

No 259.

the rebel was removed out of the Court before the charge given unto him; and as for the witnesses in the executions, they could not be received for proving the reply, one of them being the pursuer's father-in-law, and the other her brother-in-law' *Triplied*, They were *testes instrumentarii*, and so receivable. THE LORDS ordained the pursuer to condescend upon as famous witnesses to prove his reply by, as the defender had condescended on, otherwise they would prefer the defender in probation of his duply; for they respected not the executions which bore that the officer designed the rebel, as being done besides the officer's duty, which was only to give a charge, and not to put that narrative in his executions, whereas, if the question had been anent the truth of the executions of the charge simply, none had been receivable but only the witnesses inserted.

Spottiswood, (CAPTION.) p. 32.

1671. December 14. DUFF and BROWN against FORBES of Culloden.

No 260.

Collusion being objected against a preferable creditor, in that he desired the bailie and clerk to keep his infestment secret; the Lords would not admit witnesses to prove the emission of words, but admitted them to prove the other circumstances of fact.

THOMAS MONCRIEF and James Brown, having apprised a part of a salmon fishing, upon the water of Ness, from Duncan Forbes, brother to Culloden; and Thomas Moncrief having disposed to William Duff, his right upon the apprising, one of the Bailies of Inverness gives sasine, which bears the apprising, and the ordinary tenor of a charter with a *tenendas* and *reddendo*; and the Bailie being charged, gave sasine in obedience, and in the sasine there is also inserted a ratification of the Provost, Bailies, and Council, and the sasine is subscribed by the notary, and the first Bailie that gave sasine, and by the Provost, Bailies, and Council; and in the competition of the right, Culloden produces a disposition by the said Duncan his brother to him, of the same fishing, containing a procuratory of resignation, together with a sasine, bearing the resignation to be in the hands of one of the Bailies of Inverness, and sasine given to him thereupon, which sasine is prior to the appriser's sasine, and thereupon craved preference. The appriser *alleged*, That Culloden's prior sasine cannot give preference, because it is null, not being done *habili modo*; for though in burgage lands which are holden immediately of the King, all infestments may be given by any Bailie of the burgh, who as to that, is the King's bailie; yet where burghs acquires lands or rights not in burgage, but as any other superior, and give out the same to be holden of them, they are in the same condition as any other superior, and no infestment can be given but by themselves, and cannot be done by one Bailie who is not superior. It was *answered*, That albeit by the common law and custom of the kingdom, infestments can only be given by the superior, or persons empowered by him, yet all feudal rights have their original by custom, and as to the solemnities thereof, there is no law, but custom introducing the same; for at first, the superior's introducing the vassal, and possessing him in presence of the peers of Court, did suffice.

ciently constitute the fee, and any attest thereof was sufficient; and though by the nature of the right, it necessarily imports, that infeftment must be given by the superior himself, or others by his warrant, yet the solemnities are customary and local; and there is a particular custom in the town of Inverness, that infeftment even of lands not holden burgage, where it is not the constitution of an original right, but the transmission thereof to heirs or singular successors, either upon apprising or resignation, the same has been always given either by any Bailie, or by the whole, if the party required, which hath continued for hundreds of years, which seems to rise from this ground, that by the same ancient custom, towns take nothing from singular successors but a *duplicando*, which the clerk gets for his service, and so is not concerned in making compositions.

THE LORDS having granted commission to try the custom of this and other burghs, report was made, that Inverness had always been accustomed to give infeftment upon apprisings or resignation by any one Bailie, and that upon inspection of the records, hundreds of infeftments were so found, and many of the principal infeftments were produced, and that there were also many other infeftments given by a Bailie, and ratified by the Magistrates and Council, but almost none by the ordinary way of charter and sasine.

