vassal’s resignation, will be preferred; yea a voluntary infestment upon a posterior resignation, being first expedie, will be preferred to a posterior infestment upon a prior resignation, albeit there might appear fraud in the superior and prior vassal, in granting and accepting double dispositions, which are declared fraudulent by act of Parliament; yet the purchaser of the first infestment not being *particeps fraudis, dolus auctoris non obest successori*, so his right is good; and it is certain by the present custom, that superiors accepting resignations, do never notice when the new infestment is expedie, knowing the old vassals remain till then; so that Kinaldie *sibi imputet*, that he did not expedie his infestment before his auther died. It is true, if the superior be *in culpa aut mora*, in not expeding his infestment, he might justly lose the ca-

salty incurred by his own fault or delay. It was *replied* for the defender, that the resignation accepted denudes the resigner, so that in him there is no real right, but the feudal contract betwixt him and his superior is fully dissolved; for as he was infest by solemnity of sasine by earth and stone, so he is divested by a symbolical re-delivery of his fee and possession by staff or baton, which he delivers to the superior, and he takes it in his hands, in evidence of his acceptance, and delivers the same to the acquirer, who receives it, in token of his becoming vassal, which dissolves the first feudal contract, and makes up the second; and as all casualties fall by the apparent heir, though not infest, so the casualty should occur by the new vassal, as if he were infest, who can never pretend that by his own delay to infest himself, he should shun the casualties of the fee; for it is certain that *refutatio feudi* is always competent to the vassal, he satisfying anterior casualties; which refutation is upon resignation by staff or baton, which truly carries the fee to the superior; though when it is *in favorem*, there be an obligation upon the superior to resign the fee to another; and therefore the mails and duties belong to the superior by the resignation only, *ex pleno dominio*; because the former vassal cannot pretend to the duties, having resigned the fee; nor can the new vassal, till he hath perfected his infestment; so that the superior having the fee in his own hands, and the full profit, he can have no other casualty; for if the question were now of the ward-duties, they could not be claimed by reason of the ward, but the whole duties by the resignation; so that the superior should have no casualty after resignation, while the fee is in his hand; or if any, it should not fall by the old vassal but by the new; wherein neither the King nor any other superior will have detriment as to the future; because they may qualify their acceptance of the resignation, that the new vassal should be liable in all the casualties, through his death, rebellion, or injury, as if he were presently infest; which would do better for the superior, the acquirer being always more opulent than the seller; who having sold the lands with the superior's consent or acceptance, and likely to be free of a ward, should at the option of the buyer, who might lie uninfest so long as he pleased, incur the marriage of his heir; which oft-times would be of greater value than this fee; seeing the marriage respects the apparent heir's whole estate heritable and moveable.

THE LORDS found, that the acceptance of a resignation *in favorem* did not denude the former vassal; and therefore till the new vassal was infest, they found the casualty of superiority fallen after the resignation, to arise from the resigner, and not from the acquirer; and so found the land to be burdened with Elsie's marriage; for they considered that the real right of property is not in the superior by a resignation *in favorem*, and he only liable to a personal obligation; so that an original infestment by the superior to a third party might give the first real right, and exclude both resigner and purchaser; and though the question were of the ward-duties, the superior might take himself to the ward, which needs no declarator, and continues during the vassal's minority;

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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 burgage-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 burgal 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-