

1708. July 22. LADY RICcarton *against* SIR JAMES BAIRD, &c.

No 13.

In a contract of marriage, an estate being disposed to the husband and wife in conjunct fee and life-rent, upon which the husband and wife were infeft holding *a me*; a confirmation granted to the husband, was found to accresce to the wife, so as to validate her infeftment in a competition with real creditors.

THE competition betwixt Margaret Dalglish, the old Lady Riccarton, and Sir James Baird of Saughtonhall, and other real creditors of Craig of Riccarton being reported, it was *objected*, That the Lady's liferent infeftment was null, because her sasine was taken upon a charter *a me*, and never confirmed till 1703, long after the creditors are infeft, which, as middle impediments, hinder her confirmation to be drawn back *ad suam causam*.—*Answered*, Her sasine relates only to a charter in general, which might as well be *de me* as *a me*; and the contract mentioning to infeft her both ways, it must be presumed to be upon both, *quæ fieri debent facile præsumuntur*; and the contract of marriage, though the remote warrant of the sasine, must be sufficient to support it; for *probatis extremis præsumuntur media*, especially *in re tam antiqua et favorabili*, as is the *materia dotis*; and the husband's right being confirmed, though in general, without mentioning her's, it must accresce to her, especially being fortified by 40 years possession. And President Gilmour observes, that the Lords sustained a wife's liferent infeftment on a charter *a me*, 15th Jan. 1663, Campbell, No 35. p. 1302.; and Home, No 5. p. 1690.; and 22d June, and 28th July 1637, Blairquhan *contra* Viscount of Kenmure, *voce* UNION.—*Replied*, The Lady's sasine can be ascribed to no other warrant but the charter *a me* produced, though it do not expressly mention it; and the husband's confirmation can never support it, it having no relation to her infeftment; yet *see* Norvel *contra* Hunter, *voce* PROOF.—THE LORDS sustained the Lady's infeftment, being clad with 40 years possession, notwithstanding no other immediate warrant appeared, but the charter *a me*, seeing the husband's confirmation accresced to her; and therefore preferred her to the real creditors, though they were infeft before her confirmation in 1703.

*Fol. Dic. v. I. p. 193. Fountainball, v. 2. p. 457.*

\* \* Forbes reports this case differently, thus:

IN a competition of the Creditors of Riccarton, the Lady claimed preference for her liferent annuity of 2,500 merks upon her contract of marriage in December 1661, with Lewis Craig, then younger of Riccarton, containing a procuratory of resignation and precept of sasine, wherein Thomas Craig his father provided him to the fee of the estate, and her (who brought 32,000 merks of tocher) to the said annuity, and obliged himself to infeft them in the fee and liferent *respective*, by two manner of holdings *a me* and *de me*; a charter *a me* granted to them by the said Thomas Craig in January 1662; a sasine of the same date, long prior to the creditors rights; and a charter of confirmation in anno 1703, which, though posterior, ought to be drawn back *ad suam causam*.

*Alleged* for the Creditors, The Lady's infeftment proceeding upon a charter *a me* is null, for not being confirmed before the Creditors right-intervened, which mid-impediment hinders the drawing back *ad suam causam*.

