

1682. November 15. KING against CHALMERS.

IN an action of reduction, pursued by King against Chalmers, the defender did *allege*, That the pursuer's title being a gift of *ultimus heres* of Janet Chalmers, whose right was as heir to James and Thomas Chalmers, who were infeft only by a sasine *propriis manibus*, given by the grandfather to them, of a certain tenement; and which sasine not being subscribed by the grandfather, neither having any warrant, nor being adminiculated by any subscribed writ, was not a sufficient title to quarrel the defender's right, which did flow from the heir of the grandfather of the said Thomas and James Chalmers; by virtue of which, the defenders and their authors had been 40 years in possession. THE LORDS found that James and Thomas Chalmers' sasine, not being subscribed by the granter, nor adminiculated by any subscribed writ under his hand, to be only the assertion of a notary, and so not a sufficient title to quarrel the defender's right; and therefore assolizied the defenders.

Fol. Dic. v. 2. p. 244. P. Falconer, No. 28. p. 14.

1714. July 1. WALKER against ADAMSON'S CREDITORS.

JOHN WALKER, as having right to a tenement of land at the head of the Skinners' Close in Edinburgh, by disposition and infeftment from Janet Handyside, who was infeft by hasp and staple as heir to John Handyside merchant there, her father, heritor of the said tenement, having raised reduction and improbation against the Representatives and Creditors of James Adamson, of an adjudication and infeftment in the said tenement obtained by him, upon which thirty-eight years' possession had followed;

Alleged for the defenders, That the pursuer's author's infeftment being by hasp and staple, which is of the nature of an infeftment upon a precept of *clare constat*, that is good only against the superior granter, and tenants or possessors having no right of property, cannot be sustained for overturning rights habilely established in the person of third parties; because, though regularly there ought to be a cognition previous to the infeftment by hasp and staple, that the party is nearest heir, as the stile thereof imports, yet, by the universal custom of all the burghs in Scotland, no such cognition is used either by witnesses or an inquest, but such infeftments pass of course.

Replied for the pursuer, That infeftments by hasp and staple are rather to be assimilated to services than to precepts of *clare*, seeing the Bailie as judge is supposed to cognosce and inquire into the parties' propinquity to their predecessors by the honest neighbours of the burgh (who are in place of an inquest), and so it is called in our law *cognitio more burgi*. Again, a precept of *clare con-*

No 401.

A sasine *propriis manibus* not signed by the granter nor adminiculated, no sufficient title.

No 402.

Found in conformity with Houston against Maxwell, No 390. p. 12515 that a sasine alone in burgage was sufficient title to carry on an action.

No 402. *stat* flows only from a subject superior, whereas burgage lands hold of the sovereign, and the Bailie is not superior.

Duplied for the defenders, *Esto* there were a cognition in this case, as there was none, yet that would not alter the nature of the infestment from that upon a precept of *clare*, seeing the superior in that case takes likewise cognition of the obtainer of the precept his propinquity, *per authentica documenta*, yet that superior's assertion will not prove the fact against third parties, more than the Bailie's assertion (or rather the assertion of the clerk in the burgh) in the infestment of hasp and staple. In one respect it is true, that the Sovereign, and not the Bailie, is superior, that is, the whole burgh holds of the Sovereign: But then the Provost and Bailies are superior with respect to their particular burgeses, by the charter of erection of the burgh, so that they grant new charters and enter heirs by hasp and staple.

THE LORDS sustained the pursuer's title of infestment by hasp and staple, as sufficient to convey the right, and carry on this process, unless the defender quarrel the propinquity of blood.

Fol. Dic. v. 2. p. 246. Forbes, MS. p. 73.

1731. June 25.

Sir RODERICK M'KENZIE of Scatwell *against* CHRISTIAN MONRO.

No 403.

A HUSBAND having granted to his wife a liferent disposition of a tenement within burgh, upon which sasine was taken, bearing, that the husband had resigned *propriis manibus*, and the sasine was subscribed by the Bailie and Notary, but not by the husband; in a competition, it was *objected* against this infestment, That it was null, as proceeding without any warrant from the husband. *Answered*, The sasine bears that resignation was made, and being subscribed by the Bailie as well as the Notary, it is an instrument that in burgage-holding is probative of the resignation as well as of the infestment, supported as it is by the liferent-disposition produced. THE LORDS sustained the instrument of sasine, in regard the liferent-right was produced, and that in the instrument of sasine the husband resigned *propriis manibus*, in the hands of the Bailie, who signed the said instrument with the Notary, in terms of the act 27th, Parl. 1567. See APPENDIX.

Fol. Dic. v. 2. p. 246.