

No 19. not claim his infeftment. Notwithstanding whereof the LORDS sustained Pitferran's allegiance, he reporting a sufficient discharge from Bogie, and from Pitferran's brother to Parbroath.

*Fol. Dic. v. 1. p. 194. Haddington, MS. No 2124.*

1678. December 6. MILN against The LAIRD of POWFOULS.

No 20.

In a competition betwixt two infeftments, the first confirmation was preferred, and the bare giving in of a signature to the exchequer was found not sufficient, unless all diligence had been used by the one, or precipitation by the other.

In a competition betwixt the Creditors of Clackmannan, Alexander Miln and Powfouls, upon two base infeftments, were the same day and hour infeft in Clackmannan's estate; the said Alexander for an annualrent of a sum due to him, and Powfouls, for relief of several sums in which he had been cautioner for Clackmannan; both infeftments to be held of and from Clackmannan. Both gave in signatures to the Exchequer in one day for confirmation, but Alexander Miln's signature was first past in Exchequer, and his confirmation first past the seals. Alexander did also, before either confirmation, obtain a decret of poinding of the ground; whereupon they compete for preference. Powfouls *alleged*, That his infeftment, being for relief, was valid from its date, there being no ground of simulation, but the infeftment astructured by anterior bonds to other creditors, wherein Powfouls is cautioner; and, therefore, by the act of Parliament, such infeftments, though base, are never to be postponed to any infeftments, not being prior, but are in the same case as infeftments of warrandice; both which cannot attain possession till distress, but from distress have effect from their date. *2do*, As to the confirmations, the Exchequer, by act of Parliament, is ordained to give confirmations to all parties, as they demand the same; so that Powfouls having presented a signature of confirmation as soon as Alexander Miln, the gratification of Exchequer, in passing Alexander Miln's first, cannot prejudice him. It was *answered*, That public infeftments are always preferred to base infeftments before possession, or diligence for the base infeftment first attaining possession; and, though custom hath accepted infeftments of warrandice, where possession is had of the principal lands, it hath not extended the same to infeftments for relief of personal debts, which would much unsecure purchasers. And as to the confirmations, the giving in of a signature, without continuing to get the same past, imports nothing. *2do*, Though the King, as superior by the common law, must receive apprisers or adjudgers, yet as to infeftments upon resignation or confirmation, the King, as all other superiors, may refuse all or confirm whom he pleases. And, by the act of Parliament founded on, viz. act 66. Parl. 5. 1578, The first confirmation is declared the best right. And albeit that act mention an act of Council, yet the King or his compositors ought not to deny confirmation upon the reasonable expenses

of any party, yet that is not repeated in the statutory part, but only in the narrative; and an act of Council can derogate from no man's right, much less the King's.

No 20.

THE LORDS found the giving in of a signature could not bring in that party, without first obtaining a confirmation, unless all diligence had been used by the one, or precipitation by the other; but did not determine that point, whether the Exchequer was obliged to confirm according to diligence, and did resolve further to hear that point, whether infestments for relief of personal debts were valid from their dates.

*Fol. Dic. v. 1. p. 194. Stair, v. 2. p. 653.*

1680. February 26. Laird of CLACKMANNAN against The EARL of WIGTON.

BRUCE of Newton having infest Clackmannan for relief of his cautioneries for several of Newton's creditors, and having thereafter infest the Earl of Wigton for his relief as cautioner to other creditors, both infestments are confirmed by signatures past at the same time, whereupon both do now compete. It was *alleged* for the creditors, to whom Clackmannan was cautioner, That his infestment ought to be preferred, because his base infestment is prior, his signature of confirmation is *simul*, and it is first past the seal by a month's space, as it appears by the attest of the keeper of the seals to the charter, as use is. It was *answered* for Wigton, That both infestments being base, without possession, the confirmation only, by which they become public, makes them effectual rights, so that both their confirmations, past of the same date, must come in *pari passu*; and no respect ought to be had to the attest by the keeper of the seal, otherwise it should be in his power to prefer and postpone as he pleases, for which he hath no commission; and though his oath was taken, he is but one witness. It was *replied*, That the seal only perfects the confirmation, and is in place of the King's subscription; and albeit the dates be insert in charters, according as the signatures pass, yet it is not the signature that gives the right, otherwise no infestment by confirmation could be known or secured, but a naked signature would be preferred to a posterior sealed charter. Neither is there any hazard of the collusion of the keeper of the seal; because, when a signature passeth the seals, it is to be found recorded at the Privy and Great Seals in the Chancellery, and there is a minute kept of all the sealings of charters.

No 21.

The confirmation first expedite thro' the seals was found preferable, though the date of the charters was the same.

THE LORDS found the first expedite confirmation through the seals preferable, although the date of the charters were the same; and that the attest of the sealer was sufficient, unless it were controuled by the registers, or that the other party had craved to pass his signature as soon, and taken instruments upon the refusal, and collusion of the keeper of the registers and seals.

*Fol. Dic. v. 1. p. 194. Stair, v. 2. p. 765.*