No 110.

sion of other creditors; seeing there is no such provision in the infeftment, which is only granted for relief of debts particularly therein enumerated. Nor doth it alter the case, that the infeftment relates to the charter; seeing singular successors are only obliged to notice what is expressly and fully contained in the sasine; and the words of the charter, To be relieved of all cost, skaith, or damage, can only relate to the debts he stood engaged for. 2*do*, Whatever might be pleaded as to the expense of expeding his infeftment, it is absurd to pretend that the deburements in maintaining his right against the competing creditors ought to be sustained; seeing in competitions every creditor must bear his own burden of expenses for his own security.

THE LORDS sustained preference upon the infeftment of relief for the principal sums, annualrents, and expenses paid by Sir Hugh Campbell to Park's Cretors, and allowed the same to be stated as a principal sum at the time of payment; but refused to sustain his claim of expenses for expeding his infeftment and making it effectual against the other competing creditors.

Fol. Dic. v. 2. *p.* 70. *Forbes, p.* 124.

1711. *November* 27.

AGNES COLQUHOUN LADY MONTBODDO *against* HALIBURTON of Newmains, and JANET CAMPBELL, his Spouse.

No 111.
Found, That an irritant resolutive clause which was unusual, and not inserted verbatim in the precept and instrument of sasine, but only by general reference, could not prejudice a singular successor.

THE said Agnes being married to Irving of Montboddo in 1665, by their contract of marriage she dispones to him the lands of Kippock, &c. wherein she was infeft as heir to her father, and he obliges himself to infeft her in a liferent jointure out of his own lands of Montboddo; but it bears this clause, that if either of them failed in performance to one another of their several obligements, then this contract was to be void and null, in the same manner as if it had never been made, nor *in rerum natura*, and each party-contractor should enjoy and possess their own proper estates, as if the said marriage had never been solemnized. The husband was infeft in the wife's lands by virtue of the precept of sasine contained in the contract; but the wife was never infeft in his lands for her jointure, there being no precept for her, but only a procuratory of resignation, which was never expeded nor prosecuted. And he being in great debts, not only his own proper lands of Montboddo, but likewise those disponed to him by his wife, are evicted by his creditors, and adjudged from him; and he dying about the 1675, Janet Campbell's father, and others of his creditors, enter into possession of the lands that came by his wife, and Burnet of Alagarven purchased his own lands of Montboddo; so that Agnes, his widow, was debarred both from her own proper lands, whereof she had been heiress, and likewise from her liferent provided to her forth of her husband's lands. And

after many essays to recover her rights, she at last raises a declarator of the irritancy of the contract, and that she may enter to her own lands, whereof she was heiress, in regard her husband failed in performing his part of the contract, by infefting her in his lands for her liferent use, and had suffered both his own and her estate to be carried away by his creditors. *Alleged*, 1*mo*, You cannot declare the property of the lands to be yours, unless you produce your infeftment therein, as heir to your father. *Answered*, If I had no right, then my husband, to whom I disponed, and who is your author, could have none; and so you cut the branch on which you stand; but the truth is, the contract bears I was infeft, and my sasine has been given up when he transacted with the creditors. 2*do*, *Alleged*, You can never declare the irritancy, seeing it was incurred through your own fault and negligence that you did not resign and compleat your right by infeftment. *Answered*, I was *vestita viro subque ejus potestate*, and I could do nothing for myself. It was his duty to have secured, and he neglected it; neither were there any friends named in the contract, at whose instance execution was appointed to pass; so being wholly destitute of help, and his estate evicted in his own lifetime, I cannot be said to have been either *in culpa* or *mora*. The LORDS laid small weight on these two allegeances; but the third defence struck with them, as of more import and moment; which was, that she had legally denuded herself in favours of her husband, whom they found infeft, and they, as his creditors had fully denuded him by adjudications 35 years ago, and been in peaceable possession ever since; and though the husband's right bear *in grœmio* a relation to the contract of marriage, and to be granted to him by the wife, under the provisions, restrictions, and limitations therein mentioned; yet that being only a reference in general terms, it was noways here sufficient to put the creditors *in mala fide* to contract with him, or affect singular successors, nothing making it real unless it had been *verbatim* engrossed in the precept or body of his sasine, as is clear from the act 1617, for registration of sasines, that reversions must be incorporated in the body of the infeftment; and the act of Parliament, introducing tailzies in 1685, requires, that the irritant clauses be inserted in the procuratories, charters, precepts, and instruments of sasine, otherwise not to be effectual against singular successors; and so the LORDS decided on the 26th of February 1662, The Viscount of Stormont against The Creditors of Annandale, *voce* TAILZIE; and Canhan *contra* Adamson, No 56. p. 10233. and No 53. p. 2727. And if general clauses were sustained, it would be a snare to creditors, and destroy commerce. *Answered*, Creditors ought to know the condition of him with whom they contract, and can have no more right than he had, for *uti debent jure auctoris*, and no farther. Now here was a clear beacon and meith set up to warn you, viz. his sasine burdened with the provisions, conditions, and limitations contained in the contract of marriage; and you ought to have enquired what these were, and then you would have learned, that on the husband's failing to perform his part, she was in her own place, and

No 111.

No 111. might return to her own lands; and till the act 1685, there was no necessity of engrossing the irritancies at length, but a general reference was sufficient to put all parties *in mala fide*. And wherefore was warrandice introduced but to secure against such clauses? Some thought there was a difference betwixt voluntary purchasers and legal adjudgers; that the first were bound to know the qualities and conditions of their author's right, which creditors could not so well come to the knowledge of. Others thought adjudgers in a worse case; for they do not follow the faith of registers when they lend their money, and they are put to adjudge their debtor's lands, which can carry no more but such right as he had; whereas a purchaser lays out his money *ab initio* to obtain a real right. THE LORDS by plurality found, seeing this irritant and resolutive clause was unusual, and not inserted *verbatim* in the precept and instrument of sasine, but only by a general reference, it could not prejudge the singular successors, and therefore assoilzied from her declarator of the irritancy.

Fol. Dic. v. 2. p. 71. Fountainhall, v. 2. p. 678.

1729. *February 6.* GALL *against* MITCHELL.

No 112.

A FEU was granted in the year 1611, with this express irritancy, That if the feuer annalzied the land, without previously offering the same to the pursuer for re-payment of the sum advanced for the feu-right, the feu-contract should be null and extinct, and all that might follow thereupon. This irritancy was brought into the charter as it was in the feu-contract, but omitted in the precept of sasine, whereby it came about, that it was not engrossed in the sasine, nor in any of the following infeftments, not even by way of reference; whereupon it was found, That it could not affect the singular successor of the original vassal. See APPENDIX.

Fol. Dic. v. 2. p. 71.

1730. *February* 13.

Competition betwixt the DUKE of ARGYLE and the CREDITORS of BARBRECK.

No 113.

A SUPERIOR granted a feu-right to his vassal, with certain prohibitory and irritant clauses. These clauses were engrossed at full length in the charter, but not in the precept of sasine, nor in the sasine itself, otherwise than by a general reference, viz. With and under the provisions and conditions particularly mentioned in the charter. It was *pleaded*, in a competition betwixt the superior and the creditors of the vassal, That this general reference was sufficient to interpel creditors or purchasers; for no prudent persons, who lends money upon the faith of an estate in the person of his debtor, will trust to the sasine alone;