No 47.

THE LORDS preferred Ludwhairne's right; and found the defender liable for the rents since citation, with allowance of public burdens paid for the lands during that time.

Forbes, p. 22

1705. *November* 29.

THE CREDITORS of EARNESLAW *against* MR ALEXANDER DOUGLAS.

No 48.
Lands being disponed by a father to his son, whose sasine was not registered, nor he in possession, and, after his decease, the daughter, as heir in special to her father, having disponed the lands to her husband, the creditors adjudging from the husband were preferred to the creditors of the son of the daughter adjudging from him, as lawfully charged to enter heir in special to his mother's brother, and thereby competing upon the said disposition with the unregistered sasine, upon which no possession had followed.

JOHN GREDEN of Earneslaw, dispones the said lands to John Greden his son, with certain burdens, redeemable upon payment of 20 merks; whereupon the son is infeft, but the sasine never registrated. The son dying before his father, Grace Greden, as the only surviving child, becomes heir served and retoured to her father, without taking notice of John her brother, whose infeftment attained no possession; and she, by contract of marriage, disponed the lands to Mr James Douglas, from whom they were adjudged. The Creditors having now right to that adjudication, pursue a declarator of their right, and of the expiration of the legal,

It was *alleged*, for Mr Alexander Douglas: That he had adjudged the same lands from Robert Douglas, son of the marriage betwixt Mr James, and Grace Greden, as lawfully charged to enter heir in special in these lands to John Greden his uncle; whereby he being in the place of the said John Greden younger, had right to the disposition and infeftment of the said lands, granted to him by his father, which were never redeemed; and albiet Grace Greden, the sister, by her service, had right to the superiority, because John was only infeft base, yet the property belonged to John, and the pursuer as in his place.

It was *answered*, John's sasine was not only base, but never registrated, and so null in competition with creditors and third parties, for onerous causes, by act of Parliament 1617.

It was *replied*, unregistrated sasines are good against the granters and their heirs by the same act; and though the Creditors of Earneslaw be third parties, yet in this case they can only be considered as heirs, because the right they found upon is a voluntary disposition made by Grace Greden the heir, in favours of the husband, whereby she dispones them *talis qualis*, according as she herself had right, which resolved only into a right of superiority; and her husband, or his creditors, can be in no better condition than she was in before she disponed. It is true, if John Greden her father had made a posterior disposition, whereupon infeftment had followed duly registrated, or if he had been denuded by his creditors, the posterior rights or diligences would have been preferable to this son's infeftment; but seeing the posterior right flows from his heir, her singular successors *utuntur jure auctoris*, and whatever can be ob-

jected against her service takes place against them, because her service is the midcoupling by which the right is conveyed to her husband's creditors; and whatever can be objected against the retour, or can burden the same, is relevant against her successors, as if the service were annulled by the existing of a near heir, or reduced on the falshood of the execution of the brieves, or otherwise; and, for the same reason, the defender has interest to object against her service, as carrying only the superiority, and to claim the property as his own, and thereby he is preferable to her singular successors; as was lately found in the case of Keith of Ludwhairn against Sinclair of Diren, 17th Deeember 1703, No 47. p. 13562. where Ludwhairn, as deriving right to certain lands from the son of the heritor, was preferred to Diren, who did derive right from the daughter, which daughter had obtained a precept of *clare constat*, as heir to her father, notwithstanding the daughter's precept and infeftment, duly registrated, was produced, and there was nothing produced to clear the son's right but a sasine unregistrated, proceeding on a precept of *clare constat*. No 48.

It was *duplied*: The singular successors of the daughter are in the same case as if they had derived right immediately from the father; for the act 1717, provides, that sasines unregistrated shall be void and null as to the third parties, which is general without distinction; and the exceeption, that the same shall be valid against the granter and her heirs, is only personal, because the granter, or his heir, cannot object the nullity. 2*do*, It is true, that singular successors in many cases *utuntur jure auctoris*, and therefore if the retour be null, or can be reduced, the right is not conveyed, but remains *in hæreditate jacente*; but if the service be formal and legal, the right of the heritage is thereby established in the person of the heir, in the same way as the defunct had it, and so is conveyed to the successors of the heir. 3*tio*, In Ludwhairn's case, there was 40 years possession found proven, whereby, the precept being ingrossed in the instrument of sasine, there was no necessity to produce the precept of *clare constat*; and the sasine being of lands of Caithness in the year 1620, it was found that there was no particular register of sasines in that shire then established; and there were many other circumstances in that case, whereby it could be no precedent.

The Lords repelled the defence, and found that the singular successors of the daughter and heir were in the same case as if their rights had been derived immediately from the father.

Fol. Dic. v. 2. *p.* 331. *Dalrymple, No* 66. *p.* 85.

