

ject, will direct letters of horning, to charge the superior to receive for his vassal the user of the redemption.'

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The President gave his opinion, that the proper method for making up titles was, That the Captain should serve heir in special to Sir James Gordon his father. I objected to this for the two following reasons; *imo*, That the estate did not remain *in hæreditate jacente* of Sir James, but had been vested in the crown, and stood vested in the crown at this very time; and, therefore, that the estate could not be taken by the Captain as representing his father; but that some method must be devised by which the crown may be divested; that by the act 1685, cap. 22. upon a contravention of the irritant clauses, the next substitute may indeed serve to the predecessor who did not contravene; but that this clause of the statute does not apply to the present case, which differs in every circumstance. *2do*, The Captain in this case must not be held to be an heir, but a remainder-man or conditional institute; and to him, under this character, a service does not at any rate apply. After full deliberation, the interlocutor was pronounced in terms of the petition, from analogy of what is delivered by Sir Thomas Hope. My doubt at first was, whether a charter from the crown might not be necessary in this case. But I got clear of the doubt by the following consideration; property is transferred by consent with delivery. By the charter under the Great Seal to Sir James, the crown will not only to give Sir James the property, but also to give it to the Captain as a conditional institute, after Sir William and his male-issue are exhausted. Therefore, to establish the property in the Captain, nothing remains but to make delivery to him, which is done by a precept out of the chancery.

*Sel. Dec. No 127. p. 181.*

\*\*\* See No 60. p. 4728, *voce* FORFEITURE.

1766. *January 29.*

JOHN MURDOCH, Merchant in Glasgow, *against* SAMUEL CHESLIE, Merchant in Glasgow.

By contract of marriage, in 1688, between John Herbertson, the eldest son of George Herbertson, merchant in Glasgow, and Janet Bell, George Herbertson the father, disposed certain tenements in Glasgow, to his said son and spouse in conjunct fee and liferent, and to the heirs and bairns of the marriage in fee.

Upon the procuratory of resignation contained in this marriage contract, John and his wife were infest in 1694; and, upon this title, John, after his father's death, possessed these tenements till his own death, which happened in 1722.

John Herbertson, of his marriage with Janet Bell, had a son named John, and several younger children. Upon the death of John the father, John, the son,

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Infestment taken on a procuratory of resignation which had formerly been executed, null.

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served himself heir in general to his father, and thereafter caused resignation to be made by the procurator of George, his grandfather, in the hands of the Magistrates of Glasgow, his superiors; and upon this resignation he was infest in 1723.

John the father, and John the son, had both contracted considerable debts, upon which the creditors led adjudications. Against John the son, two of these adjudications were led by Samuel Cheslie, and two by John Murdoch.

Cheslie's adjudication proceeded against John the son, without any special charge to enter heir to his father.

Murdoch's adjudication proceeded upon special charges against John the son to enter heir in special to John the father, and to procure himself properly infest as such.

When these creditors came to be ranked, it was objected by Murdoch, against Cheslie's adjudication, that, as the infestment of John the son had proceeded upon the procuratory of resignation granted by George the grandfather in his son John's contract of marriage, which procuratory had already been executed in the person of John the father, it could not again be executed by John the son; and consequently the infestment in favours of John the son, proceeding on said procuratory of resignation, was void and null, and of course the adjudication led by Cheslie must be void, as not proceeding upon a special charge.

*Answered* for Cheslie; This is too critical an objection to be laid hold of to void the diligence of a lawful creditor. Supposing the infestment of John the son to have no support from the procuratory of resignation, the infestment itself was neither irregular nor improper, but such as the Magistrates were bound to grant, not only in respect of the notoriety of John being his father's eldest son, and consequently his heir general, and of line, but more especially in respect of his general service, *tanquam legitimus et propinquior hæres* to his father; and as the Baillies could have been compelled to grant such infestment, the saine could not be cut down; because the infestment also proceeded upon the resignation in the contract of marriage, as supposing it not to have been properly executed before; *superflua non nocent, et utile per inutile non vitiatur*.

In support of what was pleaded for Cheslie, the followed authorities were cited; Lord Bankton, v. I. b. 2. tit. 3. § 7. par. 68.; Renton *contra* Feuars of Coldingham, 20th Jan. 1666, *voce* VIRTUAL; Livingston *contra* Menzies, 22d Jan. 1706, *voce* REPRESENTATION; and Bell *contra* Carruthers, 21st June 1749, *IBIDEM*.

For Murdoch, the decisions Edgar *contra* Maxwell, 21st July 1738, *voce* REPRESENTATION; Marquis of Clydesdale *contra* The Earl of Dundonald, 26th Jan. 1726, *voce* VIRTUAL; and Landale *contra* Landale, 12th June 1752, *voce* SERVICE TO HEIRS, were referred to.

'THE LORDS found the infestment of John the son void, and preferred Murdoch.'

For Cheslie, *Lockhart*.

For Murdoch, *Jo. Dalrymple*.

A. E.

*Fac. Col. No 33. p. 56.*