

1682. *March.*The LORD CARDROSS *against* GENERAL DALZELL and Others.]

No 22.

In a competition among creditors, on a bankrupt estate, it was found, that a confirmation having first passed the seals, was preferable to another confirmation, though it was long before past in Exchequer.

THE tenants of the estate of Kincardine having raised a multiplepounding against the creditors, it was *alleged* for my Lord Cardross, That he ought to be preferred, he having infeft 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 infeft 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 Cardross'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 infeftments, but the parties ought to be infeft in every land, as if no such dispensation had been granted; and albeit the Lord Cardross, his first sasine, be confirmed by the superior, yet it is null, seeing it is not registered; 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 poiding 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 General Dalzell's right being made public before the Lord Cardross was distress, 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 infeftments, so he may convey and communicate the benefit of the dispensation; and albeit the Lord Cardross'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 sasines to follow thereupon; so that the last sasine being taken before General Dalzell's sasine was made public by a decret of poiding 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 Colvil writer, That he ought to be preferred to the Lord Cardross by virtue of his adjudication, which is long prior to the Lord Cardross's infeftment upon his bond of relief, and he likewise used diligence to obtain himself infeft upon the adjudication before the Lord Cardross's infeftment, having presented a signature to the Exchequer, albeit the expeding thereof was stopt by other creditors, which ought not to prejudice 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 without a charge against the superior would have been preferred to the Lord

Cardross's posterior infeftment, by that same reason Robert Colvil ought to be preferred by virtue of his adjudication, seeing he did diligence to obtain himself infeft before the Lord Cardross's infeftment; and not only had he obtained an adjudication and done diligence for obtaining infeftment, but the citation upon the adjudication was prior to the bond of relief granted to the Lord Cardross; and as to the act of Parliament 1621, the common debtor could do no voluntary deed after the 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 Cardross in prejudice of Robert Colvil, after citation upon the adjudication; and albeit the bond of relief was granted for antecedent causes of debt before the citation, yet the same cannot be respected, unless there was an antecedent express obligation to infeft for security of these debts; seeing citation upon a summons of adjudication is equivalent to of lands to be appraised after, where it has been found in many decisions, that the common debtor could not prefer one creditor to another.—*Answered* for the Lord Cardross, Adjudication being but a personal right, and he having the first real right, he ought to be preferred, especially his bond of relief being prior to Colvil'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 declared, that the superior and adjudger are declared to be in the same case, but determines nothing as to third parties in the same condition they were in before the case of appraisings; 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 Colvil could not be preferred upon the account that his signature was stopt 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 whom in justice they think ought to be preferred.—*Alleged* for Cornelius Vanaersan, the Earl of Kincardine, his 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 infeft, and his infeftment clad with possession by receiving payment of several years annualrent, as appears by the discharges, before the Lord Cardross's right.—*Answered* for the Lord Cardross and the other creditors, that the discharges being holograph, do not prove as to the date, and so cannot clothe the base infeftment with possession.—*Replied*, That base infeftments of relief are valid without possession, as in the case of infeftments of warrandice the principal parties possession being their possession before distress; and this was expressly decided in February last, in the case of Bruce against Clackmannan, No 55. p. 1332. where the Lords found that Bruce of Newton's base infeftment of relief was preferred to a posterior public infeft-

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ment, albeit the base infeftment was clad with possession; and Newton was not preferred upon that consideration, that immediately after his base infeftment, he presented his signature of confirmation to the Exchequer, and was refused; seeing the Exchequer was not obliged to have past the signature, his Majesty being in the same case as other superiors, who cannot be compelled to receive vassals and grant infeftments 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 principle in law, that a public infeftment is always preferable to a prior base infeftment not clad with possession, which is founded on that act of Parliament of King James the V. relating thereto, and there is no speciality in the case of base infeftments of relief, *et non est distinguendum ubi lex non distinguit*, and there was more hazard, and a greater prejudice, to sustain such base infeftments of relief than others; because they being private and latent deeds, they may be granted by a debtor to his friends for their relief, in defraud of all other creditors; and albeit such infeftments 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 *declaratorie juris*, to take effect when distress; 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 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 Kincardine and her children, who stand infeft in an yearly annualrent to the principal sum of 50,000 merks, That she ought to be preferred to the Lord Cardross, her infeftment being prior and clad with possession before the Lord Cardross'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 Torrieburn, can only make the right public as to the lands lying within that regality, and not as to other lands which lie not within that jurisdiction.—*Replied*, That albeit the decret of pointing the ground doth not only make the infeftment public as to the lands lying within the regality of Torrieburn, 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 infeftment 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 Ker against Ker, No 60. p. 1338. where an infeftment 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 annual-rent while after the father's decease; and that in respect both the sums being *in eodem corpore juris*, could not be divided.—*Alleged* further for the Lady Kincardine, 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 L. 3000 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 annual-rent before his decease, the said aliment cannot be allowed, nor can affect the heritable estate, but ought to be paid out of the moveables intromitted 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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Fol. Dic. v. I. p. 194. Sir P. Home, MS. v. I. No 197. p. 282.

1691. July 8.

LORD SINCLAIR *against* CREDITORS of LANGTON.

MY LORD SINCLAIR having presented a signature of confirmation of a right of relief (after he was distressed by a bare registration without a charge,) to the Exchequer, and taken instruments thereon, was brought in *pari passu* with those whose confirmations were past that same day his was presented; it being presumed, that if my Lord's had first past in the Exchequer, he would have got it sealed as soon as Carnwath's. A bill being given in against this interlocutor, as contrary to a former in the same cause the preceding session, the LORDS adhered, except as to the lands holding ward; *2do*, Found, that a citation in a mails and duties, prior to a confirmation in Exchequer, was no cloathing of the the base right of relief; but answer was delayed as to the effect of a second citation, if it cloathed like a citation in a pointing of the ground, or if not, till decreet or possession followed.

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Fol. Dic. v. I. p. 194. Harcarse, (INFESTMENT.) No 623. p. 172.

Confirmation operates a discharge of the superior's casualties. *See* IMPLIED DISCHARGE.

Confirmation makes not a base infestment public. *See* BASE INFESTMENT.

Deeds that have the force of a confirmation. *See* VIRTUAL, Confirmation.

Confirmation of Testaments. *See* SERVICE and CONFIRMATION.

See Justice-Clerk against Coldingham, No 35. p. 1753.

See SUPERIOR and VASSAL.—INFESTMENT.—APPENDIX.