*** Forbes reports this case.

In the reduction and declarator (mentioned *supra* November 21, 1705. No 21. p. 4223. *voce* Fiar.) at the instance of the Creditors of Mr Alexander Paterson against Robert Douglas of Earneslaw, and Mr Alexander Douglas his uncle, it was *alleged* for the defenders, that even Grace Greden, Mr James

No 48. Douglas's spouse had no right to the property of the estate of Earneslaw, in respect James Greden her father to whom she was served heir in special, and infeft in the superiority, was before denuded of the property in favours of John her brother, by disposition and a base infeftment, and so could not transmit the same to her husband, nor he to the adjudgers.

Replied, for the pursuers, Grace Greden was lawfully served and infeft as heir to her father, both in the property and superiority; in as much as an infeftment of property and superiority is in effect the same thing, the latter including the former; all the difference betwixt them being, that a subordinate valid right may carry away the property from the superior. 2*do*, The disposition and sasine made by the father to his son John, was only a base infeftment, never registrated nor cloathed with possession, which upon his dying in minority before his father quite evanished; at least could never signify any thing against a singular successor. Besides, it had been superfluous for Grace to have served heir to her brother, since as heir to her father, she had both the property and superiority, and was in his place who might have evacuated the son's infeftment at pleasure, by a public infeftment in favours of any singular successor. Nor is it of any moment, that the son if he had lived and his heirs might have an action against Grace Greden, as heir to her father, to denude in their favours. For 1*mo*, The son and his heirs might have had the same action against the father; but since it was never raised, as the father might have made void the son's right, by granting a public infeftment, the daughter coming in his room might do the same. And whatever the son and his heirs might have claimed against the daughter as heir to her father, their sasine not being registrated, is ineffectual against Mr James' right, flowing to him a singular successor from the daughter. There being nothing more plain by the act 1617, than that unregistrated sasines are null, *quoad* singular successors, whatever effect they may have against the granter's heirs.

Duplied for the defender, Grace Greden's retour is null, *quoad* the property, for these reasons; 1*mo*, There was no warrant in the brieve to serve her, except to him who died last vest and seised, and that was her brother, and not her father. And though the son's base infeftment could not militate against a public infeftment directly flowing from the father, yet it absolutely excluded any right in the father, and consequently in the daughter as his heir. And albeit the inquest conld not be quarelled, as *temere jurantes super assizam*, for that the son's infeftment was not produced to them; yet the retour may be reduced or declared null upon the least defect; though not appearing at the service, Stair Institut. B. 3. Tit. 5. § 42. Rorieson *contra* Sinclair, No 44. p. 9687. Hope, RETOUR, Laird of Lagton, *contra* , and Fairly *contra* Fairly, *see* APPENDIX; Lord Colvill *contra* Herds, No 13. p. 2704; Lamb *contra* Anderson, No 185. p. 10984. Nor could any of the nullities of Grace Greden's retour consisting in latent facts, be discovered from any record by the purchaser.

from her, and yet the purchaser's right would certainly fall in consequence with that of the party so retoured. Because whoever purchases from an heir, *qua* such, comes only in the heir's place as to the real right, and *utitur jure auctoris, qui non potuit plus juris transferre quam ipse habuit.* And it hath been found in many instances, that singular successors grounding their right immediately upon the heir's retour, run the risk of its defects, though never so latent and undiscernible. Thus, in a reduction and improbation against Powrie at the instance of the Lady Edinglassie heir to his debtor, the Lords granted certification, and reduced her retour, since Powrie could not produce the commission, granted by her and her curators for serving her heir; though both the retour and sasine had stood upon record a matter of 30 years. And in the case of Keith *against* Sinclair, No 47. p. 13562., Sir William's right derived by a sasine not registered, was preferred to Diren's right, flowing from her whose sasine was registered. Because Diren's right fell in consequence of his author's, who could not pass by the person last infeft, though his sasine was not upon record. And registers were mainly designed for the security of stranger purchasers. Nor can it be known from any record, that the executions of a brieve are false, or that there is a *proximior heres*, than the person retoured at the time, &c. and the clause *ultimo vestitus et sasitus de feodo*, is as necessary to be observed in execution of the brieve as the clause, *quis est legitimus et propinquior hæres, &c.* No 48.

Triplied for the pursuers. The Practick betwixt Sir William Keith, and Sinclair of Diren alleged on by the defender's, hath not the least resemblance to their case, for there Sir William derived right from Hugh Keith, whose sasine was unregistered, proved 40 years possession conform, and that there was no register for the time in Caithness where the sasine was taken, and sasines were not then in use to be registered in the public register. Sir William Keith's father and author's right was confirmed and completed by a public infeftment before Diren's infeftment; and the latter's right too was not onerous but elicited, nothing of all which can be alleged here by the defenders. And if a base sasine unregistered not cled with possession, granted by a farther to a son, were sustained after so long a time, to the prejudice of singular successors and creditors, especially such as have more than 40 years progress since the date of the said latent deed and possession thereof, then no purchaser or creditor could be secure against such contrivances.

The Lords repelled the defence founded on the disposition granted by John Greden to his son, with the sasine following thereon; in respect the same were not clothed with possession, and the sasine not registered, and sustained Grace Greden's retour, and therefore preferred her husband's Creditors to Mr Alexander Douglas' adjudication.

