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'nees whatsomever,' any thing different from what is their obvious and technical meaning. When I find him using expressions in a more limited sense, following almost immediately in that destination; when I find him repeating those terms in the final part of this destination; I cannot, for one, understand him to mean, by 'heirs and assignees 'whatsomever,' that which he has expressed in another part of the instrument by 'heirs of the body.' When I find those different expressions used, and that undoubtedly the persona prædilecta was the heir-male of the body; when I find nothing inconsistent with that construction, though any one reading this instrument cannot but see there were events not contemplated by him; I cannot, for one, say what he would have said if he had been asked, If you have a son of the first marriage, and he dies without issue, do you mean that all the daughters should come in without distinction, or one should take without division?—when I cannot find that solved by the declaration of the parties, it appears to me it is the safest course to adhere to the natural construction of those words; by adhering to which construction I am adhering also to the principles on which all these cases must have been decided. I say, my Lords, therefore, for one, if your Lordships should concur with me upon that principle, this judgment must be affirmed; and if your Lordships should be of that opinion, I should humbly move you that this judgment be affirmed.

Appellant's Authorities.—2. Mack. p. 325.; Kilk. 463.; 3. Ersk. 8. 48. and 35.; Kilk. 190.; Buchanan's Trustee, March 4. 1813, (F. C.); Harvie, Dec. 12. 1811, (F. C.); Begg, Jan. 14. 1663, (4251.); Gordon, Feb. 19. and March 4. 1685, (14,849.); Schaw, Nov. 10. 1687, (14,850.); Laws, Jan. 19. 1697, (14,850.); Dickson, Feb. 23. 1697, (14,851.); Stephenson, June 24. 1784, (14,872.); Lord Eldon in Roxburghe cause; M. of Clydesdale, Dec. 16. 1725, (1262.); Kerr, June 23. 1807, (F. C.); Tinnoch, Nov. 26. 1817, (F. C.)

Respondent's Authorities.—3. Mantica, 4.; Baillie, March 26. 1770, (F. C.); Campbell, Nov. 28. 1770, (14,949.); Hay, July 24. 1788, (2315.); Sutties, Jan. 15. 1809, (F. C.); 2. Dict. 369.; Ballantyne, 1687, (3002.)

J. CHALMER—SPOTTISWOODE and ROBERTSON,—Solicitors.

(Ap. Ca. No. 29.)

No. 23. JAMES B. FRASER, Esq. Appellant.—*Shadwell—Murray.*
J. JORDAN WILSON, Esq. Respondent.—*Walker—Matheson.*

Real Burden—Poinding of the Ground—Ameliorations.—Held, (affirming the judgment of the Court of Session), 1. That it is competent to constitute a real burden on lands by a resignation ad remanentiam, effectual against a singular successor; 2. That the creditor in such real burden is entitled to pursue a poinding of the ground; and,

3. That he is entitled to sell the lands without accounting for ameliorations made by the singular successor. April 15. 1824.

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2D DIVISION.
Lord Pitmilly.

IN 1809, Thomas Douglas, who was infeft on a crown charter in the lands of Blackburn, near Edinburgh, sold part of them to the respondent, James Jordan Wilson, for L.10,600, which was immediately paid. On the disposition which Douglas granted the respondent was immediately base infeft,—the superiority thereby remaining vested in Douglas. Soon thereafter the respondent, being dissatisfied with his purchase, entered into a transaction with Douglas, by which he agreed to reconvey the lands to him at the price of L.11,000, which sum was to be constituted a real burden on them, and for which Douglas, and two cautioners, George Lyell and Robert Dick, were to grant their personal bond, payable by instalments in ten years. In carrying this reconveyance into effect, Mr Ross, the late Dean of Faculty, recommended, that as Douglas was still vested in the superiority, the respondent should grant to him a disposition, containing a procuratory of resignation ad remanentiam, burdened with the price, and that upon that procuratory Douglas should complete his titles. The respondent, accordingly, on the 3d of November 1819, redisponed the lands to Mr Douglas,—

