that clause of the sasine, which bears, *acta erant*, &c. no mention being made by the notary that the same was done *in turri*, but only *in fundo dictarum terrarum*, whereby the defender alleged, that seeing *turres* are *inter regalia*, and that sasine thereof is not taken *per expressum*, at the tower and fortalice, as it ought to be, therefore that the pursuer cannot seek removing from the tower by virtue thereof; this allegeance was repelled, and the sasine sustained, bearing, that the sasine was taken of the land and tower, albeit the clause of *acta erant*, &c. made no mention of the tower. No. 21.

Act. *Mowat.* Alt. *Stewart.* *Gibson*, Clerk.

Fol. Dic. v. 2. p. 363. Durie, p. 525.

SECT. V.

Sasine in favour of Heirs without naming them.

1740. *November* 7.

BLACKWOOD *against* The EARL of SUTHERLAND, and the Representatives of COLVIL and RUSSEL.

No. 22.

A SASINE was found null, in respect it proceeded on a precept for infefting the representatives of Robert Robert Colvil and Andrew Russel, without particularly naming and designing those representatives.

Fol. Dic. v. 4. p. 263. Kilkerran, (SASINE) *No. 2. p. 503.*

1794. *February* 14.

JOHN MELVILLE *against* The CREDITORS of GEORGE SMITON.

No. 23.
An infeftment taken in favour of the heirs of a person deceased, without naming or designing them, is ineffectual.

LADY DIANA MIDDLETON conveyed her estate to trustees by a deed, which directed them to settle, upon good, real, or personal security, one half of the residue, after the other purposes of the trust were accomplished, for behoof of Lady Gordon, "in liferent, for her liferent use allenarly, during all the days of her life, and to her son George Gordon, and her daughter Diana Gordon, equally, and their heirs and assignees, in fee."

George Gordon survived Lady Diana Middleton. After his death the trustees lent £1000, part of the residue of the trust-fund, to George Smiton, upon an heritable bond in favour of Lady Gordon, "in liferent, for her liferent use allenarly, during all the days of her life, and to her said daughter Diana Gordon, and the

No. 23. heirs of her said deceased son George Gordon, equally, and their heirs and assignees in fee. The precept of sasine contained in the bond, and the infeftment taken on it were precisely in the same terms.

Some time after, Major Melville lent a thousand pounds, upon receiving a conveyance to this security from Lady Gordon, Diana, her daughter, and from the surviving brothers and sisters of George Gordon, as his heirs or executors, but who had in neither capacity made up titles to him.

Major Melville took infeftment on this conveyance.

In the ranking of Smiton's creditors, the common agent, besides objecting to the conveyance in favour of Major Melville, in so far as it flowed from the heirs of George Gordon, that they had not made up titles to him, and therefore were not entitled to grant it, contended, that the infeftment on the heritable bond itself was ineffectual, as to George's share; because his heirs ought either to have made up titles to him before the security was granted, in which case the infeftment ought to have been taken in their favour *nominatim*, or the fee should have been vested in trustees for their behoof. In support of this objection, he

Pleaded: It is essential to every feudal right, that it should name the vassal in whose favour it is created; 7th November, 1740, Blackwood against the Earl of Sutherland, and the representatives of Colvil and Russel, No. 22. 14327. It is impossible for the bailie, according to the words of style, to give actual, real, and corporal possession to a person who is not named, and who is unknown to him, or for the notary in such circumstances to declare, that he is well assured of the attorney's powers to receive it.

Farther, such right could neither be exercised nor transmitted. The vassal could not execute a poinding of the ground, nor grant a renunciation, and as little could any action be carried on against him. At his death, the superior could not discover from the last infeftment, in whose favour it had been granted; nor could the heir be served, unless in the character of heir to the heirs of the deceased, which is absurd. When a subject is disponed to a person and his heirs, and he dies without taking infeftment, his heir must expede a general service before executing either the procuratory or precept, which, however, would be unnecessary if the present infeftment was effectual. Indeed, the supporting of such infeftments would go far to supersede the necessity of services altogether. For, if infeftment may be given to the immediate heirs in this manner, it may be given to heirs *in infinitum*. See also act 1693, cap. 35.

Besides, it is necessary that the nature and extent of a feudal right should appear upon the records. But a purchaser or creditor of the vassal could neither discover from them the person vested with the feudal right, which had been executed in that manner, nor the number of persons among whom it was divided.

Answered: It is true, that in every infeftment there must be some person in whose favour the feudal right is created, and such in the present case was the heir of George Gordon.

No. 23.

