No 86. enter the sasine. The superior afterwards, by a personal deed, discharged the said restriction. The question occurred, If this discharge was good against a singular successor in the superiority? The singular successor *pleaded*, That the woods here were truly reserved, and nothing given to the vassal but the *usus*, and that a discharge could not transfer the superiority, or any of its accessories. The vassal *pleaded*, That he was infeft in the lands and woods, and that the clause was no other than a restriction on his property, calculated that he might not interfere with his superior in the sale of his woods, to lower the price, by overstocking the market, and that restrictions may be discharged by any personal deed. The Lords found the discharge effectual against the singular successor.

Fol. Dic. v. 2. *p.* 69.

1740. *December* 17. Nasmyth *against* Storry.

No 87.

Where a superior had, by a clause in a feu-charter to his vassal, obliged himself, when any casualties should fall by reason of non-entry, liferent escheat, or any other way, to renounce and dispone, and *per verba de præsenti* renounced and disponed the same and all profits thereof in favour of his vassal, his heirs and successors; this clause was found not to be effectual against singular successors; for, as there is no record of charters, singular successors could not otherwise be safe.

As to the effect of this clause between the vassal and the granter and his heirs, see Superior and Vassal.

Fol. Dic. v. 4. *p.* 69. *Kilkerran*, (Personal and Real.) *No* 3. *p.* 383.

1748. *November* 8. Nasmyth *against* Storry.

No 88.

A superior, in granting a feu-charter to his vassal, obliged himself, his heirs and successors whatsoever, to enter and receive the heirs and assignees of the vassal, without any other payment than doubling the feu-duty, and renounced for himself and said heirs all casualties that might happen to fall by non-entry or any other way. Another person having purchased the superiority, it was questioned, whether the above-mentioned clauses were real, and affected a singular successor; and if he could be obliged to engross them in a new charter, to be granted to a successor in the feu? The conveyance to the new superior contained a clause, excepting from the absolute warrandice the feu-rights and charters granted by the disponer and his predecessors, with which rights the conveyance was expressly burdened; but declaring, That this exception should import no ratification of these rights, which the disponee might quarrel and reduce on any competent ground of law. The Lords doubted much on the ge-

neral point of law; but found, That in respect the new superior had accepted of the conveyance of the superiority with the burden of the feu, he was bound by every clause in the feu-right. This in effect implied a decision of the general question, at least as to the extent of the obligation; for if the obligations upon the original superior were only binding on the granter and his heirs, they made no part of the feudal right, with the burden whereof only the conveyance to the new superior was granted; and, for the same reason, the import of the exception from the warrandice also depended on the intention of these obligations; for if it was no other than that they should be binding on the original superior and his heirs, they did not fall under the warrandice contained in a conveyance to singular successors. No 88.

Fol. Dic. v. 4. p. 71. Kilkerran.

*** Kilkerran's report of this case is No 96. p. 5722, *voce* HOMOLOGATION.

*** D. Falconer also reports this case:

1748. *July* 5.—ROBERT HAMILTON of Airdrie disponed the lands of Arbuckle to Claud Nasmyth in Nether Braco, to be holden of him feu, for payment of L. 7 Scots; and afterwards disponed to him the said feu-duty, to be holden blench, for payment of a penny money, and relieving the disponer of 45s. Scots, as a proportional part of his feu-duty; "and further, so soon as the heirs of the said Claud Nasmyth should crave to be entered by him, or his foresaids, he bound and obliged him and his foresaids to enter and receive them vassals in the foresaid lands, to be holden free blench, for payment of the penny Scots yearly, and relieving him and his foresaids of the payment of the said 45s. at his superior's hands, in manner aforesaid; likeas he altered the manner of holding of the said lands, from feu to blench in all time coming, and obliged him to grant to the said Claud Nasmyth and his foresaids all and sundry charters, and other writs requisite and necessary for their security thereanent."

Claud Nasmyth was infeft in the feu-duty, as he had been in the lands.

The superiority came into the person of James Nasmyth of Ravenscraig, and the property into that of John Storry of Braco, both by singular titles; and Braco being in non-entry, Ravenscraig brought a declarator against him, claiming the retour-duties, the holding being changed to blench; to which it was *answered*, There was only an agreement to make the change, but it was never actually done by granting a feu-charter of the lands.

THE LORDS, 17th December 1740, (*see* No 87. *supra*) "Found that notwithstanding the agreement betwixt the superior and vassal, for changing the holding from feu to blench, yet the lands held feu."

This being fixed, a question arose about the tenor of the charter to be granted to Braco, in order to his entry; the pursuer *contending*, That while the lands held feu, the conveyance of the feu-duty to the vassals was void, as being con-

No 88. trary to the nature of his right, as it would be to the nature of a tack to want a tack-duty; and so the Lords had found, that a perpetual discharge of a feu-duty was not good against a singular successor, 19th November 1679, Lady Blackbarony against Borrowman, No 82. p. 10272.

Answered, There was here a feu-duty, to wit, the L. 7 Scots which was not discharged, and there was nothing to hinder this from being separate from the superiority by disposition, as in church lands the King was superior, but the feu-duty was payable to the Lord of erection; the feu-duty here was disponed to be held by a separate tenure, and there was an infeftment upon it, which behoved to make the conveyance effectual against the purchaser of the superiority; nor could it make any difference, that it was granted to the vassal himself, who might hold it as well as another, and who indeed might alienate it without alienating the lands, in which case he would have a feu-duty to pay.

THE LORDS found, That the feu-duty of L. 7 Scots behoved to be insert in the feu-charter to be granted by the superior to the defender, payable to the superior, pursuer, or to the person who had or should have right to the infeftment, proceeding upon the disposition of the feu-duty by Robert Hamilton of Airdrie the pursuer's author.

Reporter, *Drummore*. Act. *R. Craigie*. Alt. *A. Macdouall*. Clerk, *Murray*.
D. Falconer, *v.* 2. *No* 270. *p.* 363.

SECT. VII.

Effect of Fraud—of Force and Fear—of Simulation of a Gift of Escheat—of Spuilzie—of *Pactum contra Fidem*—of Minority—of Reduction *ex capite lecti*—of *Donatio inter Virum et Uxorem*—of Payment to an Adjudger.

No 89. 1617. *February* 28. EARL of TULLIBARDINE *against* DALZIELL.

IN an action between the Earl of Tullibardine and James Dalziell, the LORDS found, that the exception of simulation of a gift of escheat, taken upon the expenses of the rebel, could not be opponed against the assignee, who being a creditor, had acquired the same to his own behalf, except it were proven that the assignation were also simulate.

Fol. Dic. v. 2. *p.* 70. *Kerse, MS. fol.* 543.