1663. *January* 16. CAMPBELL *against* The LADY KILCHATTAN.

No 4.
In favorem of a relict's infeftment upon her contract of marriage, for her liferent-right, a base infeftment to be holden of the superior not confirmed, is sufficient against a singular successor publicly infeft.

IN the process, (No 35. p. 1302.) pursued by Major Campbell, compeared Hugh Hamilton, bailie of Edinburgh, and *alleged*, That he ought to be preferred, because he comprised against Kilchattan; and upon his comprising is infeft, holding of the King as superior, before the Major's confirmation. It was *answered*, That Kilchattan being only infeft by a base infeftment, to be holden of the superior, and not confirmed, the comprising could comprise no more but the personal right standing in Kilchattan's person, the infeftment being in-valid till confirmation; and the infeftment upon the comprising signifies nothing till Kilchattan's infeftment be confirmed; and therefore the Major's infeftment of annualnualrent being anterior to the comprising, the subsequent confirmation makes the infeftment preferable.

THE LORDS repelled the allegeance. *In præsentia.* *See* No 11. p. 3016.

Fol. Dic. v. 1. *p.* 193. *Gilmour, No* 62. *p.* 47.

1713. *July* 10.

JAMES DOUGLASS of Hisleside *against* WILLIAM SOMERVEL of Kennocks.

No 5.
A party served heir in general to the receiver of a disposition (who died infeft *a me* without the superior's confirmation), renounced and disharged the disposition. The Lords found, the whole right in the defunct's person was conveyed by the general service to the heir, and the heir's discharge and renunciation were found to be a mid impediment, and effectual stop to any subsequent confirmation of the infeftment *a me*, to hin-

MR WILLIAM SOMERVEL having disponed the lands of Kennocks and Blantaggart to James Stuart son to Mr William Stuart of Hisleside, who was infeft in the year 1670; Grissel Stuart spouse to Samuel Douglass of Hisleside, in the year 1683, after having been served heir in general to James Stuart her brother, did with her husband subscribe a discharge and renunciation in favours of William Somervel, of all right in their persons by virtue of any disposition or other right or title they could pretend to the lands of Kennocks. After the decease of Grissel Stuart, James Douglass now of Hisleside her son, served heir in special to James Stuart his uncle, as the person last vest and seased in these lands of Kennocks, and commenced a proving the tenor of the said disposition and infeftment, which were abstracted and amissing.

William Somervel *objected*, That the pursuer had no right to prove the tenor, because, 1. His special service is intrinsically null, as proceeding upon an infeftment *a me* not confirmed by the superior at the time of the service, which infeftment was null, or at most but a preparatory step in order to establish a right whenever a confirmation should be obtained; so that there was no subject for a service, that is no feu, which could not be constituted by a null, or at most a conditional infeftment: And though the ordinary way of annulling services be by a great inquest, yet the Lords sustain reductions of services before themselves where the nullities are obvious. Nor can a confirmation lately impetrated by the pursuer, validate the service expede before there was a right in being, to which James Douglas could be served, suppose it might make way for

No 5.
der it to operate *retro*, to validate the infeftment of another upon a special service, as heir to the obtainer of the disposition.

a subsequent service. 2. *Hæ est*, that before confirmation, the disposition in favours of James Stuart (which notwithstanding the infeftment *a me* not confirmed continued a personal right), was transmitted to Grissel Stuart his sister by her general service, and by her effectually discharged and renounced, as if no sasine had followed: Which general service and renunciation was such a mid-impediment as hindered the confirmation to operate *retro*, so as to validate the pursuer's infeftment from the date thereof. For Grissel being generally served, might have resigned upon the procuratory in the disposition, and completed her right, or might have conveyed her right to others, who might in the same way have rendered theirs effectual. And as the imaginary infeftment was no hinderance to the transmission in favours of Grissel; so after the right came in her person, she did so extinguish it, as there was no more place for confirmation. For clearing which point, it would be noticed, That the defender doth not plead, that the general service conveyed the disposition with the sasine *a me* taken upon it, which truly could not fall under any service, as being really no right, but merely a consent to establish a right, in case another party concurred, that did not exist till that concourse was given; nor yet does he pretend, that the general service alone did make the infeftment *a me* to cease, or hinder it to become a valid right by confirmation; but what the defender urgeth is, That the whole right James Stuart had being conveyed to his sister, the same was legally and fairly extinguished by her renunciation, and so hindered the effect of any subsequent confirmation; or as our lawyers say, was a *medium impedimentum* to hinder the drawing back of the confirmation to the date of the sasine. It is not necessary in all cases, that a mid-impediment for hindering the conjoining a confirmation with a precedent sasine, be a real right established by infeftment, Dirleton's Doubts, tit. CONFIRMATION, Craig, Feud. lib. 2. Dieg. 4. § 19, Paton *contra* Stuart, *voce* SUPERIOR and VASSAL; which seems to be required only when more voluntary rights are granted by the same person, and the last right first completed would be preferred. But after all, it seems needless to dispute this point; since the question is not about a conveyance of the disposition made by Grissel Stuart which the receiver neglected to complete before this confirmation intervened; but about a total extinction of the right itself, which takes away all place for confirmation, as an accident cannot be without a subject.