'Declaring always, as it is hereby expressly provided and de-
'clared, that the lands, teinds, and others before described, are
'hereby disponed under the express burden of the aforesaid sum
'of L.11,000 sterling, interest thereof from the term of Martin-
'mas 1809, and a fifth part more of liquidate penalty in case of
'failure, contained in the said bond granted by the said Thomas
'Douglas, George Lyell, and Robert Dick, to me, and payable
'by the instalments and at the terms therein mentioned: And
'which sum of L.11,000 sterling, interest and penalty as afore-
'said, is hereby declared a real lien and burden affecting the
'aforesaid lands, teinds, and others, and appointed to be engross-
'ed in the infeftment or resignation to follow hereon, and in all
'future transmissions and investitures of the said lands, teinds,
'and others, aye and until the said sums be completely paid up
'in terms of the said bond. Declaring always, as it is hereby
'expressly provided and declared, that in the event of any part of
'the interest to fall due on the foresaid sums, or any part thereof,
'remaining unpaid after the term or terms of payment thereof
'respectively, it shall not only be competent to and in the power
'of me, the said James Jordan Wilson, and my aforesaid, to do
'personal diligence for recovery thereof, in virtue of the bond

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'granted as aforesaid; but also, notwithstanding of the assigna-
'tion to the rents, mails, and duties hereinafter inserted, it shall
'be competent to and in the power of me and my aforesaids to
'enter to immediate possession of the lands and others before
'described, and to uplift, discharge, or assign the rents and
'duties thereof, or to attach the crop and stocking upon the said
'lands for payment of the said interest; and in such case, I and
'my foresaid shall noways be liable for the insolvency of tenants,
'or the not doing of exact diligence, but only for our actual in-
'tromissions, as the same may be ascertained by our writ or oath,
'or those of our factor, attorney, or commissioner in the pre-
'mises: As also declaring, as it is hereby expressly provided and
'declared, that in the event of any one of the said instalments
'remaining unpaid for three months after the same shall become
'due, not only shall it be competent to me the said James Jor-
'dan Wilson, and my aforesaid, to do personal diligence for
'recovery of the sums contained in the aforesaid bond, and con-
'stituted a real lien on the said lands as aforesaid, the respective
'terms of payment thereof being come, but, notwithstanding of
'any infeftment or resignation which may follow hereon in
'favour of the said Thomas Douglas, it shall also be lawful to,
'and in the power of me and my aforesaid, to revert to the in-
'feftment in my favour before narrated, and in virtue thereof,
'(and without any process of declarator to establish our right),
'to sell and dispose of the whole lands and others before de-
'scribed, by public roup or private sale, at such price as can be
'got therefor, on previous advertisement once a-week,' &c.; 'and
'to grant valid dispositions of the said lands, containing all usual
'and necessary clauses for feudally investing the purchaser in
'the property of the same; all which are hereby declared to be
'as valid and sufficient to all intents and purposes as if these
'presents had never been granted.' It was also 'expressly de-
'clared, that all infeftments, instruments of resignation, or other
'investitures of the said lands in favour of the said Thomas
'Douglas and his aforesaid, in which the said real lien and bur-
'den, and the aforesaid declarations, shall be omitted, are and
'shall be null and void to all intents and purposes, and of no
'avail, force, strength, or effect whatever against me, my heirs
'and successors.' In like manner it was declared, in the pro-
curatory of resignation ad remanentiam, that it was granted
'always with and under the real lien and burden of L.11,000
'sterling, payable by the instalments before specified, interest
'thereof, and penalty stipulated in case of not punctual payment,

'as before-mentioned.' Douglas thereupon expede an instrument of resignation ad remanentiam in his own favour, containing the above declaration, which was immediately recorded. April 15. 1824.

