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be of the same opinion; and this therefore must be considered as the *ratio decidendi*.

Rem. Dec. v. 2. *No.* 128. *p.* 271. *and No.* 129. *p.* 279.

1770. *July* 20.

Thomas Finlay, Heir to the deceased John Finlay, late of Shaw, Pursuer, *against* Thomas Morgan, Hugh Campbell, William Smith, and William Muir, Defenders.

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An infeftment taken upon a precept of *clare constat*, to the next heir of the person last seised in liferent, and to his son in fee, erroneous; and an adjudication led against the son, as vested in the estate upon that title, reduced.

John Finlay having died seised in the lands of Shaw, James Finlay, his brother, and next heir, on the 26th September, 1709, obtained from the superior a precept of *clare constat* in favour of himself in liferent, and of his son John in fee; and upon which infeftment, on the 15th December, 1709, followed.

James Finlay being dead, John his son, on 27th March, 1725, granted an heritable bond to Robert Cumming, upon which he was infeft. Cumming conveyed the bond to John Morton; who obtained from John Finlay a bond of corroboration, upon which also he was infeft.

Morton conveyed the bond to William Richmond, who, on 5th January, 1731, was infeft, and who thereafter obtained decreet of adjudication against John Finlay, of the said lands of Shaw, over which the heritable security extended. Richmond conveyed his debt and adjudication to Jean his daughter, who again conveyed them to Hugh Campbell, who, in November, 1746, obtained a charter of adjudication of the said lands, which, in 1759, he conveyed to William Muir, by whom they were conveyed to Thomas Morgan, who was regularly infeft upon the precept in the charter of adjudication, and entered into possession of the lands, and, as he alleged, laid out money in improving them.

Thomas Finlay having got himself served and retoured heir to his brother, John Finlay the first, brought an action against Morgan and the other defenders, concluding for reduction of all their rights, in respect that the infeftment of date 15th December, 1709, was void and null, *quoad* the said John Finlay, against whom Richmond's adjudication had been obtained, the same having proceeded upon a precept of *clare constat* granted by the superior during the life of James Finlay his father, the nearest heir to John Finlay, the last vested and seised in the lands. The Lord Ordinary, by different interlocutors, "Found the adjudication at the instance of William Richmond against John Finlay void and null."

In a reclaiming petition, Morgan pleaded:

Though the original feudal principles were, in some measure, relaxed, property was still understood to be so far in the superior, that an application to him was necessary before it could be completely vested in the heir. The heir was entitled to demand delivery, but the superior alone could grant it; and when such was

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the nature of their joint power, there was no reason why, in the exercise, it might not be carried a little farther as to the mode of acknowledging the vassal's right, by infefting such immediate heir in life-rent, and his eldest son, who stood next in succession, in the fee. Renewing the grant in this manner might be prejudicial to the superior himself, as it superseded the necessity of a new entry by the son; but if the superior should, at the desire of his vassal, consent to that measure, there was no good reason why he should be restrained.

The same object could be effected in another manner. The immediate heir, when once he was infeft, could instantly resign in the superior's hands in favour of himself in life-rent, and of his son in fee; so that the only consequence of denying liberty to the superior to grant warrant by his precept of *clare constat* for infefting the immediate heir in life-rent, and his son in fee, would be, to oblige the parties to take a more circuitous and troublesome way to obtain the same end.

It could not be disputed, that a simple renunciation, by an heir apparent, was sufficient to empower the superior to dispose of the subject at pleasure, provided no creditors were in the field; and it would be strange, if the simple renunciation of the heir should have a greater effect than his express consent to the renovation of the feu, nearly in the terms in which it would at any rate have been granted to himself in life-rent, and to his son, the next heir, in fee.

There was a material distinction between the present case and that of 12th June, 1752, Landales *contra* Landale, No. 30. p. 14465. relied on by the pursuer. In the present instance, John the fiar survived his father; and as he had then a legal title to demand a complete investiture from the superior, the infeftment he had formerly taken in virtue of the precept, became from that moment effectual and valid. This circumstance distinguished the case from that of Landale; for, although the infeftment might, during the father's life, have been held effectual, as flowing *a non habente*, yet, the moment the father died, it could not fail to be good, the objection to the superior's power of granting it to the son in fee being then removed.

Answered for the pursuer:

Whatever may have been the case in the more early ages of the feudal law, it was now understood to be a clear point, that, upon the death of the vassal, the property did not return to the superior; for although, in virtue of his radical infeftment in the *dominium directum*, he might be entitled to levy the mails and duties, when the fee was not full, yet the *dominium utile* remained *in hæreditate jacente* of the last vassal, and was carried, not by diligence against the superior, but by diligence against the heir of the vassal, upon a charge to enter to the person last infeft. As a consequence of this, it followed, that although the superior could renew the investiture in favour of the heir of his vassal, he could not dispone the estate away to a stranger; it being undoubted, that such a disposition, as flowing *a non habente*, would be null and void. But the infeftment in fee, in the present instance, in favour of John, the son of the heir, was the same as if it had

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The superior's power over the estate of his vassal was confined entirely to the renewal of the investiture in favour of the apparent heir of the vassal last infeft, and in the very terms in which it stood in his person. As the superior was so far divested of the property in favour of his vassal, he could make no new grant without being reinstated himself; which could only be done by a resignation by the vassal vested in the property. Without, therefore, being so reinvested, the *lex investituræ*, though both superior and vassal should consent, could not be altered; for, as the consent of a party could not supply the want of an instrument of sasine, so neither could it supersede the necessity of a formal resignation.

The argument reared as to the supposed effect of a simple renunciation by an apparent heir, was erroneous. Such a renunciation was not sufficient to enable the superior to dispose of the subject at pleasure; for it might be adjudged even by the apparent heir's own creditors. Neither was it sufficient to vest the vassal's estate in the superior; for though it might entitle him to levy the mails and duties during the life of the apparent heir, the feudal right could only be conveyed by a resignation *ad remanentiam* made by a vassal previously vested in the property; and that being the law, it was plain, that the consent of the apparent heir, before making up titles, and when he had no right in the lands, could give no force to a grant by the superior, otherwise ineffectual.

The case of Landales was directly in point. The supposed distinction and illustration attempted from the doctrine of *jus superveniens* was not applicable to the point in dispute: For, 1*mo*, That doctrine could apply only in the event that the superior was bound to warrant the right; but, in this case, it was granted *periculo petentis;* and as it was null and void *ab initio*, no supervening right could *ipso jure* accresce to it so as to render it a valid infeftment: 2*do*, There was here no supervening right in the person of the granter that could accresce to the right of the grantee: The objection here was not, that the superior could not grant a renewal of the investiture, but that John Finlay was not the person entitled to receive it; and as he had no right to be infeft, his infeftment must go for nothing.

1770, *July* 20.—The Court gave judgment, "finding, That the infeftment upon the precept of *clare constat*, 15th December, 1709, in so far as it was granted to John Finlay in fee, was an erroneous infeftment."

Lord Ordinary, *Kames*,	For Finlay, *Macqueen*.
Clerk,	For Morgan, *Wight*.

R. H. *Fol. Dic. v.* 4. *p.* 276. *Fac. Coll. No.* 34. *p.* 92.

*** See No. 24. p. 6904. *voce* INFEFTMENT.