

1682. *March.*

EARL OF KINCARDINE'S CREDITORS.

No 56.

Found in
conformity
with No 55.
supra.

THE tenants of the estate of Kincardine having raised a multiplepounding against the creditors, it was *alleged* for my Lord Cardros, That he ought to be preferred, he being infest upon a bond of relief granted to him by the Earl of Kincardine, for considerable sums of money, wherein he stood engaged as cautioner for him.—*Answered* for Lieutenant General Dalzell, who likewise stood infest in the lands in an yearly annualrent effeiring to the sum of 15,750 merks, due to him by the Earl, That he ought to be preferred, because the Lord Cardros's sasine was null, it being taken at certain places in the lands by dispensation; for, albeit the Earl's charter under the Great Seal bear a dispensation as to the lands, yet that benefit is not communicable to singular successors by base infestment, but the parties ought to be infest in every land, as if no such dispensation had been granted; and albeit the Lord Cardros, his first sasine, be confirmed by the superior, yet it is null, seeing it is not registrate; and the last sasine taken upon the same bond, which is long after the confirmation, is posterior to General Dalzell's sasine and decret of pouding the ground thereupon, which makes his right public; as also it being declared by the bond of relief, that it was not to take effect before distress; but so it is, that Gen. Dalzell's right being made public before the Lord Cardros was distressed, it was *medium impedimentum*, and the distress could not be drawn back to his prejudice.—*Replied*, That the dispensation contained in the Earl's charter, being under the Great Seal, as he may convey and communicate the right of property of the lands to singular successors by base infestments, so he may convey and communicate the benefit of the dispensation; and albeit the Lord Cardros's first sasine be not registered, yet the last sasine is a sufficient ground of preference as to General Dalzell; because the confirmation by the superior, confirms not only the sasine already taken, but all saines to follow thereupon; so that the last sasine being taken before General Dalzell's sasine was made public by a decret of pouding the ground; whenever the sasine is taken, it is drawn back to the date of the confirmation, and so must prefer him to General Dalzell. *Alleged* for Robert Colvill writer, that he ought to be preferred to the Lord Cardros, by virtue of his adjudication, which is long prior to the Lord Cardros's infestment upon his bond of relief; and he likewise used diligence to obtain himself infest upon the adjudication before the Lord Cardros's infestment; having presented a signature to the Exchequer, albeit the expeding thereof was stopt by the creditors; which ought not to prejudge him; especially it being provided by the act of Parliament anent adjudications, That the adjudger shall be in the same case after citation, as if an apprising were led of the lands at that time, and a charge given to the superior thereupon; and therefore, as a comprising, with a charge against the superior, would have been preferred to the Lord Cardros's posterior infestment, by that same reason Robert Colvill ought to be preferred by virtue of his adjudication, seeing he did diligence to obtain him-

self infest before the Lord Cardros's infestment; and not only had he obtained an adjudication, and done diligence for obtaining infestment, but the citation upon the adjudication was prior to the bond of relief granted to the Lord Cardros; and as by the act of Parliament 1621, the common debtor could do no voluntary deed after denunciation upon a comprising, so as to prefer one creditor to another; so by the same reason the Earl of Kincardine could grant no bond of relief to the Lord Cardros, in prejudice of Robert Colvill, after citation upon the adjudication; and albeit the bond of relief was granted for antecedent causes of debts, before the citation, yet the same cannot be respected, unless there was an antecedent express obligation to infest for security of these debts; seeing citation upon a summons of adjudication is equivalent to of lands to be apprifed after, where it has been found by many decisions, that the common debtor could not prefer one creditor to another.—*Answered* for the Lord Cardros, The adjudication being but a personal right, and he having the first complete real right, he ought to be preferred, especially his bond of relief being prior to Colvill's adjudication, and being for debts long prior to the adjudication; and the act of Parliament anent adjudications, declaring the adjudger to be in the same case after citation, as if a comprising were led and a charge given thereupon, is only in relation to the superior and the casualties belonging to him; seeing the act declares that the superior and adjudger are declared to be in the same case; but determines nothing as to third parties, who are in the same condition they were in before the case of apprifing; and it was just that the superior should have been in the same case; and if there had been a charge given, in so far as concerns his casualties, because he was cited upon the summons of adjudication; and Colvill could not be preferred, upon the account that his signature was stoppt before the Exchequer; seeing the Lords of Exchequer may stop or pass a signature upon such reason as they shall think fit; and many times upon competition, they will prefer those, who in justice they think ought to be preferred.—*Alleged* for Cornelius Van Aersan, the Earl of Kincardin's brother-in-law, That he ought to be preferred upon a bond of relief, granted to him for the sum of 12,000 guilders, for which he stood engaged as cautioner for the Earl to Mr Villars, he being infest, and his infestment clad with possession, by receiving payment of several years annualrent, as appears by the discharges before the Lord Cardros's right.—*Answered* for the Lord Cardros and the other creditors, That the discharges being holograph, do not prove as to the date, and so cannot clothe the base infestment with possession.—*Replied*, That base infestments of relief are valid without possession, as in the case of infestments of warrandice, the principal party's possession being the possession before distres; and this was expressly decided in February last, in the case of Bruce of Newton against the Creditors of Clackmannan, No. 55. p. 1332. where the Lord's found, that Bruce of Newton's base infestment of relief was preferred to a posterior public infestment, albeit the base infestment was not clad with possession; and Newton was not preferred upon that consideration, that immediately after his base infestment