In the course of the following year Douglas sold the property at the price of L.11,500 to the appellant, Mr James Bristow Fraser, writer in Edinburgh, and at the same time became bound to uphold the rent for 19 years at L.448, for which the lands had just been let to a tenant. The titles of Douglas, containing the burden of the price in favour of the respondent, were then laid before the appellant, who suggested, that instead of engrossing it in the disposition to him, the appellant should grant a bond and disposition to Douglas over the lands for the L.11,000. Accordingly, Douglas granted a disposition to the appellant without taking any notice of the burden, but at the same time the appellant granted a bond and disposition in security, declaring, 'that as L.11,000 sterling is secured as a real 'burden and lien on the said lands, due to James Jordan Wilson, 'Esq. from whom the said Thomas Douglas purchased the same;' therefore he bound himself to pay that sum to Douglas by the same instalments and at the same times as Douglas was bound to pay them to the respondent; and it was also declared, that that sum should be a real burden on the lands; and 'I the said 'James Bristow Fraser, and my aforesaids, shall be entitled to 'see the same instantly paid over to the said James Jordan Wil-'son, his heirs and assignees, and suitable discharges and re-'nunciations thereof, and of the said real burden or lien, granted, 'and recorded in the general or particular register of sasines, 'reversions, &c.; and shall also be entitled, in case the said James 'Jordan Wilson, or his foresaid, shall consent and agree thereto, 'to have this present bond and disposition substituted by assig-'nation or conveyance for and in place of the bond and obli-'gation granted by the said Thomas Douglas and his cautioners 'to the said James Jordan Wilson for the said principal sum and 'interest; and which conveyance the said Thomas Douglas and 'his foresaids shall in that case grant at my joint expense;' and this was followed by a power of sale in favour of Douglas and his assignees.

When the first instalment fell due, it was paid by the appellant, who received two separate deeds of discharge, one from Douglas to himself, and another by the respondent also to the appellant and to Douglas. To avoid the necessity of these double discharges, the respondent obtained from Douglas an assigna-

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tion to the bond and disposition in security granted by the appellant, in virtue of which he was infeft.

Thereafter, the tenant having become bankrupt, and Douglas being unable to uphold the rent to the stipulated amount, the appellant raised an action of damages, and obtained a decree against him for upwards of L. 3000. In the mean time, the appellant had paid the second instalment to the respondent; but when the third became due, he maintained, that he was entitled to retain it in extinction of the debt due to him by Douglas, and that, as the respondent was his assignee, he was liable to that defence. This plea having been sustained by the Court, the respondent brought an action of declarator and of removing against Mr Fraser, founding on his real right, and concluding to have it declared, 'that notwithstanding of any infeftment or resignation 'which may have followed on the said disposition in favour of 'the said Thomas Douglas, or of the said James Bristow Fraser 'as deriving right from him, it is lawful to and in the power of 'the pursuer to revert to the original infeftment in his favour of 'the aforesaid lands, and in virtue thereof to sell and dispose 'of the whole lands and others before described, by public roup 'or private sale, at such price as can be got therefor, on using the 'order of sale before-mentioned; and to grant valid and sufficient 'dispositions or other rights thereof to the purchaser or pur-'chasers thereof, containing all the usual clauses, which shall be 'equally effectual to all intents and purposes as if the said dis-'position by the pursuer to the said Thomas Douglas had never 'been granted; and to apply the proceeds of said lands, after de-'duction of all expenses, in payment and extinction of the fore-'said sum of L.9000, annualrents thereof, and penalties stipu-'lated therefor in case of failure in payment thereof, all as 'specified and contained in the deeds before narrated; as also, 'that it is competent to the said pursuer, and his aforesaids, to 'enter into the immediate possession of the lands and others 'before described, and to uplift, discharge, or assign the rents 'and duties thereof, or to attach the crop and stocking of the 'said lands, for payment of the said interest due and to become 'due since the term of Whitsunday 1814;' and also, that the appellant should be ordained forthwith to remove. At the same time he also brought an action of poinding the ground, which was conjoined with the declarator.

In defence it was maintained by the appellant,—

First, That no real burden had been created on the lands,

because it was not competent to do so by means of a resignation ad remanentiam. And,

Second, That as the respondent had no infeftment, he was not entitled to pursue a poinding of the ground.

