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true, that the Lords resolved to enforce the observance of the said statute 1686 by an Act of Sederunt; but this act has never yet been made; and as this case is the same with that of the Duke of Roxburgh, the like judgment may be expected.

Replied for Clark: 1*mo*, If a form established by a statute may be omitted without incurring a nullity, that statute may at all times be eluded.

2*do*, The erroneous practice of notaries in former days, cannot afford any argument in defence of a sasine dated in the year 1748; when it is considered, that from the year 1730, when this objection was first moved, the custom began to be reformed; and that ever since the 1741, the general practice of notaries has been agreeable to the statute, as appears from a declaration signed by the deputy-keeper of the register of sasines at Edinburgh.

3*tio*, The case of the Duke of Roxburgh against the Feuers of Kelso is not in point; for the persons who objected to the Duke's sasine did not pretend any right to the subjects contained in his charter and infeftment; and, besides, that sasine had been a title of possession for upwards of forty years, and was dated at a time when notaries universally omitted the solemnity in question; nor could there be any suspicion of fraud in that sasine; for the beginning of the precept was ingrossed in the first page, and the end of it in the last.

"The Lords repelled the objection to the sasine, in respect of the general "non-observance of the act 1686, with regard to enumerating the pages or "leaves of sasines written bookways; as appears in the case betwixt the Duke "of Roxburgh and John Knox and Andrew Hall, marked in the book of "Sederunt; and that the said act has not yet been regularly observed."

For Clark, *R. Craigie.* For Waddel, *A. Lockhart.* Reporter, *Woodhall.*

D. *Fac. Coll. No. 2. p. 3.*

1777. *January* 21.

JAMES SCOTT of Scalloway *against* JOHN BRUCE STEWART of Simbister.

No. 2.

A sasine taken not on the lands, but in consequence of a dispensation from a subject superior, found null.

THE Sinclairs of Scalloway had been, in the seventeenth century, proprietors of large estates within the lordship of Zetland, which were feudalized by charters from the Crown in favour of that family.

In 1667 and 1678, wadsets were granted of certain of these lands, by the then proprietors James and Arthur Sinclairs, in favour of Lawrence Stewart of Bigtown.

The estate of Scalloway, including the lands so wadsetted, was, in 1677, adjudged from Arthur Sinclair by James Smelholm. He obtained a charter of adjudication, and was infeft, thus acquiring the right of reversion to the wadsetted lands; which came by progress into the person of James Scott.

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The wadsets descended from Lawrence Stewart to John Bruce Stewart.

Scott brought an action of reduction and declarator against Bruce Stewart, for recovery or redemption of the wadsetted lands.

The Lord Ordinary (Kennet) "sustained the pursuer's title, and found that "the defender must either produce to exclude, or take a day to produce the "writs called for in the reduction."

The Stewarts, in conveying the wadset from the one to the other, had given absolute dispositions, without noticing that the lands were redeemable. Of this description, was a disposition from Charles Stewart son of Laurence, the original wadsetter, to John Laurence Stewart his son, in 1706—upon which infeftment followed in 1708. These were produced by the defender as titles to exclude, possession, as of an absolute right, having followed on them for 40 years.

The pursuer pleaded: That they were insufficient to exclude; 1*st*, As the reversion being *in gremio* of the original right, was perpetual, and not subject to prescription; and, 2*do*, As the infeftment 1708 was null, because taken upon the lands of Bigtown, which were no part of the wadset lands, in virtue of a dispensation in the disposition which was beyond the power of the granter.

The Lord Ordinary (26th July 1776) "found, that the defender had pro-"duced sufficient to exclude, and therefore assoilzied from the reduction."

In consequence of a petition and answers, a hearing in presence took place, in which the chief point agitated was the validity of the infeftment, the Court having signified that there the difficulty lay.

Argument for the pursuer.

