

S E C T. XVII.

Effect of a Real Right in Security granted by one who is only Superior of the Lands.

1794: January 22.

ALEXANDER HOME *against* JOHN SMITH and Others.

Charles Scot, superior of the lands of Kersland, which he held of a subject, granted to Alexander Home an heritable bond, obliging himself to infeft him in an annual-rent out of the lands, for the interest, and in the lands themselves, for principal, interest, and penalties.

The bond contained procuratory and precept. Alexander Home took infeftment on the latter.

Alexander Home, general disponee of the original creditor, having obtained a precept of *clare constat* from Charles Scot, brought an action against the feuers of Kersland, before the Sheriff, for payment of their feu-duties.

Charles Scot was by this time dead, and his representative had not entered heir to him.

The Sheriff gave judgment against the feuers, who, in a process of advocacy, Pleaded, *1mo*, It is an established point, that a superior cannot interpose a third party between himself and his vassals. It is true, that by a right in security like the present, the superior is not completely divested of his right. Still, however, subinfeudation to a certain degree takes place, and the infeftment is inept, as so far infringing the implied condition in the contract, that the vassal should hold immediately of the granter.

2do, The feu-contract imposes mutual obligations on the superior and vassal. The former obtains a right to his feu-duty and casualities. These, however, he cannot demand, unless he is ready, when required, to give a complete feudal investiture to his vassals; and no person claiming under him, can be in a better situation than himself. While the superior continues in a state of apparenacy, the heirs of the vassal are unable to make up titles; and withholding payment of the feu-duties, is the easiest mode in their power of forcing him to relieve them from this hardship.

Answered: *1mo*, When originally the connection between superior and vassal was a matter of personal favour and attachment, no change of either could take place without mutual consent. But, when afterwards a consideration in money was substituted for personal services, and the parties came to have no further connection with each other, than in so far as their patrimonial interest was concerned,

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A real right in security may be constituted by a base infeftment, flowing from a person who is only superior in the lands; but such of the vassals as are in non-entry, are not obliged to pay the feu-duties to the creditor, till they are entered by the superior.

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it came to be understood, that each was at liberty to act in any way which did not injure the right of the other; and the superior continued to be prohibited from interposing a third party between himself and his vassal, merely because by that means the amount of the feudal casualties might be increased. This prohibition, however, strikes only against irredeemable dispositions, and not against rights in security; because the granter of the latter continues to be superior, and is alone entitled to all the feudal casualties. The creditor, on the other hand, acquires only a right of the pledge, of which a simple discharge, without new infeftment on the part of the superior, is sufficient to divest him; Ersk. B. 2. Tit. 8. § 31. Tit. 12. § 46. Bank. B. 2. Tit. 5. § 1. Stair, B. 2. Tit. 10. § 1. Bennet against Drummond, No. 14. p. 6895. *voce* INFESTMENT. Even a public infeftment would not give the creditor any higher right. There can be no doubt, that the vassal may grant such securities, and there is no reason why the same right should be denied to the superior.

2do, The right of the creditor being once legally constituted, no after deed of the debtor, or of his heir, nor consequently the circumstance of the latter neglecting to enter, can affect it. Besides, in the character of apparency, even the heir himself is entitled to draw feu-duties from vassals, in the same manner as rents from tenants.

When the immediate superior refuses to enter, his vassals may get themselves entered, without any additional expense, by having recourse to the next superior, or the Crown; 1474, C. 58. And, when a declarator of the tinsel of the superiority is obtained, the superior passed over loses his right to the non-entry duties, but is still entitled to the feu-duty, and other casualties. Mackenzies Observations on act 1681, C. 21. Wight on Elections, p. 205. 1780. Earl of Fife and Sir James Duff against Sir John Sinclair, No. 111. p. 8687. *voce* MEMBER OF PARLIAMENT.

Replied: The right of vassals to a renewal of their investiture is coeval with the feudal contract, and antecedent to the right of any creditor.

There is a material difference between the permanent right of a feu and the temporary one of a tenant; and, if the latter had any claim against his landlord, which an apparent heir could not grant, he would not be entitled to demand rent from him. Besides, all the expense and trouble incurred by vassals in charging a higher superior, he would not be obliged to enter them until all the arrears due by the immediate superior, were paid.

The Lord Ordinary reported the cause on informations.

The Court had no doubt of the validity of the pursuer's security.

On the second point it was observed: It is an implied condition in the feudal contract, that the superior shall at all times be ready to receive his vassals, who suffer great hardship from his remaining in apparency. They are therefore entitled to retain the feu-duties, in order to induce him to enter. A creditor claiming under him cannot be in a better situation. He may, however, charge the

superior to enter in the vassal's name; to which the latter, provided all expenses are paid by the creditor, is not entitled to object.

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The Lords repelled the objections to the pursuer's title; but found, that such of the defenders as are in non-entry, are entitled to retain their feu-duties until they are entered by the superior.

Lord Reporter, *Dreghorn*.Act. *Maclaurin*.Alt. *Rolland*.Clerk, *Home*.

D. D.

Fol. Dic. v. 4. p. 313. Fac. Coll. No. 96. p. 215.

S E C T. XVIII.

Effect, as to Superiority, of the Dissolution of the Royalty of a Burgh.

1758. *January 17.*

WILLIAM URQUHART of MELDRUM, *against* JOHN CLUNES of NEILSTON, and Others.

No. 89.

The village or town of Cromarty was anciently erected into a royal burgh by charter from the Crown. Its privileges as such continued for many years. The lands within its territory were held *more burgi*, and the proprietors infeft in them as usual by the Bailies of the burrough.

The inhabitants of a Royal burgh, upon the abolition of its Royalty, are the Crown's vassals.

In 1670, the Magistrates and Council of the burrough, with consent of some of the burgesses, disposed to Sir John Urquhart, to whom they were indebted, the whole burrough-lands and common good of the burrough, saving all rights of property formerly made and granted by them, or their predecessors, to Sir John himself, or any other persons; but without prejudice of Sir John's immediate right of superiority of the whole of the said lands disposed.

In 1672, the Magistrates and Council, with concurrence of certain burgesses and inhabitants, presented a petition to the Parliament of Scotland, setting forth their poverty and want of trade; praying to be relieved of the burden of sending a commissioner to Parliament; and granting procuratory for resigning their privileges as a burrough-royal, in the hands of his Majesty, or his commissioners, the estates of Parliament, Lords of Exchequer, and convention of Royal burroughs, to remain with his Majesty *ad perpetuam remanentiam*. An act was accordingly passed in the same year, whereby the King, with consent of the estates of Parliament, accepted of this resignation, and ordained the name of the burrough to be expunged out of the rolls of Parliament, and, "That thereafter they should have