The Lord Ordinary found, 'that the pursuer, James Jordan 'Wilson, has a real lien over the lands of Blackburn for security 'of the balance of the price due to him, and is entitled to bring 'the lands to sale for payment of the balance; and therefore, in 'the action of declarator and removing at his instance against the 'defender, and also in the process for poinding the ground, de-'cerned in terms of the conclusions of the libel.' And in a suspension and interdict of a threatened sale, brought by the appellant, his Lordship found the letters orderly proceeded. To this judgment the Court adhered on the 1st of December 1820, and thereafter on the 13th February 1822.*

The appellant then entered an appeal, and maintained,—

1. That as a resignation ad remanentiam was the form in which a vassal returned his lands to the superior, it had merely the effect to *extinguish* the right of the vassal, and thereby to enable the superior to possess his lands without that burden; and consequently it was impossible, consistently with feudal principle, to create and constitute a real burden or lien by means of such a resignation: that it was no doubt true that it had been found, that on receiving a resignation ad remanentiam, the superior must take it subject to all the *pre-existing* burdens established by the vassal over the feu; but no instance had occurred, nor had any sanction been ever given to the creation of a real burden, by means of the procuratory of resignation itself; and therefore, as the burden in question did not exist on the lands prior to the granting of the procuratory of resignation, and as that resignation could only have the effect to reconvey to the superior the dominium utile in the state in which it was before the resignation, no valid real burden had been constituted.

2. That as the respondent's infeftment had been superseded and extinguished by that in favour of Douglas, and thereafter of the appellant, he had no sasine in the lands; and consequently he had no title to pursue a poinding of the ground.

3. That, at all events, the respondent was not entitled to

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* See 1. Shaw and Ball. No. 357. and Fac. Coll. of the above date, where it is stated, that 'the Court founded their opinions entirely and unanimously on the above 'legal argument, that the real lien was properly constituted, and that the proper steps 'had been taken to make it effectual.'

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attach the subjects, without giving credit to the appellant for all the ameliorations which he had made upon them. And,

4. That it was not relevant to allege that the appellant had been aware of the existence of the burden at the date of making his purchase; because, as he was a singular successor, he could not be affected by it if it was not aptly constituted.

On the other hand, it was maintained by the respondent,—

1. That although, strictly speaking, a resignation ad remanentiam extinguished the feu held by the vassal, yet the property did not return to the superior as he originally gave it out; but, on the contrary, it returned with all the burdens created by the vassal; so that a resignation ad remanentiam was in truth nothing else than a transference of the property from the vassal to the superior, differing in no other respect from any other transference, except in the mode of completing the title; which difference consisted in this, that instead of there being a disposition and precept of sasine, followed by an instrument of sasine, there was a procuratory of resignation followed by an instrument of resignation, which was recorded and published like an ordinary instrument of sasine; so that in substance there was no distinction between a burden created by means of an instrument of resignation, and by a sasine.

2. That if the respondent had a real burden over the lands, he was entitled to make it effectual by means of a poinding of the ground; and besides, he had expressly reserved right to revert to his infeftment, if necessary to realize payment of his debt.

3. That as he was not attempting to set aside the sale in favour of the appellant, and so appropriate the subjects to himself, (in which case the appellant might have an equitable demand for the ameliorations), but as he was merely availing himself of his rights as a creditor to recover payment out of the subjects pledged to him, he could not be affected by any such plea. And,

4. That as the appellant was a professional person, and was fully aware of the existence of the debt, and had expressly acknowledged it in the deed granted by him, and bound himself to see it paid, he was barred from insisting on the formal objections maintained by him.

The House of Lords ‘ordered and adjudged that the appeal ‘be dismissed, and the interlocutors complained of affirmed, with ‘L. 100 costs.’

Lord Gifford.—My Lords, In the case in which James Bristow Fraser, Esq. is appellant, and James Jordan Wilson, Esq. respondent, which was heard before your Lordships the last day I attended this

House, I am to address to your Lordships a few observations before I move you to come to the decision which I propose to do if your Lordships shall concur with me in this case. April 15. 1824.

This is an appeal against an interlocutor of the Lord Ordinary in the Court of Session, which found, 'that the pursuer, the respondent,' Mr James Jordan Wilson, 'has a real lien over the lands of Black-'burn for security of the balance of the price due to him, and is en-'titled to bring the lands to sale for payment of the balance. In the 'action of declarator and removing at his instance against the defender, 'and also in the process of poinding the ground, decerns in terms of 'the conclusions of the libel; and in the suspension and interdict pre-'sented by the defender (the present appellant) of the threatened sale, 'repels the reasons of suspension, finds the letters and charge orderly 'proceeded, and decerns.' This interlocutor of the Lord Ordinary was afterwards affirmed by the Second Division of the Court of Session, and that interlocutor also forms the subject of appeal.