Answered for the pursuer, 1. He being served heir in special by an inquest of 15 sworn men, is not obliged to defend the evidences upon which the service proceeded: The formal retour produced by him sufficiently entitles him to action, and cannot be thus taken away by exception. Again, it is *jus tertii* to any not pretending to be a nearer heir to the defunct, to quarrel the service; besides, there is no reason why an apparent heir may not pursue a proving the tenor of these very rights in which he is to be served. Nor was it necessary for the pursuer to have got a confirmation before his service; if what is daily practice, and the Lord Direlton's opinion, page 25, be to be regarded. When our

No 5. lawyers say, That an infeftment *a me* is null till confirmed, they do not understand it to be simply null, as a sasine is for want of its proper symbol; but null as to certain effects, viz. in a competition with a more complete right, or null by not taking present effect, and being as it were in suspence till confirmed by the superior, like *donatio inter virum et uxorem, quæ morte confirmatur.* So that albeit the sasine *a me*, was null or uncomplete *quoad* the superior, or a third party, vested first with a more solemn right, yet it is good against an heir who may be debarred *personali objectione* from quarrelling. 2. James Stuart's infeftment could be carried only by a special service, because had it not been more than a personal right, confirmation could not make it a complete real right. Its being rendered completely real by confirmation, implies that before such completing it was of the same nature as after, that is real; seeing confirmation (which is but an approving or ratihabition) might strengthen the right, but could not alter the very essence of it. 3. The infeftment *a me* is not carried by a general service (which conveys personal rights) because it hath several effects of a real right, the best proof that it is one; viz. it infers recognition, Lady Carnegy *contra* Lord Cranburn, *voce* SUPERIOR and VASSAL, Stair Instit. tit. EXTINCTION OF INFEFTMENTS, § 11.; which an unregistered sasine doth not, as Craig observes; and yet an unregistered sasine is acknowledged to be a real right. The casualties of superiority fall *retro* from the date of the sasine *a me*, whenever confirmation is obtained, Stair, Instit. tit. INFEFTMENTS OF PROPERTY; but no such casualities fall by a personal right, though confirmed by the superior. And infeftment *a me* would be a sufficient title in a mails and duties against tenants. 4. *Esto*, a sasine *a me* did not make a valid right till confirmation, yet the disposition on which it proceeds, is owned to be a valid personal right: Now the same arguments that are made use of to annul the infeftment, would also annul the disposition, which is the warrant of it, and properly that which the superior confirms. 5. Grissel Stuart's general service could be no mid-impediment; because even after that service she herself could have confirmed the sasine, and completed her right that way; and consequently, so could the pursuer, when his mother did no more but serve heir in general. Had Grissel Stuart, after the general service, resigned upon the procuratory in the disposition granted to her brother, and taken a charter of resignation and infeftment, that would indeed have hindered the pursuer's confirmation, to draw back, because two could not be vassals in the same right to the same superior: But she never having become vassal, it was entire to the pursuer to make use of the faculty he had of making himself vassal, by serving heir in special and confirming. Her renunciation could have no effect, because her general service could at most carry only the procuratory of resignation, which could not be effectually renounced; seeing the dispositive part and precept of sasine were not carried by the general service. Again, when our lawyers say, that an apprising is a sufficient mid-impediment to hinder a confirmation to draw back, they are to

be understood of a complete apprising. Because they mention apprisings against the disponer, and not apprisings against the obtainer of the disposition. No 5.

THE LORDS found, That the whole right in James Stuart's person, by the disposition made in his favours, having been conveyed to his sister by the general service; her discharge and renunciation was a mid-impediment and effectual stop to any subsequent confirmation of the infeftment *a me*, which was once in James's person.

Fol. Dic. v. 1. *p.* 192. *Forbes, p.* 700.

SECT. II.

Confirmation of Infeftments to be holden *a me & de me.*

1680. *July* 15.
The BISHOP of ABERDEEN *against* The VISCOUNT of KENMURE.

No 6.
Sasine being taken upon an obligation to infeft *a se et de se*, without relating specially to either, a posterior confirmation was found to perfect the sasine *a se*, not only from the confirmation, but from the date of the sasine; upon which footing, the creditor in an annualrent right having died before confirmation, the annualrent right was found to be in the superior's hands by non-entry, who confirmed it.

THE Bishop of Aberdeen pursues a poinding of the ground of the baronies of Kenmure and Kirkmichael, upon an infeftment of annualrent.—It was *alleged* for Kenmure, heritor of these baronies, That the annualrent was in non-entry, by the decease of the Lord Whitekirk, who was infeft therein upon a precept relative both to the infeftment from his author, *a se et de se*, which not being confirmed in Whitekirk's life, the Bishop's retour should have retoured the annualrent, as being in the hands of Kenmure by non-entry, and not in the hands of the King, who was not Whitekirk's superior till the confirmation; 2*do*, Whitekirk's sasine was null, as not having four witnesses.—It was *answered*, That such sasines upon precepts relating to infeftments, both public and base, are always applicable to either infeftment, as the party infeft pleases; and when a confirmation supervenes, the right becomes public, holden of the superior, and the confirmation perfects the sasine from the date of the sasine; so that the confirmation being before the Bishop's retour, the annualrent was rightly retoured, as in the King's hand, and Kenmure was never superior; and as to the sasine, four witnesses are only required to writs of consequence, to be subscribed by the granters, who cannot subscribe with their hand, and was never extended to sasines, or any instruments of notaries, proceeding upon a warrant sufficiently subscribed.

THE LORDS found, That if Whitekirk had taken infeftment expressly, to be holden of his author or successor, the annualrent would have been in non-entry till the confirmation; but, the sasine bearing applicable to both infeftments, *a se, et de se*, that the application made by the confirmation, did exclude the non-entry, and perfected the sasine *a se* from the date of that sasine; and found no necessity of more than two witnesses in a sasine.

Fol. Dic. v. 1. *p.* 193. *Stair, v.* 2. *p.* 786.