

1740. November 7.

No 23.

An infestment granted to representatives not specially named, is null.

BLACKWOOD of Pitreavie against The REPRESENTATIVES of ROBERT COLVILL and ANDREW RUSSELL.

SIR GEORGE HAMILTON having right to an heritable bond on the lands of Didup, disposed the same (among other funds) to his creditors; in which, after enumerating several debts due to particular creditors, he adds, *Item*, to the representatives of the deceased Andrew Russell, merchant in Rotterdam, specifying the particular sum due to them. *Item*, to the representatives of the deceased Robert Colvill, the sum of, &c. And the disposition further recites, That the creditors, in whose favours the same was granted, had condescended to accept of their respective funds therein specified, for their further security in corroboration of the several debts due to them, without any preference to any of the creditors, but all to have a joint interest therein; and it likewise contained a precept, upon which sasine was taken.

In the ranking and sale of the lands of Didup,

Blackwood of Pitreavie, who had right to a debt due by Sir George, upon which an adjudication had been led, appeared and claimed to be ranked for so much of the heritable bond adjudged, as was not exhausted by prior valid infestments; and particularly upon that part of the subject which was claimed by the representatives of Colvill and Russell; to whom he *objected*, That the infestment being given impersonally to the representatives of certain people deceased, the same was altogether invalid and inept, seeing it was impossible a feudal right could be constituted otherwise than to a certain person, one or more *nominatim*, who shall thereby become the vassal to the grantor of the infestment, and by the law of Scotland must appear in the register of sasines to be vested in such feudal right, so as third parties may know from whom they can safely purchase or acquire, or whom they shall call as defenders in a reduction and improbation. Now, if the infestment thus given impersonally to representatives was void and null, it followed, that the subject disposed, in so far as concerned the predecessors of those representatives, and which was intended to be secured by this infestment, did truly remain with Sir George Hamilton the grantor, who was never effectually divested thereof, until it was taken out of his person by Pitreavie's diligence, namely, the adjudication of this subject, and infestment following thereon; see Craig, *Tit. De sasinis*, § 4. Stair, upon the requisites of a sasine, (B. 2. t. 3.) and the decision betwixt the Duke of Norfolk and Sir William Billers*.

Answered, That there is nothing in the feudal law of Scotland, that requires, that, in a precept of sasine, the person intended to be infest, should be designed by his Christian name and surname; that the direct contrary is true. For instance, a charter granted to one, his heirs and assignees, containing

* Examine General List of Names.

a precept of sasine, is a good charter and precept, not only in favours of the vassal named in the charter, but also in favours of his assignees, voluntary or legal, independent of the statute 1693, cap. 35. ; and therefore Pitreavie's doctrine that the superior must know his vassal, and that the same is not to be left to the judgment of his bailie, is contrary to the established principles of the feudal law. So that the objection comes to this, that the sasine given to the attorney for the representatives, is null, because it is given to no particular person. As to which it was observed, that no body ever doubted, there could not be a feu without a vassal and superior ; but then no law has required, that the vassal, and much less that the creditor, should, in the sasine, be designed by his Christian name and surname, and that such omission should infer a nullity ; witness the case of infestments granted to bodies politic and corporate, where there is no person infest by name and surname ; nor is it any answer that the body politic *sustinet visem personæ* ; for still this proves that the name of the vassal is not necessary to the validity of an infestment ; and that if the vassal is sufficiently described, so as he may be known, though the particular person in the fee does not appear from the infestment, it is no nullity ; and therefore, as in the present case, the representatives of Andrew Russell, in the moveable bond due to him, could be none other than his executors confirmed to him, to wit, his own daughters, who were confirmed to him at the date of the disposition ; and the representatives of Colvill in the bonds due to him, secluding executors, behoved *quoad* the principal sum to be his heirs of line, served and retoured, there was no uncertainty as to the person of the vassal. Besides, there were many infestments not granted to persons by name and surname, such as grants of lands to peers, described by their title of Duke, Earl, &c. The grant of the revenues of the religious houses in Perth, to the poor members of Jesus Christ, grants to the Virgin Mary, and the other saints, and those to the seamen of Leith, which have been sustained by the Court, though these last are not a body politic.

Replied, Rights granted to bodies politic, having a *nomen juris*, and perpetual succession, are persons known in law, and the infestments given to them, or their administrators, in name of the society, are equivalent to the infestment given to a particular person by name and surname : And as to the societies not incorporated, Pitreavie is not bound to impugn their titles ; possibly some of these, by long usage or possession, may have acquired a right to hold their acquisitions ; but it is believed an infestment given for the use of such societies, would be ill advised, if it were not given to certain persons *nominatim* for the use and behoof of such voluntary society ; otherwise an infestment given to the free masons of the lodge of Edinburgh or Lesmahago, would constitute a valid feudal right, without expressing the name of the grand-master for the time being.

No 23.

THE LORDS sustained the objection made to the sasine following upon the disposition granted by Sir George Hamilton, in so far as relates to the representatives of Russell, and the representatives of Colvill.

Fol. Dic. v. 3. p. 317. C. Home, No 157. p. 266.

No 24.

A precept of *clare constat* having been granted to the person who was the apparent heir, in liferent, and to his son in fee; infestment taken thereon, to them, in the same terms, in so far as it was granted to the son in fee, found to be erroneous.

1774, January 28. THOMAS FINLAY *against* THOMAS MORGAN and Others.

JOHN FINLAY of Shaw, was proprietor of, and died vest and seased in these lands.

After John Finlay's death, James Finlay, his brother and heir, obtained from the superior a precept of *clare constat*, to himself in liferent, and his son John in fee; upon which infestment followed in their favour, for their respective rights of liferent and fee, in 1709.

After the father's death, John Finlay, the son, granted heritable bonds over the said lands, upon which infestment followed; and these bonds having come into the person of William Richmond, he, in the year 1735, obtained a decree of adjudication of the lands of Schaw, &c. over which these heritable securities extended, against the said John Finlay, for payment of the accumulated sum of L. 2816 Scots.

This adjudication was afterwards conveyed by Richmond's daughter, and heir to Hugh Campbell, who, in consequence of this conveyance, obtained a charter of adjudication from the superior in 1746; and, in January 1759, he conveyed the lands therein contained to William Muir, who, having soon thereafter disposed the lands of Schaw to Thomas Morgan, for whose behoof he made the purchase, Morgan, in February 1759, was regularly infest, upon the precept of sasine contained in the charter of adjudication, granted to Campbell, his author, and entered into the possession of the subjects conveyed to him; and, as he alleged, bestowed money upon inclosing and improving them.

A process of reduction and improbation was lately brought at the instance of Thomas Finlay, as heir to his brother John Finlay, the antient proprietor, against Morgan, Campbell, and Muir, for setting aside these rights; and also containing a conclusion of compt and reckoning against them, in which two questions in law arose; the last whereof properly falls within the period of this collection; but, on account of the connexion, the heads of the argument and the decision on the *first* point, are also here inserted.

I. The pursuer insisted, that Richmond's adjudication was null and void, when it was led, in respect, that John Finlay, the granter of the heritable bond on which it proceeded, had neither established any title in his person to these lands, nor had been charged to enter heir to his predecessor; to which it having been *answered*, in point of fact, That John Finlay had been infest along with his father upon the precept of *clare*, granted to them in liferent