The facts of this case are shortly these:—Mr Wilson, the respondent, in the year 1809, became the purchaser of the estate in question from a gentleman of the name of Douglas for the sum of L.10,600; Mr Douglas having by the agreement become bound that the lands would be let on lease at a rent of L.4. 4s. per acre, or to become himself the tenant thereof at that rent. This agreement was carried into effect, the price was paid, and the respondent, Mr Wilson, obtained from Mr Douglas a disposition or conveyance of the lands, property and superiority, containing a procuratory of resignation in favorem, precept of sasine, and all other usual clauses. Upon the precept of sasine contained in this disposition the respondent was infeft in the lands by instrument of sasine. By this proceeding, in the language of the law of Scotland, he was base infeft in the property, with power to make his right a public one, either by confirmation or resignation by charter from the crown. That proceeding, however, never took place, and the superiority therefore remained in Mr Douglas. Some short time after his purchase had been completed, Mr Wilson was desirous of redisposing of this estate, and a new agreement was entered into betwixt him and Mr Douglas, by which Mr Douglas agreed to repurchase those lands from the respondent at the price of L.11,000, payable by instalments. The price had been originally paid by Mr Wilson to Mr Douglas, but on the resale it was agreed that Mr Douglas should secure the L.11,000 to be paid by instalments, and therefore he did not pay the purchase-money to Mr Wilson, the present respondent.

My Lords,—In consequence of this agreement, it was thought that the proper mode of reconveying this estate to Mr Douglas would be by a disposition in his favour by the respondent, containing simply a procuratory of resignation ad remanentiam; and, my Lords, in consequence of that, there was a disposition made by Mr Wilson of the premises to Mr Douglas, by which he did convey those

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lands to Mr Douglas; but it was declared, that the L.11,000 should be considered as a real lien or burden upon the lands until the money was paid. It was to be paid by three instalments of L.1000 each at particular periods stated in the reconveyance, and the residue, L.8000, was to be paid at a more remote period; but there was a declaration, that whenever any of the instalments should not be regularly paid, it should be competent for Mr Wilson to sell those lands in order to recoup himself that portion of the price which at that time remained unpaid; and, my Lords, in consequence of this there was a disposition and procuratory of resignation, in which procuratory of resignation the same condition was inserted, that these lands were to be resigned to Mr Douglas, 'always with and under the real lien and burden of 'L.11,000 sterling, payable by the instalments before specified, 'interest thereof, and penalty stipulated in case of not punctual pay-'ment as before mentioned, and with and under the several provisions 'and declarations before written.'

After this transaction had taken place, Mr Douglas contracted for the sale of this property to the present appellant, Mr Fraser, for the advanced price of L.11,500. It is not necessary to trouble your Lordships with the contract between Mr Fraser and Mr Douglas; it is sufficient to state to your Lordships, that Mr Fraser, at the time he purchased, was fully aware of the nature of the contract between Mr Wilson and Mr Douglas, by which it was agreed that there should be this burden on the land; but in consequence of this increase of price, and Mr Fraser not being quite satisfied that the value of the land then let was equal to the rent at which they appeared to be let, he took a guarantee from Mr Douglas that the lands were worth the rent at which they were then let. Mr Fraser, the appellant, being fully aware of the state of things between Mr Douglas and Mr Wilson, afterwards took a conveyance of the property from Mr Douglas. Two of the instalments were paid by Mr Fraser to Mr Wilson, but on the third becoming due, payment was refused by him. He had then discovered that the lands were not worth the sum at which they were valued, and he raised an action of damages, and recovered against Mr Douglas a very considerable sum of money. I should rather say he took judgment against him for a very considerable sum of money, as damages to be paid to him in consequence of the lands not being of the value at which they were reckoned by Mr Douglas. Finding, therefore, that he had been deceived in the value, he resisted the payment of the third instalment to Mr Wilson, and then contended, that, by the law of Scotland, the burden which had been attempted to be laid on this property as a real lien did not affect it; that therefore he was not bound to pay it, and Mr Wilson, the present respondent, had no right to insist upon his paying him the residue of the price then due to him. In consequence of this, a process of declarator was brought by the respondent, Wilson, against Mr Fraser, and also against the trustee on the sequestrated estate of Douglas, who in the mean time had be-

come insolvent, and that process concluded,—(Here his Lordship read the conclusions of the summons,—see p. 166.) At the same time he brought an action of poinding the ground, the only process competent in such circumstances to a creditor in a debitum fundi for attaching the fruits of the soil for his debt.

