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diligence against him by hornings, inhibitions, arrestments, Liddel called them all in a multiple-poinding; whereupon a competition having ensued, Dick's creditors objected to Liddel's heritable bond, that one of the subscribing witnesses to it was not designed in the body of the bond, consequently it was null by the act 1681; the clause, requiring the solemnities of the act, running in the following terms: In witness whereof, I have subscribed this and the two preceding pages, at Clachan of Fintry, written by William Wishart, notary at the Clachan of Fintry, before these witnesses, the said William Wishart and Thomas Wishart.

Answered; Such nullities have been found suppliable by acts of homologation; and here a strong one occurred, viz. an assignation to the mails and duties of the lands granted by Dick to Liddel, wherein the heritable bond is fully recited, and of even date with it, and which was written by the same writer, and had the same witnesses, and ought to have been a part of it; and here Thomas Wishart is designed 'son to William Wishart notary in Fintry.' If indeed Dick had been brought under any disability by his creditors, betwixt the date of the heritable bond and the assignation to the mails and duties, there might have been ground to have made a distinction betwixt the debtor and his creditors, with respect to the effect of the nullity and act of homologation; but as they were both executed *unico contextu*, there is no room for such a distinction. See 17th Feb. 1715, Sinclair, against Sinclair, *voce* Writ; 29th Feb. 1732, Suddy, *see* Appendix; 21st January 1735, Blackwood, *see* Appendix.

The Lords found it competent to the creditors, competing with the pursuer for the price, to object the nullity.

C. Home, No 272. *p.* 442.

1748. *November* 9. Nasmith of Ravenscraig *against* Story of Braco.

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A disposition of superiority burdening it with the vassal's right, found to make the purchaser liable to anomalous conditions in the vassal's charter.

Robert Hamilton, by his disposition to Claud Nasmith, mentioned in the case betwixt the same parties 5th July 1748, *voce* Personal and Real, had granted several privileges to his vassal; as that he or his tenants being convicted of any wrong or riot in the superior's court, should not be fined in more than 50s. Scots, and that his heirs and assignees should be entered upon payment of double the feu-duty; and he gifted to him the casualties of non-entry, liferent-escheat, or any other by which the lands might fall into his hands; and having disponed the superiority to Ravenscraig, he excepted from the warrandice the feu-rights and charters granted by him and his predecessors, with the burden whereof he granted that disposition; declaring that the exception of the feu-rights should not infer a ratification thereof, but that it should be lawful to Ravenscraig to impugn them on any ground of law, not inferring warrandice against him.

Pleaded for the pursuer of the no-entry against the defender offering to enter, upon a charter being granted him containing these clauses, That they being

contrary to the nature of the holding, were only personal, and not binding on a singular successor.

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Pleaded for the defender, The disponer is bound by the warrandice of his disposition to make the privileges effectual to his vassal; and has taken the purchaser of the superiority bound not to quarrel any right in the vassal, on which he may have warrandice against his author.

Replied, The disponer is bound that he and his heirs shall allow these immunities, but not that he shall retain the superiority of the lands; and therefore no warrandice is incurred.

Observed, That these clauses, being contrary to public law, could not be made real; and therefore a personal obligation was taken for them, which went no further than to bind the granter while he continued in the right.

THE LORDS, 5th July 1748, 'found that the clauses anent receiving the disponee, his heirs and assignees, vassals for a certain sum, and discharging the casualties of superiority mentioned in the disposition, were not real, and did not affect the pursuer a singular successor; and therefore ought not to be engrossed in the charter.'

On bill and answers observed, besides the arguments used above, That the disposition to the superiority was burdened with the feu-right; and Ravenscraig, by his acceptance of his right so qualified, was bound to implement it.

'THE LORDS found, that Nasmith of Ravenscraig, purchaser of the superiority, having accepted his disposition thereto burdened with the feu-right granted to the original vassal, was obliged to implement to the said vassal and his successors the obligations contained in the feu-charter granted to him.' See No 9. p. 4180.

Act. *R. Craigie*. Alt. *A. Macdouall*. Clerk, *Murray*.

Fol. Dic. v. 3. *p.* 271. *D. Falconer, v.* 2. *No* 6. *p.* 7.