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he presented his signature of confirmation to the Exchequer, and was refused; seeing the Exchequer was not obliged to have passed the signature; his Majesty being in the same case as other superiors, who cannot be compelled to receive vassals, and grant infestments upon voluntary rights without a legal diligence; but the *ratio decidendi* in that case, as appears by the interlocutor, was, that it is a complete right *in suo genere*: And albeit the discharges be holograph, yet they do sufficiently prove, seeing by the custom of Holland, where they were signed, such writs are probative without witnesses.—*Duplied*, That it is a certain principal in law, that a public infestment is always preferable to a prior base infestment not clad with possession; which is founded on that act of Parliament of King James V. relating thereto; and there is no specialty in the case of base infestments of relief, *et non est distinguendum ubi lex non distinguit*; and there were more hazard and a greater prejudice, to sustain such base infestments of relief, than others; because they being private and latent deeds, they may be granted by a debtor to his friends and relations, for their relief, in defraud of all other creditors; and albeit such infestments do not take effect till distress, yet the party has a remedy in law; for he may either obtain a confirmation thereupon from the superior, or may take a decret thereupon, declaratory *juris*, to take effect when distressed; and in the case of Bruce of Newton, his main ground of preference was, his diligence in obtaining the signature of confirmation to be past by the Exchequer; and as to the discharges, albeit such discharges are valid by our law, as well as by the law of Holland, yet they cannot prove as to the date, unless otherwise instructed, to make an heritable right in Scotland preferable, seeing such rights must be ruled by the law of Scotland.—*Alleged* for the Lady Kincardin and her children, who stand infest in an yearly annualrent to the principal sum of 50,000 merks, That she ought to be preferred to the Lord Cardros, her infestment being prior, and clad with possession before the Lord Cardros's right.—*Answered*, That the decret of pointing of the ground, by which the Lady pretends her right was clothed with possession, being before the bailie of the regality of Torieburn, can only make the right public as to the lands lying within that regality, and not as to the lands which lies not within the jurisdiction.—*Replied*, That albeit the decret of pointing the ground doth not only make the infestment public as to the lands lying within the regality of Torieburn, but even as to other lands, being *in eodem corpore juris*; and as the receiving payment from the tenants, of a part of the lands, would make the infestment public as to the whole; so the decret of pointing the ground, which is valid against a part of the lands, must make the right public as to the hail lands that are contained in the same right; and it was so decided in the case of Ker against a Creditor of Gradep, No 60. p. 1338. where an infestment of annualrent for two several sums, one for borrowed money, and another for a portion natural, the Lords found the receiving of the annualrent for the sum of borrowed money, did make the infestment public as to the hail, albeit the portion-natural did not bear annualrent while after the father's decease, and that in respect both the sums being *in eodem corpore juris*, could not be divid-

ed.—*Alleged* farther for the Lady Kincardin, That she ought to be preferred, not only for 80,000 guilders due to herself, by her contract of marriage, for which she stands infest in the hail estate, but also for 3000l. of aliment, modified by the Lords for maintaining of the family, for the space of three months from the time of the late Earl's decease to the next term thereafter.—*Answered* for the creditors, That the late Earl being denuded of his estate, by virtue of adjudications and infestments of annualrent before his decease, the said aliment cannot be allowed, nor can affect the heritable estate, but ought to be paid out of the moveables intronitted with by the Lady, by virtue of her husband's escheat and otherwise, which are of a considerable value.—THE LORDS found, That Cornelius Somerdyke, his infestment of relief, albeit base, was preferable to the posterior public infestments; and that General Dalzell's confirmation having first past the Seals, was preferable to the Lord Cardross's confirmation, albeit it was long before past in Exchequer.

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Sir P. Home, MS. v. P. No 197. p. 282.

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LORD CARDROSS *against* VAN SOMMERDYKE, GENERAL DALZIEL, and Old
LADY CARDROSS.

FOUND, that base infestments of relief were public from the date, without possession, confirmation, or declarator; but this was afterwards stopped. *2dō*, Found, that it is not the priority of passing signatures in Exchequer, that gives preference, whether they be signatures of confirmation or apprising, or upon resignation; but that which is first expedie at the seal will be preferred, even though the competing signatures be signed by the King; because a subscribed signature is an incomplete deed, till the seal is appended. *3tio*, Found, that a bailie of regality's decreet of poinding the ground of lands lying therein, clothed a base infestment with possession, even as to other lands *in eodem corpore juris*, though lying in another jurisdiction. It was debated in this process, if a stranger Dutchman might buy or wadset lands here, without being naturalized, and this could be quarrelled by any but the King. See FOREIGN.

Harcarse, (INFESTMENT.) No 589. p. 163.

* * * This is the same case with the above by P. Home.

1691. *July 1.* CREDITORS OF LANGTON *against* SINALAIR.

FOUND, that infestments of relief are not public from the date, nor from the time of distress, until possession be apprehended; and that any posterior infestment, public before the said possession, (though intervening between the date of the base sale and distress) is preferable.

Fol. Dic. v. 1. p. 91. Harcarse, (INFESTMENT.) No 616. p. 171.

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Found, but not finally decided, that infestments of relief were public from their date, without possession, confirmation, or declarator.

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