My Lords,—These two actions were conjoined, and against the first of these actions the appellant gave in the following defences:—'*First*, 'To warrant a pursuer to insist in a process of declarator and remov-'ing, or other real action, an infeftment in the lands libelled is indis-'pensably necessary, but the pursuer has not produced or founded 'upon any such infeftment. *Secondly*, et separatim, The pursuer is 'not effectually vested in any real lien over the lands libelled, in secu-'rity of certain sums of money, as he alleges, and the defender is not 'due the sums libelled.' My Lords, after a variety of procedure, the Lord Ordinary pronounced the interlocutor read to your Lordships at the outset of the observations I have addressed to your Lordships. That decision of the Lord Ordinary being brought under the review of the Court, on advising the petition, with answers thereto, their Lordships pronounced an interlocutor on the 1st of December 1820, by which 'they adhered to the interlocutors reclaimed against, 'refused the desire of the petition, and found the petitioner liable in 'the expenses incurred since the 13th of May 1818, being the date of 'the Lord Ordinary's first interlocutor on the merits.' My Lords, that decision was again brought under the review of the Court, and they pronounced another interlocutor by which they adhered to the interlocutor reclaimed against.

My Lords,—Undoubtedly the important question in this case is, Whether the Lord Ordinary in this case, and subsequently the Court of Session, have come to a right conclusion, in affirming that Mr Wilson had a real lien over the lands of Blackburn for security of the balance of the price due to him, and entitled in consequence to bring the lands to sale for the payment of the balance in the action of declarator? And undoubtedly, my Lords, this case involves a question of some nicety, and some subtlety in Scotch conveyancing. My Lords, I have stated to your Lordships that it appears to be distinctly admitted, and I think will not be doubted, that this bargain would have been clearly valid and effectual against a third person, had this resignation been, in the language of the Scotch law, a resignation in favorem; there can be no doubt that this burden would have been well created on these lands. I say, not only has this been admitted, but it appears to me, on reference to the writers of the law of Scotland, that no doubt could be entertained upon that subject. My Lord Stair, I think, seems to be precise on that subject, in Book iv. tit. 35. § 24., in which he says, that 'if an infeftment be granted with the burden 'of a sum, it makes that sum a real burden;' and the same is laid down in Mr Erskine's Institutes, and in his Principles, in more than one place.

April 15. 1824. My Lords,—However, it is said in this case, that this burden cannot be created by a resignation ad remanentiam; and I will just state to your Lordships what a writer on the law of Scotland defines a resignation ad remanentiam to be. Lord Stair, in Book ii. tit. 2. § 1. (Here his Lordship read the passage). Then he states afterwards the statute of 1669, 'whereby instruments of resignation are null if not 'registrate within sixty days,' &c. Then he states the effect of this resignation.

My Lords,—The instances put by Lord Stair are instances of burdens created before the resignation ad remanentiam, and therefore a distinction has been taken at the Bar, and very powerfully argued, that you cannot, in the same instrument, at the same time when the resignation ad remanentiam takes place, create the burden; for that the effect of this resignation ad remanentiam is not the transmission of the right, but an extinction of the right, which becomes consolidated in the superiority in the hands of the superior.

My Lords,—In Mr Erskine's Principles, he states the effect of the resignation ad remanentiam in the words I will read to your Lordships. (Reads). So that he says that the effect of the resignation ad remanentiam, as it respects the superior, is, that no sasine is necessary, and the effect of it is to consolidate the property which the vassal receives with the superiority, and therefore to extinguish the minor right; and therefore Mr Erskine says, 'that resignations ad remanentiam 'are truly extinctions, not transmissions, of a right;' but then undoubtedly it is a qualified extinction, for he goes on to state, that it would not have the effect of extinguishing any real burden which may have been created by the vassal, B. ii. t. 5. § 35.; and he says, 'This sort 'of resignation was not ordained to be recorded by the Act 1617 for 'registering real rights, which omission, because it weakened the secu-'rity of singular successors, is now supplied by the statute 1669.'