Forbes, p. 46.

*** Fountainhall also reports this case:

No 48.

THE deceased Mr James Douglas being married to Grace Greden, heiress of Earnslaw, she, in her contract of marriage, dispones these lands to him; and he being debtor in considerable sums to Mr Alexander Paterson, he adjudged the lands of Earnslaw from him; and Mr Paterson's Creditors deriving right from him, raised a reduction of an adjudication led by Mr Alexander Douglas of these lands of Earnslaw, on a bond granted by his nephew Robert, and craved preference thereto; who repeated also a reduction he had of Paterson's adjudication, on this ground, that you claim right to the lands, as being creditor to Mr James Douglas, who never was in the fee of that estate; and that the contract of marriage gave him no more but a liferent, in so far as the dispositive clause run, "to him in liferent, and to the heirs of the marriage in fee, quhilk failing, to the said Mr James's heirs and assignees whatsomever;" and so Mr Alexander Paterson's right flowing from one that was a naked liferenter, he could never transmit the fee to him or his creditors. *Answered*, Whatever ambiguity might be in that clause, it was fully cleared and explained in the procuratory of resignation, where the tailzie was repeated; and there it was expressly provided to Mr James "in conjunct fee; and the procuratory being the warrant of the charter and sasine, and entering thereunto, creditors seeing him fiar by that conception were bound to inquire no farther, whether there were any dissonant clauses in the contract of marriage. THE LORDS found Mr James fiar, though it was a *feudum fœmininum* coming by his wife, especially the last termination being "on his heirs and assignees;" and how could he assign the lands if he were only liferenter? Then it was 2*do*, *Alleged* for Earnslaw and his uncle, That Mr James Douglas, Paterson's, author, his right was null, as flowing *a non habente potestatem*, in so far as Grace Greden his wife, and disponer to him, was not rightly infeft, being only retoured as heir to her father; whereas she ought to have been served heir to John Greden, her brother, who died vest and seised in these lands, upon a disposition from his father *in anno* 1655; and so having passed by her brother, and served heir to her father, her retour was erroneous and null; and though it will not make the inquest liable as *temere jurantes super assizam*, yet less defects have been sustained to annul retours, as Stair observes, Book 3. Tit. 5. § 42. Thus a son passing by his father infeft, and entering to his grandfather, was found liable *passive*, 23d November 1671, Rorieson, No 44. p. 9687.; and a sister's retour as heir to her brother was found null on the appearance of a second brother, though an excommunicated papist, 16th February 1627, Colvil, No 13. p. 2704.; and a second brother being retoured on the report of his elder brother's decease abroad, it was found null on the elder brother's return, 11th January 1673, Lamb, No 185. p. 10984.; and a woman having been retoured sole heir, it was reduced, it being verified that there was another sister existent

at the time, Hope, Tit. RETOURS; so that any small defect annuls them, in respect they often pass without a contradictory; and much more is this Lady Earnslaw's retour null, being to the father who was denuded in favour of his son, who was infeft, and not to the said son, as it ought to have been. *Answered*, She neither could nor was obliged to take any notice of her brother's infeftment; because, 1*mo*, It was base, holden of the father, and never clad with possession, he having died before his father; 2*do*, As it was base, so it was null, never being registrated; and what legal certioration could she have of her brother's infeftment, to put her *in male fide* to pass by her brother, and enter heir to her father, when her brother's infeftment was to be found in no register? Likeas a superior's infeftment differs nothing from the vassal's as to the way of their conception, but is truly an infeftment of the property, unless there be a subaltern right to carry the *dominum utile*, and the property; but here there was no such valid subordinate right. *Replied*, That, by the act of Parliament 1617, anent registration of sasines, a sasine unregistrated is declared a valid, good, and sufficient right against the granter and his heirs; now the Lady Earnslaw being the granter's heir, it must militate against her; and the like was found *supra*, 1st January 1703, betwixt Keith and Sinclair, No 47. p. 13562. *Duplied*, Whatever that might operate against the Lady Earnslaw, her husband's Creditors were singular successors and third parties, and an unregistred sasine could never compete with them. THE LORDS sustained her retour, in respect of the answers, and preferred the husband's Creditors to Mr Alexander the uncle's adjudication.

No 48.

Fountainhall, v. 2. p. 295.

1715. *February* 22. Sir JOHN CLARK *against* PRESTON.

No 49.

IT is appointed, by act 119. Parl. 1581, That inhibitions, with the executions, be within 40 days of the publication recorded in the sheriff-court books, both of the shire where the debtor dwells, and where his lands lie, and the principals be signed by the Sheriff-clerk, and delivered back to the party, declaring the same to be null, unless duly registered in this manner. Upon this ground an inhibition was found null, where the execution at the market-cross was not marked and signed by the clerk.

Fol. Dic. v. 2. p. 329. Dalrymple. Bruce.

*** This case is No 120. p. 3769. *voce* EXECUTION.