1701. *November 27.* MAGDALEN KINLOCH *against* SIR ANDREW RAMSAY of ABBOTSHALL.

ARNISTON reported the competition betwixt Magdalen Kinloch, relict of Alexander Chaplain, writer, and Sir Andrew Ramsay of Abbotshall. John Hepburn of Waughton gave infeftment to umquhile Harry Kinloch in the lands of Oldcambus, for security of 6100 merks; and his seasine is dated the 28th of June 1655; and, on this right, Magdalen, as heir to her father, pursues the tenants for maills and duties. Sir Andrew Ramsay compears, and craves to be preferred, as having right to an apprising led of the same lands by John Scot, whereon he was infeft on the 29th of June that same year, only a day posterior to Kinloch's seasine; so, this being a public infeftment intervening before Kinloch's base infeftment could be clad with possession, it must be preferred thereto, upon this principle of law, That a public infeftment is always preferable to a base infeftment, if the public right be dated before the said base infeftment was clad with possession.

ANSWERED,---Though his infeftment was base, yet they could neither charge latency, simulation, nor *mora* upon him; for he had done all diligence possible, and had entered to the possession the very next term after the seasine, by getting a bond from the tenants for paying their rent to him, which is as good possession as a citation upon a process, which has always been sustained to clothe a base right. And the Lords have oft found, That base infefters, doing diligence to attain possession before, or at the term of payment, are preferable to public infeftments;—Dury, 13*th February* 1634; 2*d July* 1625, *Raploch* against *the Tenants of Letham;* and Stair, 26*th July* 1676, *Alison* against *Carmichael.*

REPLIED for Sir Andrew,---That the preference of the public infeftment is not upon the consideration of the base infefter's being *in mora,* but on the solemnity of the right: which is double, both on the granter's and the superior's part; whereas the private infeftment is only the deed of the granter. And the bond gotten from the tenants is no possession at all; for, if they had got a discharge of their rent, it might have been pretended that was a novation; but there was no such thing in this case, but a nimious and preposterous diligence to exact bonds for rents before they were due, and a mere collusion betwixt him and the tenants; and can never be equivalent to a citation on a libel, for that is a public judicial act, *et tangit fundum,* and is an interpretative possession, which cannot be said of this bond. And whatever might be said of an infeftment of annualrent, this was an infeftment of property for security of a sum: and therefore a public infeftment interfering before the first term of payment was preferred thereto, —6*th November* 1691, *Creditors of Langton competing.* See Stair, book 2. tit. 2.

The Lords, in regard the point was momentous, and of importance, appointed it to be heard *in præsentia.* *Vol. II. Page* 124.

1701. *December 2.* CANNON of HEADMARK *against* The VISCOUNT of STAIR and SIR JAMES DALRYMPLE.

CANNON of Headmark, having given in a petition to the Lords against the