

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 infestment 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 infest on the 29th of June that same year, only a day posterior to Kinloch's seasine; so, this being a public infestment intervening before Kinloch's base infestment could be clad with possession, it must be preferred thereto, upon this principle of law, That a public infestment is always preferable to a base infestment, if the public right be dated before the said base infestment was clad with possession.

ANSWERED,---Though his infestment 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 infesters, doing diligence to attain possession before, or at the term of payment, are preferable to public infestments;—Dury, *13th February 1634*; *2d July 1625*, *Raploch against the Tenants of Letham*; and Stair, *26th July 1676*, *Alison against Carmichael*.

REPLIED for Sir Andrew,---That the preference of the public infestment is not upon the consideration of the base infester'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 infestment 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 infestment of annualrent, this was an infestment of property for security of a sum: and therefore a public infestment interfering before the first term of payment was preferred thereto, —*6th 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

Viscount of Stair and Sir James Dalrymple, upon a competition of a wadset, whereof they were seeking to dispossess him ; and having had some indiscreet and indecent expressions in a postscript of that copy given in to my Lord Tillycoultrie's box ; and, calling for him, the Lords found it was done by Alexander Cannon, his brother, who judicially acknowledged it ; whereupon the Lords sent him to prison to lie for a month, and then to crave pardon of the Lords on his knees, and to be debarred from agenting in the House for all time coming. Some proposed pillorying or fining ; but that was waved.

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1701. *December 10.* JOHN HILL *against* MURRAY of SPOT.

SPOT's father, when he acquired these lands from Douglas of Spot, he granted him a back-bond, declaring them redeemable from him on payment of forty thousand pounds Scots. Douglas assigned this back-bond to Helenor Dawson his wife, and she in favour of Mr Hill, her second husband : and he pursuing Murray of Spot, on his father's back-bond, he proponed and raised improbation against it ; and craved, *1mo.* That Hill and his lady should abide at the verity of it *sub periculo falsi* ; *2do.* That they find caution, to the value of the estate, to attend all the diets of process, and undergo the punishment as an user of a false writ, if it be found so ; *3tio.* That he design a domicile in Edinburgh, at which he may be cited.

ANSWERED to the *first*,---They are ready to bide by the verity of the writ, and have several holograph missive letters to astruct and adminiculate it ; but being infirm, and unable to travel from London this winter-season, they were willing to subscribe their abiding before any commissioners whom Spot should name at London. *2do.* Caution to the value is only sought to fright the pursuer, a stranger, and to force him to abandon his just claim ; for it is impossible that he or any man can find such caution. To the *third*,---The pier and shore of Leith is the legal domicile of strangers out of the country ; but if the Lords require a special one to be designed at Edinburgh, as his lawyer's or agent's house, he shall do it.

It was REPLIED,---That bidding by a writ that was quarrelled of falsehood was of that moment and importance that it could not be taken on a commission, but the user's personal presence was necessary ; for, when the Lords found presumptions of the forgery, they used to send them to prison ; as they did to *Barclay of Towie's Witnesses, Captain Rutherford*, and others. As to the *second*,---Caution for a small sum was no sufficient check against forgery.

The Lords found the parties might abide at the verity of this back-bond on a commission, and directed one to the secretaries of state ; and found the caution needed not be equivalent, and therefore modified it to £200 sterling ; and ordained him to design a special domicile within the Town of Edinburgh.

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