As the sum in the bond vested directly in the heir of George Gordon, as creditor or disponee, he had no occasion to establish his right by a service; and, if a service were necessary, it could still be obtained. The objection then comes merely to this, that the name of George's heir was not inserted, but the law no where declares such omission a nullity. The sole object of inserting it is to point out the person meant; and this may frequently be done as well by a description as by its insertion. He may be described, for example, as the eldest son of a marriage, or the person holding a certain office at a given time. Indeed, the name of the disponee may frequently be unknown to the disponer; he may be the son of a friend or relation living abroad.

Although heritable security must bear the form of feudal rights, the essential part of the transaction is the publication of the incumbrance to the world. Persons contracting with the debtor, might in the present case have known both the extent of the debt, and the persons in whose favour it was contracted, just as well as if their names had been inserted; for, even then, it would have been necessary for them to have inquired what persons bearing those names were vested with the right.

Formerly a disposition of lands, under burden of the disponer's debts in general, gave a real right to every one of his creditors: That, indeed, is not now the case, because a perpetual unknown incumbrance cannot be created upon land; but, if the present objection is well founded, the right of such creditors should all along have been annulled, merely because their names were not inserted.

Even granting, however, that the infeftment in favour of the heirs of George was ineffectual, the heritable security would still be valid. Smiton was completely denuded; and therefore, as the fee of a subject cannot be *in pendente*, if it was not vested in the heirs of George Gordon, Lady Gordon, or her daughter Diana, must have possessed the fee of his half; and indeed, the latter, though obliged to account to her brother's heir for one half, was infeft, *pro indiviso*, for the whole.

Replied: When a subject is disponed to one in liferent, and children *nascituri* in fee, *ex necessitate*, a fee, real or fiduciary, is vested in the former, but, as the heirs of George were in existence, there was in this case no such necessity.

The fee of the lands continued with Smiton, unless in so far as they were legally conveyed to another, and George's claim remained a mere personal security. Diana Gordon was infeft in the whole lands, but only for a half of the debt. If George had been alive, and had not made up titles, her infeftment could not have carried the whole, and a null infeftment in favour of his heirs can make no alteration.

The Lord Ordinary, "in respect the infeftment is taken for the heirs of George Gordon, without naming or pointing out who those heirs are," found, "that the infeftment is unavailable to establish a real right in the lands in favour of those heirs, and therefore sustained the objection to the amount of the interest of George Gordon's heirs, which is one half of the heritable security claimed upon; but found, that Major Melville, in the right of George Gordon's heirs, is entitled to

No. 23. claim as a personal creditor, and may be ranked on the estate, *ultimo loco*, he always adjudging before drawing."

When a petition for Major Melville against this interlocutor was moved, a doubt was expressed, how far Lady Gordon might not be held as fiduciary fiar in George's half, and the security on that account effectual; but, when it was advised with answers, these doubts were given up; and the Court approving of the *ratio decidendi* expressed in the interlocutor of the Lord Ordinary, unanimously "sustained the interest of the petitioner to the amount of the whole liferent; and, with this addition, adhered to the interlocutor reclaimed against."

Lord Ordinary, *Justice-Clerk*. For Major Melville, *Solicitor-General Blair*.
Alt. *Rolland*. Clerk, *Pringle*.

Fol. Dic. v. 4. *p.* 264. *Fac. Coll. No.* 103. *p.* 230.

SECT. VI.

Sasine of different Lands taken place at one only.—The same Person both Bailie and Attorney.—Sasine taken in the Night.—Notary's Attestation of the number of Leaves.

1636. *March* 19.

LAIRD LAWRISTON *against* LADY DUNNIPACE.

No. 24.
Where lands are discontiguous, unless the sasine be taken at the place named by the king in the act of union, the sasine is null.

THE Lady Dunnipace, younger, being infeft by her husband and her father-in-law, in conjunct fee, in certain lands of his, lying in the Mearns principally, and in the lands of Seabegs, lying within the sheriffdom of Striviling, in special warrandice of the said principal lands, and sasine being given to her of the said lands, both principal and warrandice, at the ground of the lands in the Mearns, which were the principal, conform to an union made by the granter thereof in favours of the Lady, whereby he appointed the sasine to be taken at such a place designed by him for that effect, to serve for all the lands, both principal and warrandice, and according whereto she was seised at the said place, viz. at the ground of the lands of in the Mearns, which was appointed to be the place of union constituted in the Lady's right; it being of verity, that all the said lands, both principal and warrandice, were united to the old Laird of Dunnipace himself, in a barony by the King, and sasine appointed to be taken at the place of Lawriston in the Mearns, and to serve for the whole foresaid lands, notwithstanding of the discontiguity thereof; and this place of the King's union contained in the Laird's charter, not being that place designed in the Lady's infeftment, whereat he appointed