

SECT. II.

Symbol in Resignations.

1729. *December 2.*CARNEGY *against* CREDITORS of CRUIKSHANKS.

No. 8.

A SASINE within burgh, upon a resignation anno 1718, carrying the symbols of earth and stone, was found null upon the act of sederunt, 11th February, 1708, declaring "staff and baston the only symbols to be used in resignations," though the old custom had been long continued in the town of Aberdeen, where that sasine was granted. See APPENDIX.

*Fol. Dic. v. 2. p. 362.*1742. *June 25.*EARL of ABERDEEN *against* WILLIAM DUNCAN.

No. 9.

A resignation made by any other symbol than staff and baston, is void.

IN the mails and duties at the Earl's instance, for the rents of certain tenements in Aberdeen, which originally pertained to John Anderson, common author to both parties, compeared William Duncan, who had purchased an annual right on the said tenements, and craved to be preferred on his prior infestment.

Objected: The title under which Duncan claims a preference, is void, in so far as the resignation in the hands of the magistrates of Aberdeen was not made by the usual and customary symbols allowed of by the law and practice of this kingdom.

Answered: By the nature of the thing itself, nothing is more indifferent than what shall be the symbol used in a resignation: If the form of resignation be actually adhibited upon a proper warrant, and thereupon a new investiture given to the purchaser, and the sasine recorded, every thing is done material for constituting the right, and publishing the same to the lieges. The symbol used in this case, of a penny *utole*, has been very ancient, and so common in tha tburgh, that allt he resignations since the year 1708, (except 16) have been made by that symbol, as appears from a certificate of the town-clerk's. The act of sederunt 1708, which discharges the using any other symbols in resignations except staff and baston, respects only resignations of lands, and not annual rent rights. See Craig, Tit. *De resig.* § 8.

Replied: That it surely was originally matter of indifference what symbols the law enjoined to be used, such things being, in their own nature, quite arbitrary; but when once ascertained by law or practice, it becomes matter of consequence, that the same should not be variable. Therefore it is, that the law has ascertained the

different symbols that are to be used in different cases, according to circumstances, as it is by tradition only *quod dominia rerum transferuntur*. Where a vassal is to be infeft, the *traditio possessionis* must be upon the ground of the lands; but as there cannot properly be a *traditio* of the lands themselves, the law has allowed of a symbolical tradition, by delivery of earth and stone, part of those very lands whereof the property is meant to be transferred; whereas, when the lands are to be surrendered to the superior, as such resignation might be made at any place, the symbols to be used in re-delivering the possession could not be *partes soli*; and therefore the law did pitch on staff and baston as the general symbols to be used in all such cases. Nor does it make any difference whether the resignation is made in order to renounce or transmit a right of property, or only an annual-rent; because, even in the last case, it is the lands themselves that are resigned; in virtue of which only, the superior is enabled to grant the infeftment of annual-rent, and is *in favorem* as much as the property were to be transferred, though to a more limited effect. The act of sederunt is express, which indeed is only declaratory of what was law before that period; and whatever indulgence might be given to an erroneous practice in a question with the debtor himself, it would be against all law to validate these resignations in competition with third parties, onerous purchasers, or creditors, who are entitled to the benefit of every legal exception that is competent against the right which is set up in competition. See 2d December, 1729, *Carnegie, supra*.

“The Lords sustained the objection, that the resignation was not made with the lawful symbols of staff and baston, in terms of the act of sederunt.”

Fol. Dic. v. 4. p. 263. C. Home, No. 199. p. 331.

* * * Kilkerran reports this case:

THE Lords found, that the resignation of an annual-rent out of a tenement in Aberdeen in the year 1720, being made with the symbol of a penny *utole*, and not with the lawful symbols of staff and baston, was, therefore, upon the act of sederunt 1708, void and null.

It appeared from the attestation of the present town-clerk of Aberdeen, after search of the register of sasines of the burgh, that between the 12th February, 1708, and beginning of the year 1722, there were no less than 339 resignations made by the symbol of a penny *utole*, and in all that period only 16 by the symbol of staff and baston, whereof 1 in the year 1709, 9 in the year 1720, and the remaining 6 in the year 1721. This had so great weight with the Lords, that they seemed inclined, notwithstanding the act of sederunt, to have repelled the objection, because of the consequences. But a decision in point in 1729 being referred to, *Carnegie against The creditors of Cruikshanks, (supra)* the record whereof was by appointment laid before the Court, where, in a ranking of creditors, the like nullity of a sasine on an heritable bond in a tenement in Aberdeen taken in 1718 was sustained, that the resignation was by a penny money, and earth and stone, and not by staff and baston, the Lords, not without regret, found as above.

Kilkerran, (SASINE) No. 5. p. 504.