*** Kilkerran reports the same case:

1748. *November* 8.—ROBERT HAMILTON of Andrie granted a feu-charter to Claud Nasmith in the year 1689 of the lands of Ardbuckle, to be holden feu of the granter for payment of L. 7 Scots of feu-duty, and the charter contained the following clause, viz. 'And the said Robert Hamilton obliges himself, his heirs and successors whatsoever, to enter and receive the heirs and assignees of the said Claud Nasmith and his foresaids, by precept of *clare constat*, charter of resignation, &c. or otherways, without any further payment or good deed whatsoever to be paid or given therefor, more than the doubling the feu-duty, &c.; they always presenting on their own charges all such writs as shall be necessary. And further, in case any casualty shall fall by reason of non-entry or any other way, then and in that case, I the said Robert Hamilton hereby bind and oblige myself, my heirs and successors, to renounce, dispone and overgive; and I, by the tenor hereof *per verba de pre-*

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'*senti*, renounce, dispone and overgive to and in favour of the said Claud Na-
'smith, and his heirs and successors, all and sundry the said non-entries, &c.'

In the year 1720, James Nasmith of Ravenscraig, purchased the superiority of the foresaid lands of Ardbuckle from William Hamilton the son and heir of the superior; and in the disposition there was a clause of absolute warrandice with the following exception: '*Excepting* always, furth and from the said absolute warrandice, the feu-rights and charters granted by me or my predecessors of the foresaid lands above disponed in favour of the vassals and feuers of the same, with the express burden of which rights these presents are granted by me, and no otherways; *declaring* always that the exception of the said feu-rights shall import no ratification or homologation thereof, but that it shall be leisome to the said James Nasmith and his foresaids to reduce quarrel and impugn the same on whatsoever ground of law competent to them, which shall not infer warrandice against me or my foresaids.' And upon this disposition the purchaser obtained a charter under the Great Seal, and was infeft.

Claud Nasmith, the vassal last infeft, having died some years ago, whereby the lands became in non-entry, Ravenscraig the superior brought a declarator of non-entry, wherein he called John Storry the apparent heir; who having presented a charter to be signed by the pursuer as superior, in which were inserted the whole obligations that were contained in the original feu-charter, the Lords, on report, found, 'That the clauses concerning the receiving the defender, his heirs and assignees, vassals for a certain sum, and discharging the casualties of superioritiy mentioned in the said original charter 1689, are not real, and do not affect the pursuer a singular successor; and therefore ought not to be engrossed in the charter to be granted by the pursuer.'

But the defender having reclaimed, the Court was much divided. It was on the one hand observed, in support of the interlocutor, *first*, in general, on the import of the obligation, That as every clause in a feu-right, contrary to the nature of the feudal tenure, is to be strictly interpreted, and such are all obligations upon the superior to enter the vassal and discharge casualties not yet fallen, the obligations by Robert Hamilton the pursuer's author are to be understood to import no more, than that while he or his heirs remained in the superiority, he should receive the vassal and discharge the casualties, &c.

And that it did not alter the case that the granter also *per verba de presenti*, disponed the casualties; for that was no more than executive of the obligation, as the same has been explained, that is, a disposition of the casualties how oft they should fall while the superiority should remain with him; or in other words, how long the obligation itself subsisted.

But 2*do*, Let the obligations or disposition have been intended to import what they will, still, as no such thing entered the sasine, they were but personal; such obligations or disposition, if contained in a paper a-part, would be admitted to be only personal; and what odds should it make that they are contained in the feu-charter, as whatever difference that may make in the point of

notification, still they were no constitution of a real right; and except in so far as the right given to the vassal is made real, the singular successor of the superior cannot be affected by it.

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And whereas it had been *argued*, That as every clause in a feu-charter will affect the singular successor of the vassal, so every clause therein should also affect the singular successor of the superior; it was *answered*, That the case of the vassal and of his singular successor is different from that of the superior; for the feu-charter is the constitution of the vassal's right, and that right must be affected by every quality either implied in the tenure or exprest in the reddendo; but the superior acquires no new right by the feu-charter or sasine following on it: His right is the full property that was in him before granting the feu, except in so far as it is diminished by the real right transferred to the vassal.