It seems, therefore, from these passages I have read to your Lordships, that according to the principle of the law of Scotland, as I understand it, in these resignations ad remanentiam those burdens are effectual against a superior which would have been effectual against a singular successor; and the only question, and, as I have stated, one of considerable nicety, is this, Whether such a real burden can be created by an instrument of resignation ad remanentiam? or Whether it must be created before? If created before, there is no doubt upon the subject, because undoubtedly, by the passage I have cited to your Lordships, it would be effectual. Now, my Lords, on the best consideration I can give to this case, and seeing as I do, that such a burden as this would be clearly effectual against a singular successor on a resignation in favorem, I must confess it does appear to me, that, according to the principles of the law of Scotland, this was a real burden effectually created upon this land against the purchaser; and, my Lords, undoubtedly that was the clear opinion of the Lord Ordinary before whom the case was heard, and it was the unanimous opinion of

the Second Division of the Court of Session, on a review of that decision, and on a consideration of the principles to be extracted from the passages from my Lord Bankton and Sir George Mackenzie—passages cited in the appeal papers, which have been so fully commented upon at your Lordships' Bar that I have not thought it necessary to trouble your Lordships with them. Upon these authorities the Court of Session were of opinion this was a real burden, and effectually created; and a passage was referred to in a work of considerable authority in the law of Scotland, I mean Mr Ross's Lectures on Conveyancing, in which, undoubtedly, it appears to be his opinion, and is distinctly stated as such, that such a burden as this is would be effectual against the superior; and, my Lords, in point of convenience, one cannot see the least objection to this. This burden occurs in the instrument of resignation to Mr Douglas. It must appear, therefore, to every person who took the trouble, as it is the practice of that country to register records under the statute of 1669, to make reference to that record, that this estate had been surrendered to the superior with this qualification; and undoubtedly it was competent to any person treating with this superior, to make any agreement which he thought fit with respect to the terms on which he meant to resign the property to him; and though necessarily we could not get at what we might conceive the justice of the case, if the appellant could succeed in shewing that this has not created a real lien on the lands, and that therefore Mr Wilson, in this form, had no right to bind the lands with it, yet upon the whole it appears to me, as I have already stated, that the lien is well created. Undoubtedly it is a case of great intricacy, and great nicety, one on which I have heard no express decision cited at your Lordships' Bar, and in which, therefore, we are bound to refer to the principles on which these instruments are framed, and the principles of the law of Scotland: and on the most attentive and anxious consideration of a case, which, to a person more versed in English law, is of considerable nicety and difficulty, upon the whole it does appear to me, that the Lords of Session have come to a right conclusion, and that therefore this interlocutor ought to be affirmed.

My Lords,—Before I conclude the few observations I have further to make, I should state, that another point has been made in this case, with respect to the amelioration of this property since the purchase by the appellant; and he says, though you may have a right to sell the land to recoup yourself the price, you have no right to recoup yourself that price through the medium of improvements from money laid out by me since I had possession of the estate; and upon this part of the case, a decision was very much pressed upon your Lordships of the York Buildings Company. It appears to me that case has no bearing whatever. That was a proceeding to reduce a sale, on the ground that the party was in that situation that he ought not to have become the purchaser; and when that case came before this House, they said this,—If you seek to reduce this sale, on the ground that

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this party was an agent or a trustee, and ought not to have made the purchase, we will, at your desire, reduce the sale, and put the parties in statu quo,—you will get back the land, and the party will get back his purchase-money; but you ought not, at the same time, to get the benefit of the improvements he has made; you have no right as against the purchaser, who has thus, by a principle of law, been declared incompetent to become the purchaser, to dispossess him, without at the same time paying him that which he has fairly expended on the improvements of the land. But this is not a proceeding to reduce the sale to Mr Fraser or Mr Douglas. Mr Wilson says,—I care nothing about the sale; the land was pledged to me for the price for which I sold the estate, and all I seek for now is the price: if you will pay me the price, I am satisfied; if you do not choose to pay me the instalments, I seek to repay myself that portion of the price which you have not paid me. If you have made improvements, you may get the benefit of them in the sale of the property; but all I seek is the money effectually secured on this land, and you have in the mean time improved it with the full knowledge that the land was pledged to me. Therefore it does appear to me there is no ground whatever for that claim on the part of the appellant, and that the interlocutor, therefore, was right.