It was *alleged* for the apprisers, *imo*, That the general law or custom of the kingdom could not be altered by any peculiar custom of a town, and though infeftments given by that custom, were not quarrelled by the town who gave and owned them, or when they were in competition amongst themselves, yet as to parties that use the legal course by solemn infeftments, such an unwarrantable custom could have no effect. *2do*, The introduction of a custom cannot be by variable acts, but it must be universal and uniform, for a few acts to the contrary, according to the common course of law, are as interruptions against the prescription of such customs; and though here there be many such infeftments, yet there are also many taken in the orderly way; neither is there any custom in Scotland allowed, which is derogatory to the common law of the land, but only the udal rights of Orkney, which was a part of another kingdom; but if such customs be allowed to every petty burgh, barons may come to pretend the like, and take off the stability and uniformity of our law. It was *answered*, That this being an inveterate custom, time out of mind, though it be but of one town, it must be effectual as to it, at least *quoad praterita*; and whereas it is pretended not to be universal and uniform, it is a mistake, for universally the sasines are given by one Bailie, though the ratifications be but in some cases when they are demanded, and here the sasines of both parties are by one Bailie, albeit the apprisers have included a ratification, which no appriser in that place did ever before; neither have the apprisers followed the ordinary legal course by charter and sasine, but have taken sasine by one bailie, who if he have no power, the sasine is of no more moment, than if it had been done by any other person, which would be so null, that no subse-

No 260.

quent ratification could validate the same, for albeit the feudal customs have allowed an infeftment of the vassal to be holden from him of his superior, if thereafter the superior ratify the same, yet no ratification can validate a sasine, neither given by the vassal nor superior; nor can it be pretended, that one Bailie hath no power, because the constant custom of allowing and owning every single Bailie to give such sasines, where there is no original right constituted, is as much a consent of the incorporation, which is superior, as if by an act they had authorised every Bailie so to do, in which case there could be no question, for infeftments given by the superior's commissioners, are every whit as good as given immediately by himself, and if this sasine shall be annulled on that ground, the greatest part of all rights holden of that town are overthrown.

THE LORDS in respect of the ancient custom, preferred Culloden's infeftment upon resignation, as being prior, but declared they would sustain no infeftments to be given in time coming, but conform to the course of common law.

1671. December 15.—UPON the pronouncing of the foresaid interlocutor betwixt Culloden and Duff, it was *alleged* for Duff, That Culloden's right was fraudulent and collusive, in so far as he had not only taken the more private way of sasine by one bailie, and not by the whole Magistrates, but also that he desired the bailie and clerk to keep the infeftment secret, and suffered his brother to possess for several years thereafter, which could have no other intent but to ensnare parties to contract with his brother, standing in a visible estate of land, and that in that very time the debt was contracted; and desired that the clerk's and bailie's oath might be taken *ex officio*, for proving of these allegations. It was *answered*, That this tending to evacuate Culloden's infeftment, could only be probable by writ or his oath. It was *answered*, That the circumstances of fraud are probable by witnesses, whatever the effect may be, for therein no writ uses to be adhibited.

THE LORDS found the allegiance of collusion, as it is qualified, relevant, but as to the manner of probation, they would admit no witnesses to prove the emission of words in desiring the bailie or clerk to conceal it, but only writ, or Culloden's oath, but that they would admit witnesses for proving the other circumstances in fact.

It was further *alleged* for Duff, That Culloden's right was fraudulent, being by one brother to another, and that albeit it bears a cause onerous, it is not to be trusted, unless it be otherways proved than by the narrative of the disposition, even though Culloden would offer his oath. It was *answered*, That Culloden instructed the cause of the disposition by two bonds produced, in both which Duff is cautioner for the common debtor to him, or co-principal, and though the debtors' names be taken away, yet the witnesses' subscriptions remains, and it is offered to be proved by their oaths, and the writer's, that

these bonds were true debts resting unpaid the time of the disposition, and whereupon Duff's oath of calumny was craved, he being at the bar. It was *answered*, That there is nothing alleged to prove that the disposition was granted for satisfaction of these bonds. It was *answered*, That it behoved to be presumed that the disposition was granted for satisfaction of these bonds, they being due at the time of the subscription thereof, unless it were proved they were otherways satisfied, and Culloden offered likewise to give his oath, that these were the true causes of the disposition.

THE LORDS found the condescendence of instructing the cause onerous relevant, and Duff having acknowledged the bonds, that Culloden's oath was sufficient to instruct that the disposition was for these bonds.

Fol. Dic. v. 2. p. 233. Stair, v. 2. p. 23.

