

1804. December 4.

KIBBLE against ROSS.

No. 7.

A liferent infestment by a husband to his wife *propriis manibus* sustained, tho' the husband's subscription to the instrument of sasine was not adhibited before witnesses.

ROBERT CORSE, upon the 9th March, 1789, gave a liferent-infestment *propriis manibus* to Elizabeth Ross, his wife, over his lands of Easter Greenlaw. After setting forth the infestment in favour of himself, the sasine proceeds thus: "And the said Robert Corse being so infest and seised, he, for the love and favour he had and bore to Elizabeth Ross, his well-beloved wife, did, *ex propriis suis manibus*, give and deliver, liferent state and sasine, real, actual, and corporal possession, to the said Elizabeth Ross, of all and whole," &c. (here the subjects are mentioned,) "during all the days and years of her life, in cases he survive him, and that by deliverance to her, *respective* and *successive* after others, of earth and stone, of and upon the ground of the same, and a little grass and stubble for the teinds, as use is, she being personally present, and accepting thereof, and infest and seised her thereintil; whereupon, and upon all and sundry the premises, the said Robert Corse and Elizabeth Ross asked and required instruments, under the hands of me notary-public subscribing. These things were done betwixt the hours of three and five of the clock afternoon, day, month, year of God, and of his Majesty's reign first above written, before and in presence of John Tenant, servant with the said Robert Corse, and James Smith, apprentice to me notary-public, witnesses called and required to the premises; and in testimony of the verity of the premises, the said Robert Corse hath signed this present instrument.

(Signed) ROBT. CORSE.

*James Smith, witness.**John Tenant, witness."*

After this follows the doquet, in the form used for a common sasine, without any allusion whatever to the subscription of Corse. This sasine is totally silent as to the name and designation of the writer of it, the time and place of subscription. It does not bear to have been subscribed before witnesses.

The heritable property belonging to Corse, having, on his death, been divided among heirs-portioners, in the process of division the point came to be argued, how far this liferent-infestment was effectual.

James Kibble, for himself and the other heirs-portioners,

Pleaded: Every conveyance of a right must be legally authenticated; and the act 1681 has introduced and defined the solemnities required to validate such a deed, as is here alleged to be a liferent-right by infestment. There being no antecedent writing, conveying this liferent, the sasine itself in this case is the conveyance, which consequently requires the same solemnities as an original conveyance does. Of these, it is essential that the subscription of the granter should be adhibited before witnesses. The granter's subscription is in fact the only evidence that a right has been conveyed; and the proof of this consent having been given, is expressly defined by our law. But this is here essentially defective. It is not enough to argue, that the subscription is adhibited as an adminicle to the conveyance of the right by

the infertment, and merely for the purpose of testifying that it has been so conveyed, and therefore that the legal solemnities are not requisite; for, as the law has, in the case of a sasine *propriis manibus*, dispensed with the necessity of a separate disposition, the subscription to which must have been properly authenticated, it surely never meant to extend this privilege still farther, and give the same effect to a subscription not authenticated at all. If it were so, nothing would be so easy as to defeat the law of death-bed; and, in many other respects, it would leave unchecked, the various evils which the law meant to guard against, by requiring certain solemnities in all deeds of importance; Bankt. B. ii. T. 3. § 42.; Ersk. B. ii. T. 3. § 38.; PROOF Div. 3. Sec. 3.

Mrs. Elizabeth Ross, the widow,

Answered: When an infertment is taken, it is taken in presence of witnesses, but there is no writing of any kind then made up. The witnesses are only witnesses to the fact of the infertment; and when an instrument is made out, it is signed by them, as testifying the truth of the fact it sets forth, that sasine was given in their presence. They do not subscribe to authenticate the signature of the notary, but to testify the truth of the facts which he narrates. Neither is the name and designation of the writer ever inserted in the instrument of sasine; Stair, B. iv. T. 42. § 9.; Bankton, B. ii. T. 3. § 40.; Erskine, B. iii. T. 2. § 6. 8vo. Lord Gray against Sir William Hope, 5th July 1710, *voce* WRIT. If the sasine be given *propriis manibus*, the instrument is also signed by the party himself, as a proof of his having knowingly performed his part in the exercising of his disposing power; and the witnesses subscribe as a testimony of their having seen this power so exercised, by his giving infertment to his disponee. To this fact they are witnesses, but to nothing else*. No further solemnity, therefore, is required, to constitute a life-rent-right by infertment, than what has been exhibited here.

The Lords (18th November, 1803,) found "The life-rent infertment over the lands of Easter Greenlaw a valid and effectual security, still affecting this estate."

To which judgment they adhered, (4th December, 1804,) on advising a reclaiming petition, with answers.

Lord Ordinary, *Craig*. Act. Clerk. Agent, *Geo. Fordyce*. Alt. *Colquhoun*.
Agent, *Ro. Sym, W. S.* Clerk, *Pringle*.

F.

Fac. Coll. No. 188. p. 423.

* The register of sasines kept at Glasgow, from the year 1740 to 1789, contains 206 sasines *propriis manibus*, by husbands to wives. Of these, there are 113 recorded during the first twenty-six years; the whole of which, without exception, are made out and signed in the same way with Corse's sasine. After this period, in some cases, the sasine is not signed by the party at all; in others, no mention is made of his subscription; and, in certain cases, the instrument is subscribed in presence of witnesses.