3dly, Had the clauses even entered the sasine, it was doubted if they could be effectual it law; it being contrary to the very nature of the feu-right, that a superiority should have no casualties attending it, or a feu have no feu-duty, which therefore no superior could grant.

And *lastly*, The decision 15th June 1731, between Lady St Clair and Sir James Stewart, (*see* PERSONAL and REAL), was referred to, where it was found, That clauses contained in the original feu-right, conceived in like words with the present, were not real, and therefore did not affect the singular successors in the superiority.

On the other hand, it was said, That the equity of the case was with the vassal; and if the law was not also with him, it was at least hard; but that even the law was thought to be with him: That there was nothing in law to hinder the superior and vassal to agree that the vassal should in all time thereafter be received *gratis*, and have the casualties discharged, more than there is to hinder a superior to tax a ward, or to give the feu-duty in feu to a third party; and that the obligation should be understood in this case as only upon the granter and his heirs, was to take for granted what could not be admitted; as the term 'successors' did comprehend successors of all kinds, the singular as well as the heir, or universal successor; and to say otherways in this case, were to say, that even an inhibition upon these clauses against the granter would not secure against the singular successor of the granter, which, even supposing them to be personal, would not be maintained.

But *2do*, That they were truly real, *1mo*, as being contained in the charter, as it is the charter and sasine jointly that constitute the feu-right, and whatever is in either must be effectual so far as the nature of the right will admit; and accordingly it was said to have been decided 10th July 1722, Duke of Gordon against Innes of Dunkinty, (*see* APPENDIX); where the Duke's predecessor having in the year 1643 disponed the lands of Dunkinty to one Fullerton, to be held of him feu, with a clause in the disposition, That he, his heirs and successors, should be bound to receive and enter the heirs, successors and as-

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signees of the feuer, or any person to whom he or they should dispone the lands, for payment of ten merks in name of composition; and the feu having come to Innes of Dunkinty by singular titles, the Duke of Gordon, who was now in the right of superiority, not as representing his predecessor, but by gift of forfeiture, was found obliged to receive Dunkinty on payment of ten merks, conform to the clause in the original feu-right, and that he was not entitled to the full year's rent for his entry.

It was, in the *last* place, *observed*, That in the present case Ravenscraig the pursuer had accepted of the conveyance of the superiority with the burden of the feu-right, whereby all clauses in it, supposing them otherwise personal, were rendered real burdens.

THE COURT being much divided upon the general question, they with a declared intention to avoid a decision of it, took up the case upon the speciality last mentioned, and found, 'That the pursuer having accepted of the right with the burden of the feu, he is bound by every clause in the feu-right.

This nevertheless in effect implied a decision of the general question, at least as to the import of the obligation. For if the obligations upon Robert Hamilton to enter the heirs of the vassal, &c. were only binding upon the granter and his heirs, they made no part of the feudal right, with the burden whereof only the conveyance to the pursuer was granted; and for the same reason, the import of the exception from the clause of absolute warrandice also depended on the intention of these obligations; for if it was no other than that they should be binding upon Robert Hamilton himself and his heirs, they did not fall under the warrandice contained in a conveyance to singular successors. *See* PERSONAL AND REAL.

Kilkerran, (PERSONAL AND REAL.) *No* 5. *p*. 385.

No 97.
An informal indenture was found homologated by the service having taken place.

1781. *July* 19. JAMES RYMER *against* ALEXANDER M'INTYRE.

IN May 1776, a son of M'Intyre's, under eleven years of age, entered into the service of Rymer, in his trade, that of an engraver; and, soon after, an indenture was executed between them, by which the boy was to become bound as an apprentice to him, for the term of six years. This writing, however, though subscribed by Rymer, by M'Intyre, as cautioner for his son, and by the boy himself, was, in other respects, informal. The testing clause stood thus: 'In witness whereof, both the said parties have subscribed these presents, written upon stamped paper by (Signed) Gavin Rymer, shoemaker, and Adam 'Richardson, ditto.' And below, these names were repeated thus: 'Witness, 'Gavin Rymer, Adam Richardson.'

The boy continued to serve Rymer till October 1779, when his father, on an allegation of bad usage, took him away from his master's service; upon which