Ever since the introduction of feudal principles, possession has been held to be absolutely necessary for completing the right. The original mode of transferring the real and natural possession to the new vassal by the superior, gave place, when written instruments had become more frequent, to symbolical delivery,—but still it was indispensable that this act should be preformed on the lands themselves. Accordingly, Sir Thomas Craig, L. 2. T. 7. § 14. reprobates a device which had been suggested of putting earth, taken from the lands conveyed, into the shoes of those who gave and received infeftment. He says, "*in re presenti et super ipso fundo hæc traditio fieri debet;* and again, "*certum enim est sasinam extra fundum ipsum datam nihil operari.*" From this principle it follows, that where different parcels of land, lying naturally discontiguous, are disponed to the same persons, infeftment must be taken on the ground of each severally, although conveyed by the same charter or disposition, and by the same disponer to the same disponee.

There is indeed a dispensation in the disposition on which the infeftment followed, but that dispensation is given only by a subject superior, who as such had no power to grant it.

It is true, that Sir Thomas Craig, L. 2. Dieg. 7. § 17. says, that a subject-superior may create an union; and Lord Kames, in his Historical Notes on the

No. 2. Statutes, p. 439, uses these words, "Though our lawyers at present have "generally come into the opinion, that it belongs to the King solely to make "an union; it is by no means a clear point, that this may not be done by a "subject-superior."

But Craig wrote before the law was sufficiently fixed on this point, and he acknowledges, that some of his contemporaries differed with him in opinion on the subject. *Imo sunt qui putant dominium utriusque fundi discontigui, ne ipsum quidem unire posse in concessione, quam subvassallo est facturus, nisi ipse unitos in unum dominium et baroneam habeat; quum nemo plus juris in alium transferre possit, quam ipse habet.*

Lord Kames does not deny, that according to the law, as it stood when he wrote, the power of creating an union was held to belong exclusively to the King,—and in the passage which follows the above quotation, he only argues, very ingeniously without doubt, for altering the law, and returning to the opinion of Craig. But no point which wants the authority of a special statute, is better established than this, that the union of lands is a part of the royal prerogative, and can only be derived from the Sovereign authority. See 16th January 1623, Aitkin against Greenlaw, No. 4. p. 16397; 16th December 1628, Borthwick against Scott, No. 6. p. 16399; Stair, B. 2. T. 3. § 44; Bankton, vol. 1. p. 566; Erskine, B. 2. T. 3. § 45.

It has been argued on the other side, "That the above objection to the sasine does not amount to an *intrinsic* nullity, for the sasine would be valid, if properly authorised by a dispensation from the Crown;—but if the objection is *extrinsic*, then the objection itself may be cut off by the negative prescription; for *post tantum temporis*, it must be presumed that the sasine was legally warranted, and that the lands had been united by a clause of dispensation contained in some former *Crown charter* of them." But, however ingenious this argument may appear, it admits of a sufficient answer. What can be called an *intrinsic* objection to a sasine, if it is not one that it bears *in gremio* of it, that the act of infeftment was not performed upon any part of the lands themselves. The only possible way in which such an objection can be obviated, is by shewing that the whole lands in the disposition were legally united, and that the infeftment was taken in terms of a valid and effectual clause of dispensation. The proving this cannot lie upon the party who objects to the sasine, but must be incumbent on him who uses and founds upon it. The objector proves his objection by the sasine. If it is not taken off by proper documents, the sasine must of course be held to be null and void. An objection which stands proved *ex facie* of the instrument, cannot certainly be rendered ineffectual by any length of time, and there can be no room for a *presumption* that other documents *might have* existed, which, if produced, might have obviated the objection.

The argument for the defender in support of the sasine, was founded on the above-mentioned opinion of Sir Thomas Craig and of Lord Kames; on the

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presumption arising for the length of time, that there had originally been a Crown charter; and it was added, that there had prevailed an usage in Zetland of such infeftments as this.

The cause was reported by Lord Braxfield, as part of his probationary trials. The following interlocutor was pronounced (13th December 1776): "On report of the Lord Probationer, and having advised this petition, with the answers, and heard the parties procurators at the bar, the Lords find that the defender has not yet produced sufficient to exclude, and therefore that a day falls to be assigned to him to satisfy the production; but reserve to him, at discussing the reasons of reduction, to found upon his titles now produced, and to the pursuer all objections against the same."

The defender presented another petition, which was followed with answers, replies, and duplies.

The Court adhered, (21st June 1777.)

Reporter, *Braxfield.* Act. *B. W. M'Leod, Dav. Rae.* Alt. *Ilay Campbell.*

W. M. M.