*Answered* for the Lady; Her father-in-law being obliged to infeft her both *a me* and *de me*, and the sasine relating to a charter in general, he is presumed to have done it *omni meliore modo*, and consequently to have granted charters both ways, conform to his obligation; it being usual at that time so to do, and to give sasine upon both, *et quæ fieri debent et solent, facile præsumuntur*; especially considering, that the contract of marriage is of the nature of a charter, containing a precept or sufficient warrant of a sasine, though no charter were produced; and *in favorem matrimonii*, many things singular have been sustained. Nor is there any necessity now, after forty years, to produce the charter *de me*, which has been granted *ex superabundanti* for form's sake only, the contract, which is the remoter warrant, and the sasine, being produced; seeing *probatæ extremis, præsumuntur media*; especially *in re tam antiqua, et materia favorabili*. So a contract of marriage was sustained to adminiculate a sasine in favours of a wife, whereof a separate bond, granted in implement of the contract, was the warrant, and not produced; Norvel against Hunter, *voce* PROOF. 2do, *Et separatim*, though commonly a charter *a me*, is null till confirmation; yet, infeftments upon liferent rights to wives, by virtue of their contracts of marriage, to be holden of the superiors, not confirmed, have been sustained against singular successors; January 15, 1663, Campbell against the Lady Kilchattan, No 35. p. 1302.; and preferred to intervening rights completed before confirmation; 4th February 1629, Home, No 5. p. 1690. Nay, even before the act of Parliament 1695, a base infeftment in favours of a wife, not clothed with possession, was preferred to posterior public infeftments; February 21, 1672, Reid against the Countess of Dundee, No 38. p. 1305.

*Replied* for the Creditors, If the charter *a me* be not the warrant of the sasine, but a charter *de me* not produced, the sasine is null, as wanting a warrant; for the contract of marriage, which is not mentioned or referred to therein, cannot support it. And if the charter *a me* be understood to be the warrant of the sasine, the confirmation thereof could not be drawn back to the date of the charter and sasine, in prejudice of the creditors' intervening rights; according to the maxim, *Confirmatio et confirmatum, non possunt conjungi, propter medium impedimentum*. Nor doth it alter the case, that the disponent in the contract of marriage, was bound to give infeftment either to be holden of himself, or of the superior; Paton against Stewart, *voce* SUPERIOR and VASSAL. And albeit in favourable cases, law will presume a thing that ought to be, to have intervened; presumptions cannot be received against plain evidences, nor two or more fictions concur in one point; as, that the charter *a me* produced, was not the warrant of the sasine; that there was a charter *de me* granted; and that it was the warrant of the sasine.

No 13.

THE LORDS preferred the Lady's annuity to the real rights of the competing creditors completed before her confirmation, in respect her sasine was supported by her contract of marriage, providing her to that annuity, and bearing precept of sasine in the lands affected therewith, and by forty years possession, albeit a charter *de me* be not produced. For the LORDS considered that the sasine referred only to a charter in general, and that it was then the custom to grant charters *a me* and *de me*, and to take infeftment upon both at the same time; and that it is a presumption and not a fiction of law, that a charter *de me* intervened.

*Forbes, p. 270.*

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SECT. IV.

Confirmation may be granted *quandocunque*.—What rights require Confirmation.

1634. July 17.

LO. JOHNSTON *against* E. QUEENSBERRY and JOHNSTON of Corehead.

No 14.

Confirmation was found valid, being granted at any time, either before or after the disponent's or disponee's decease, providing there was no intervening impediment of any other more lawful right made by the disponent before confirmation.

IN a double pointing for the mails and duties of the lands of Lochouse, claimed by the Lo. Johnston, as having right from the apparent heir of umquhile Captain Johnston of Lochouse, heritor of these lands, and who was in possession thereof at his decease, on the one part, and of the Earl of Queensberry, as being heir to the Lord Drumlanrig, his father, who was heritably infeft therein by disposition of the said umquhile Captain, by two infeftments, one base, and another holding of the superior; which infeftment to be holden of the superior, was confirmed by this Lord Queensberry, who had acquired the heritable right of the said superiority from the L. Calderwood, of whom the saids lands were holden; which confirmation was granted after decease of Captain Johnston, granter of the infeftment, and after the decease of the Lord Drumlanrig also, to whom the infeftment was granted. In this process, the LORDS appointed that there should be a sequestration of the duties of these lands in an indifferent responsible gentleman's hands, who, during the dependence of this action, should uplift the same from the tenants, and make payment thereof to the party, who should be found to have right thereto, at the end of the process: Which sequestration was so appointed, albeit it was only verbally sought at the bar by the Lord Johnston, the time of the disputing of this cause, and that the summons craved no such sequestration, neither was there any summons or action