1733.

HERON
v.
DUKE OF
QUEENSBERRY.

PATRICK HERON of HERON, Esq. *Appellant*;
CHARLES, DUKE of QUEENSBERRY and DOVER, - - - - - } *Respondent.*

27th April, 1733.

TAILZIE.—An heir of entail in possession purchased the *dominium utile* of lands, the superiority of which was included in the entail, and took a resignation *ad remanentiam* in his own hands as superior,—found that the *dominium utile* is not thereby entailed.

No. 22. A MINUTE of sale was entered into between the appellant and respondent, by which the latter, in consideration of the sum of L.3000 sterling, agreed to sell to the appellant the lands of Loch-house and Thornick, in the stewartry of Annandale, and to grant to him, his heirs and assignees, an ample and valid disposition and charter and precept of sasine of the said lands, to be holden of the respondent and his heirs male and of entail succeeding to the dukedom of Queensberry, as immediate lawful superiors thereof, in feu blench, with a clause of absolute warrantry against all incumbrances and grounds of eviction.

The appellant, being afterwards advised that the Duke had not a good title to dispone the lands to him, refused to complete the purchase; upon which an action was raised to compel him to accept of the conveyance tendered, and to pay the price.

The appellant stated, in defence, that the respondent held his estates under a strict entail, executed by the late Duke, and that the superiority of the lands in question was originally included under that entail; that the property of these lands having been purchased by the respondent's curators, the mode taken to complete his title was by resignation *ad remanentiam* into his (the respondent's) hands as superior, whereby the right of property was merged, and the entail became as effectual over it as if the late Duke had at the time of making the entail been infeft in the property of the lands. The appellant likewise insisted that the heirs of entail ought to be made parties to the action.

The respondent argued that nothing but the superiority was affected by the entail, the granter having no other interest in the lands, nor had the respondent done any thing whereupon the *dominium utile*, purchased with his own money, could be subject to the provisions and restrictions of his father's settlement. That therefore, as the feu was no part of the entailed estate, there could be no occasion to make the heirs of entail parties to an action for compelling implement of a contract for the purchase of that feu.

January 10, 1733.

The Lord Ordinary having reported the case to the Court, they found "that the late Duke of "Queensberry, granter of the tailzie, having only "the right of superiority of the lands in question "in his person, at the time of making the tailzie, "the respondent acquiring afterwards the property "thereof, though by a resignation *ad remanentiam*,

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" does not subject the property of the feu to the " said tailzie, or any clauses irritant or resolutive " therein, and that there is no necessity for calling " the heirs of tailzie in this process, and therefore " repelled the defence, and ordained the appellant " to implement the minute, and decerned accord- " ingly."

Entered January 31, 1733.

The appeal was brought from the above interlocutor.

Pleaded for the Appellant:—By the entail, the lands are limited to the persons therein named, and though that settlement cannot take place, so as to affect the *dominium utile* as long as the right of the vassal remains; yet so soon as the vassal's right is extinguished by a resignation *ad remanentiam*, the case becomes the same as if no right of vassalage had ever been granted, that being no longer a separate subsisting estate, but merged and sunk in the superior's right, and consequently affected by the prohibitory and irritant clauses to which that right is subject.

The effect is the same here as it would be in the case of recognition, or any other feudal delict, by which the property became consolidated with the superiority. A resignation *ad remanentiam* is no more than an extinction of the fee resigned; it is not a title capable of conveyance; for the only title upon which a conveyance could be made, is the superior's infeftment; but that infeftment in this case is subject to those clauses which prevent any alienation.

Although the purchase money of the estate in question was the property of the respondent, and

the purchase made when he was a minor; yet he, after coming of age, settled accounts with his guardians, and allowed of the application of the money, which was a confirmation of the purchase and of the method whereby the lands had been conveyed.

The heirs of entail, not being parties to the action, will not be bound by any determination of this case, and they ought, therefore, to have been called, that in case the appellant should be obliged to complete the purchase, he may be safe from any challenge on their part.

Pleaded for the Respondent:—The naked superiority being the only estate that was in the maker of the entail, that and no more was, or could possibly be subjected to its fetters; the free disposition of property being by the law of Scotland incapable of restraint by implication, or without express conditions and provisions. And although accidentally the respondent's titles are made up by resignation, whereby the property is consolidated with the superiority, yet they are capable of being again separated by a new grant of the feu; and nothing in the entail hinders such a grant of the feu, the provisions of that settlement reaching no further, than to the superiority, which is alone contained in it.

Without admitting that such would be the consequence of consolidation upon recognition, or any other feudal delinquence, there is a wide difference between the two cases: in the one, the accession of the property to the superiority is a legal consequence of the superiority; and there may be some

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colour for saying that the entail affects all the natural and necessary accessions to the entailed estate, as well as the estate itself; but in the present case, the accession of the feu is no necessary consequence of the respondent's having been possessed of the superiority; as superior, he had no title whatever to reassume the feu; he purchased *tanquam quilibet*; and if his guardians, in his minority, thought fit to lay out his money on this purchase, and to make up his titles in the manner described, which is legal, it would be most unreasonable that what was so purchased with his own money should not be at his own disposal.

Judgment April 27, 1723.

After hearing counsel, "it is ordered and adjudged, &c. that the appeal be dismissed, and "that the interlocutor therein complained of be "and is hereby affirmed."

For the Appellant, *C. Talbot*, and *Will. Hamilton.*

For the Respondents, *Dun. Forbes* and *W. Noel.*