* * * Gosford reports this case :

IN a pursuit for mails and duties at the instance of the said William Duff and James Brown, as being infest in some lands and a fishing, which were held feu of the Town of Inverness, compearance being made for Culloden, who produced his interest, viz. An infestment upon the resignation of Duncan Forbes, from whom the pursuer had comprised; it was *alleged* for the comprisers, That they ought to be preferred, because their sasine, given by the Bailie whom they had charged, was made public by confirmation, subscribed by the Provost, Bailies, and Council of the burgh; and so, albeit it was posterior to Culloden's infestment, yet they ought to be preferred, because his sasine was only subscribed by one Bailie and the clerk, and was never ratified by the representatives of the Town, and so was null. It was *answered* for Culloden, That he ought to be preferred notwithstanding, because he offered him to prove, that it was the inviolable and constant custom of that burgh of Inverness, that not only as to resignations of lands held *in libero burgagio*, but as to other lands and fishings held feu of the town as superiors, the subscribing of a sasine by the Bailie, giver thereof, and the town-clerk, the same was sufficient by the custom of that burgh, without any ratification. It was *replied*, That such a custom was against law, and the general custom of all burghs royal. For trial whereof, the LORDS having given commission before answer, and the report being made, whereby it appeared, that in most of the burghs royal, charters, precepts, or the sasines themselves, upon resignations or comprisings, were all subscribed by the Provost, Bailies, and Council, and that in Inverness, it was likewise observed, by many comprisers and singular successors; but that also, many sasines and infestments, past memory of man, were subscribed only by one Bailie and a clerk, so that it was arbitrary to follow any of the ways foresaid. THE LORDS, after reading of the report, and hearing of both parties and their advocates, resumed the foresaid debate upon that point, that Culloden's right was contrary to the general custom of burghs, as like-

No 260.

wise, that it was not universally observed in the very town of Inverness, did find, That Culloden's infeftment was valid, upon these grounds, that feu-holdings, and the solemnities of conveying the same, were to be judged according to the standing and inviolable custom of the place where they did lie, and that many heritors who held feu of the burgh, held no otherwise; so that if Culloden's sasine were declared null, many other persons would suffer; and that the sasine being recorded in the register of the burgh, all parties that had to do with Duncan Forbes might know his condition; as also, that the comprising led at Duff's author's instance, no diligence was done thereupon, but against one Bailie, who did subscribe the sasine, with the clerk only, and so had no other solemnity than Culloden's sasine; neither could the posterior ratification make it valid, if it had been *ipso jure* null. But the LORDS, as to the future, did declare, that such infeftments should not be sustained as to the lands held of the representatives of the burgh royal, as superiors, but that the charters or precepts of sasine should be subscribed by the Magistrates and Council of the burgh; for which they did make an act of sederunt, and ordained the same to be publicly intimated.

Thereafter, it was *alleged*, That Culloden's infeftment was fraudulently conveyed, in so far as he had dealt with the clerk not to let the same be known, and that he suffered his brother to continue in the possession after his infeftment, and to set tacks, which was offered to be proved by witnesses. It was *answered*, That the engaging of the clerk to commit fraud *per nudam emissionem verborum* was only probable *scripto vel juramento*. THE LORDS did sustain it only probable *juramento partis*, albeit the rest of the qualities of the fraud *quæ cedunt sub sensum*, they found probable by witnesses.

Gosford, MS. No 424. p. 213.

No 261.

1671. December 21. JOHN MELROSE against ISOBEL DOUGLAS.

Found that a bond granted by a woman who could not write, subscribed by a notary and four witnesses, being assigned for an onerous cause, could not be reduced upon fraud, to be proved by the subscribing witnesses and communi-
muners.

JOHN MELROSE being assigned to a bond granted by the said Isabel to her son, Robert Gibson, for payment of 300 merks yearly during her lifetime, and having charged thereupon, she did raise suspension and reduction, upon this reason, that the bond was not subscribed by her, but by two notaries and four witnesses, she being an illiterate woman, and was never read over to her before she gave order to subscribe for her, and wherein she was circumvented, in so far as it was offered to be proved by the communi-ers who treated betwixt her and her son, that she had only condescended, and gave order for drawing the bond for payment of 300 merks during her son's lifetime only, but not her own; whereupon she desired the communi-ers to be examined *ex officio* before answer. It was *answered*, That the charger being a lawful creditor, and made assignee for an onerous cause to a bond, which was as valid by act of Parliament as if it had been subscribed by the party granter, it could not be taken