1749. *February* 10.

ELIZABETH MONTGOMERY, Factrix for M'VICAR her Husband, *against* COCHRAN and KER.

No 72.
A clause in a feu-charter containing a disposition to the vassal of all the casualties of superiority found effectual against a singular successor.

CRAWFURD of Fergushill, vassal to the Earl of Eglinton, in the lands of Hill and Megswell, sub-feued the same to James Cochran in 1697, at the yearly feu-duty of L. 24; and in 1726, Neil M'Vicar became purchaser from the heir of Crawfurd, with consent of the Earl of Eglinton, of the lands of Fergushill, and superiority of Hill and Megswell by disposition containing a clause of absolute warrandice.

When five or six years of the feu-duty had run on unpaid, Elizabeth Montgomery, as factrix for Neil M'Vicar her husband, brought a declarator of tinsel of the feu, *ob non solutum canonem*, on the 246th (250) act of the Parliament 1597, wherein she called the said James Cochran the vassal, and also Ker of Crummock, who stood infeft in the lands upon an heritable bond, for a sum near the value.

Their defence was, That the sub-feu charter from Crawfurd, the pursuer's author, to Cochran, contained a disposition to the vassal of all and sundry the casualties of the superiority of the lands falling, or that may fall or become in the hands of the said Crawfurd, the disponer, or his heirs or successors, as superiors thereof, and that either as liferent escheat, non-entry, or by contingency of not timeous payment of the feu-duties therein specified; all which was also *verbatim* engrossed in the sasine following thereon.

Though this case differed, in several respects, from that determined between Nasmyth and Storry of Bracco, (*infra*, *h. t.*); as, on the one hand, in this case, there was no clause burdening the conveyance of the superiority to the pursuer, with the feu-right, nor no exception from the clause of absolute warrandice; and, on the other hand, the clauses in favour of the vassal in the feu-charter were not by way of obligation, but by way of disposition, and engrossed in the sasine; yet the general point was again resumed upon the Bench, How far the casualties could, consistently with the principles of the feudal law, be separated from the superiority; which, by a great plurality, it was thought they might, even such as were essential to the feu. Thus a feu-duty may, by the superior, be feued away to another, and was commonly granted by the Crown, till, by the act 239th (243) of the Parliament 1597, the *alienatio feudifirmæ feudifirmarum* of any part of the annexed property was discharged, and may, at this day, be granted by any subject superior: Neither could wards be taxed, if the casualty following a ward-holding could not be separated from it. And this the Court found, notwithstanding the answer made by those who appeared to be of a different opinion, that it did not follow, that, because a feu-duty could be given away, therefore a feu-charter might be granted, bearing, that there should be no feu-duty.

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But this point cannot be said to have received a direct decision, in respect of a distinction, which in this case occurred, to be made between such casualties as are essential to the feu, and such as are only introduced by statute; that whatever difficulty there might be as to the first, there could be no good reason assigned why the last might not be renounced; and such is this casualty of the feu's reverting to the superior *ob non solutum canonem*, as it had its rise from the act 246th, (250) Parliament 1597, before which statute it was not known in our practice without paction: And even when introduced by that statute, it is only declared to have the same effect, sicklike as if a clause irritant were specially engrossed in the infeftment of feu-farm; and as before the statute, such clause in the charter might have been renounced by the superior, *cum unicuique liceat juri pro se introducto renuntiare*; so the statute does, in that respect, make no difference, as it is a statute solely in favour of the superior, and to which, therefore, the rule does not apply, that *pactis privatorum non derogatur juri communi*; and which cannot be better illustrated than from the case of the statute 1685, concerning tailzies, which provides that irritant clauses, not inserted in the precepts of sasine, and procuratories of resignation, should not be effectual against creditors and purchasers; and which, therefore, as being in favour of the whole nation, cannot be dispensed with by any clause in the tailzie; but were there a clause in a tailzie, that the heir's not inserting the irritancies, &c. should not infer an irritancy of the heir's right, it would be effectual, though the creditors would be safe.

THE LORDS found the clause effectual against the singular successor.

Kilkerran, (PERSONAL AND REAL.) *No* 7. *p.* 391.

*** D. Falconer's report of this case is No 9. p. 4180. *voce* FEU.

1750. *November* 21. FRASERS *against* The KING'S ADVOCATE.

No 73.
An estate was disponed to an apparent heir, reserving powers to contract debt, and dispose of the rents. No infeftment taken. The estate was found to be still forfeitable in the person of the father.

SIMON, Lord Fraser of Lovat, tailzied his said estate to Simon his eldest son, and the heirs-male of his body; which failing, to Alexander and Archibald, his second and third sons, with other substitutions; reserving the liferent of certain lands; and also reserving 'the full power and liberty of administration 'and intromission over the whole estate during his life; and to contract debt, 'and grant security therefor, real and personal; and to grant feu-rights and 'wadset-rights of the same, and tacks, long or short; and to make such 'appointments concerning the rents, falling due even after his death, for 'the payment of his debts, as he should think fit; and to be sole tutor and 'curator to the heirs of tailzie, during his life, in the means and estate belonging to them, in virtue thereof, without being liable to account for his intromissions, or to find caution, or give up inventory; and with power to ap-