

No 72. so applied. But, if Mr Scot now prevails, it does not occur of what use this record of adjudications will be.

THE LORDS found, 'That, in this competition, Walter Scot, the annualreuter, is preferable, and prefer him accordingly.' And, upon advising a reclaiming bill and answers, 'Their Lordships adhered.'

N. B. It was at first further *pleaded* for the Dutchess, That the Duke being himself superior of the lands of Wauchope, his adjudication consolidated the property with the superiority, and was therefore preferable to all other adjudications or voluntary rights, according to Stair, lib. 3. tit. 2. § 22.; but this was afterwards given up as untenible; *see* Lord Bankton, book 2. tit. 11. § 14. *See* LITIGIOUS.

For Scot, *Lockhart et Swinton.*

For the Dutchess of Douglas, *Burnet et Rae.*

J. M.

Fac. Col. No 142. p. 332.

S E C T. XII.

Infestment upon Resignation with other Rights.—Charters of Resignation and Confirmation.—Liferents with other Rights.

1666. *January 17.*

LORD RENTON, JUSTICE CLERK, *against* FEUARS of COLDINGHAM.

No 73.
A charter upon resignation, where the original infestment was not produced, was sustained *in re antiquo*, in opposition to other charters of posterior date.

MY Lord Renton, as being infest in the office of Forrester, by the Abbot of Coldingham, containing many special servitudes upon the whole inhabitants of the Abbacy, as such a duty out of waith goods, and out of all timber cutted in the woods of the Abbacy, with so many woods, hens, and a threave of oats, out of every husband land yearly; pursues declarator of his right, and payment of the bygones since the year 1621, and in time coming; both parties being formerly ordained, before answer, to produce such writs and rights, as they would make use of; and these being now produced, the pursuer *insisted*, *primo loco*, for declaring his right as to the threave of oats.—It was *alleged* for the defenders, absolutor, because they had produced their feus granted by the Abbot of Coldingham, prior to the pursuer's infestment, free of any such burden.—It was *answered*, The defence ought to be repelled, because the pursuer has not only produced his own infestment, but his predecessors' and authors' infestments, and his progress to them, *viz.* the infestment granted to David Evin, of the forrestrie, containing all the duties aforesaid, which is before any of the defen-

ders infeftments produced.—It was *duplicated* for the defender, That the infeftment granted to the said David Evin is no original infeftment, but bears to be granted on his mother's resignation, and has no special *reddendo*, but only relative to the former infeftments; and therefore, unless the former infeftments were produced, or it were instructed, that the resigner had right, the infeftment upon resignation can operate nothing, especially never being clad with possession, as to the threaves of oats in question; for there is great odds betwixt infeftments granted by kirkmen, who are but administrators of the benefices, and others who have *plenum dominium*; so that infeftments upon resignation of kirkmen are to be understood to confer no more right than the resigner had, and not to constitute any original right where there was none before; in the same way as infeftments granted by the King, upon resignation, are but *periculo petentis*, and give no right further than the resigner had, even against the King.—It was *answered* for the pursuer, That his reply stands relevant, and he produces sufficiently to instruct his predecessor's right; for there is no law nor reason to compel parties to produce the old original feus granted by kirkmen, but infeftments upon resignation are sufficient; neither is the case alike as to the King and kirkmen, because things pass not by the King *ex certa scientia*, which no other can pretend; but in this case, declaring a right granted by an Abbot, with consent of the Convent, it must be considered what made a right the time that it was granted, when there was no more required than his concession, with consent foresaid, which is sufficient against him and his successors; neither can they pretend that such grants are *salvo jure suo*; and if in matters so ancient, original infeftments from kirkmen behoved to be produced, that neither precepts of clare constat, nor infeftments upon resignation were sufficient; few rights of kirklands in Scotland would be found valid.

The Lords repelled the defence, in respect of the reply, and found this infeftment upon resignation sufficient.

Fol. Dic. v. 1. p. 183. Stair, v. 1. p. 338.

CREDITORS OF LANGTON *against* LADY MARY KENNEDY.

FOUND that in a competition between charters of resignation and confirmation past in Exchequer, and sealed the same day, the charter of confirmation is preferable to the charter of resignation, the latter being complete by sasine, and the former incomplete till sasine thereon.

Fol. Dic. v. 1. p. 183. Harcarse, (INFESTMENT.) No 524. p. 172.