I do not trouble your Lordships on the minor points in this case, which were elaborately discussed at the Bar. I have thought it due to this case, which is one of great nicety and difficulty, and of great importance to the law of Scotland, to state humbly to your Lordships the grounds on which I have felt it right to recommend to your Lordships to affirm the interlocutor, though it is not usual in ordinary cases to assign reasons for the affirmance of interlocutors where the House of Lords concurs. There was another point with respect to the poinding process I have not noticed, because I concur entirely in the reasons which have been given by the Court of Session; therefore, upon the whole, I shall humbly move your Lordships to affirm the interlocutor.

My Lords,—I cannot help saying in this case, I think your Lordships should give some costs, and I will tell your Lordships why. I cannot think this is a very gracious objection on the part of the appellant. He purchased the land, well knowing of the burden; he took it with the lien. He is also, I observe, a gentleman in the law, and therefore undoubtedly more likely to be aware of the effect of such a security, and therefore not likely to be taken unawares or unguardedly. My Lords, the respondent has been kept out of the price now for a long period of time, and has been subject to considerable inconvenience. The judgment of the Court below was an unanimous judgment, and on the petition they still adhered to that judgment. I do not mean to say, that because the judgment was unanimous, the costs should follow on an appeal from that judgment. There have been cases in which a decision is desirable for the parties, and in which it may be a fair

question to be brought before your Lordships; but I will only say, this point of law is not one on which Mr Fraser, the appellant, had a right to demand the judgment of your Lordships. Under these circumstances, I think your Lordships will concur in the judgment given below. This is a case in which he ought to have the expense of that discussion fall upon him. I shall therefore humbly move your Lordships that the judgment be affirmed, with L.100 costs. April 15. 1824.

Appellant's Authorities.—2. Stair, 2. 1.; 2. Ersk. 7. 19.; 2. Stair, 11. 5.; 2. Ersk. 5. 1.; 2. Ersk. 7. 22.; Redfern, March 7. 1816, (F. C.); Heriot, June 26. 1668, (6901.); Gall, Feb. 6. 1729, (10,306.); Sutherland, Dec. 1. 1664, (7229.); Argyll, Feb. 13. 1730, (10,306.)

Respondent's Authorities.—2. Ross, 239.; Mackenzie's Observations, 1663, ch. 3.; 2. Stair, 2. 5.; 2. Bank. 11. 8.; 4. Ersk. 1. 2.

A. FRASER—J. BUTT,—Solicitors.

(Ap. Ca. No. 31.)

WILLIAM DIXON, Esq. Appellant.—*Warren—Fullerton.* No. 24.

W. F. CAMPBELL, of Shawfield, Esq.—*Murray—Abercromby—Walker.*

Mutual Contract—Landlord and Tenant—Coal.—A lease of coal having been granted, with a stipulation that if the coal, 'by unforeseen accidents' occurrence, dykes, or 'troubles not occasioned by irregular or improper workings, it shall become, in the 'opinion of skilful men, mutually chosen by the parties, incapable of being wrought 'to advantage,' the tenant should be entitled to abandon; and men having been appointed, who reported, that, so far as physical difficulties existed, the coal was capable of being worked, but that, from the state of the markets, &c. this could not be done to advantage;—Held, (qualifying the judgment of the Court of Session,) That the tenant was not entitled to abandon.

IN the month of June 1815, the respondent let to the appellant a lease of part of the coal in his lands of Woodhall, for 19 years, at a fixed rent of L.900, or, in the landlord's option, of a lordship of 6d. for each cart. By the lease it was inter alia declared, that 'in the event of the coal becoming exhausted; or that by unforeseen accidents' occurrence, dykes, or troubles not occasioned by 'irregular or improper workings, it shall become, in the opinion of 'skilful men, mutually chosen by the parties, incapable of being 'wrought to advantage, then, and in that case, it shall be in the 'power of the said William Dixon, and his foresaids, to relinquish the work, and to renounce and give up the present lease April 30. 1824.

2D DIVISION. Lord Reston.