

No. 1. Blaikiter, and the matter being litigious with his author, the Lords did first by a sentence of the Outer House, and then by a deliverance *in prasentia*, upon a petition for Blaikiter, sustain this sasine, though the same allegiances were then proponed, yet it is now *res judicata*. And albeit the notary might be censurable for not exact keeping of the style and form, yet the sasine cannot be thereupon annulled.

The Lords, as before, sustained the sasine, albeit they inclined to depose the notary for altering the style; but they found that he was dead.

*Fol. Dic. v. 2. p. 362. Stair, v. 2. p. 824.*

1702. January 20.

KER of MORISTON *against* the CREDITORS of SCOT of Vogrie.

No. 2.

A sasine reduced, being upon an heritable bond, and not bearing delivery of a penny money.

IN a competition betwixt Ker of Moriston, and the Creditors of Scot of Vogrie, the Lady Vogrie producing a sasine upon the estate of Eccles, and craving preference thereon to Moriston, it was objected, the sasine was null, because, being an infestment of annual-rent, it wanted the delivery of the ordinary symbol, viz. a penny of money. Answered, It bore tradition of earth and stone on the ground of the lands, conform to the precept of sasine in all points; which relative words must take *in traditionem denarii*, that being expressly mentioned in the precept: and that the Lords have sustained sasines wanting these or the like words, 23d March, 1631, Somervel of Drum, Sect. 3. *h. t.* and 15th March, 1631, Smeton, Sect. 3. *h. t.* where the sasine of a mill was sustained though wanting the symbol of a clap and happer, because it bore these general words, *cum omni juris solemnitate*; and the reference here to the precept is equivalent. Replied, Law and custom has determined the proper symbol for every right, and without the observation thereof, has annulled the deed; and the cases cited do not meet: for there the mentioning the legal solemnities to have been used, can admit no other construction but that *omnia erant debite et solemniter acta*; whereas here the relation made to the precept of sasine, refers to the manner of holding, and clauses of reversion, and not to the symbol of a penny. The Lords, by a plurality of seven against six, reduced the sasine on this defect, and found it null; for they thought, since an annual-rent has a special characteristic, and distinguishing symbol from right of property, it ought to be observed.

*Fol. Dic. v. 2. p. 362. Fountainhall, v. 2. p. 139.*

1724. February 26.

Mr. WALTER STIRLING and other CREDITORS Adjudgers of the Estate of BALLAGAN, *against* the CREDITORS ANNUAL-RENTERS upon the said Estate.

No. 3.

The same subject agitated, but not decided.

IN the ranking of the creditors of Ballagan, a competition arose betwixt the adjudgers and annual-renters: the adjudgers had charged the superior, and the

annual-renters (the grounds of whose debts were prior to the adjudications) had all of them taken two infestments, one prior and another posterior to the adjudications.

It was objected to the infestments prior to the adjudications, that they were null, in so far as they bore to be given by delivery of earth and stone, but did not mention a penny money, which is the usual symbol of an annual-rent.

It was answered, that the infestment on the lands, by delivery of earth and stone, was sufficient to make the annual-rent real, and that there was no law requiring the symbol of a penny money as necessary. The Lord Newhall ordinary repelled the objection against the infestments, as not having a proper symbol.

This judgment was reclaimed against, but was not determined by the Lords, because the determination of the following objection put an end to the competition, and was sufficient, *ad victoriam causae*, to the annual-renters.

*2do*, It was objected to the infestments which were taken after the adjudications and charge, that they could afford no ground of preference, because, by the act 1661, an adjudication with a charge is made equal to an adjudication with an infestment thereon; for either of them makes an adjudication effectual: and no doubt an adjudication with infestment would be preferable to any posterior infestment, and therefore so should an adjudication with a charge, according to my Lord Stair's opinion, B. 2. T. 3. § 30. of his Institutions, where he says, "that after a charge no infestment upon a voluntary disposition can be granted by the superior, preferring any other vassal to the adjudger." And were it otherwise, a creditor could not secure himself against posterior voluntary rights; for what could he do more than charge the superior: and to sustain a charge as sufficient was a great advantage, for thereby both the debtor and adjudger were saved the expence of an infestment.

To this it was answered, That seeing the grounds of the debts due to the annual-renters were prior to the adjudications, it was impossible that the adjudgers could reduce them; and that seeing an adjudication with a charge is so far from being a real right, that it needs not a special service, it could not compete with an infestment taken at any time which gives a real right. As to the act 1661, it was answered, that it made a charge equal to an infestment as to one effect only, namely, to bring in the adjudgers within year and day *pari passu*, but could not be applied in a competition betwixt an adjudication upon which no infestment had passed, and an heritable security which had been made real by infestment: for if the heritable security was before the adjudication, the infestment made the debt preferable, as was found Aikenhead against Nisbet, No. 66. p. 2825.

In the next place it was pleaded, that there was not, in the present case, so much as a formal charge against the superior, there being only a charge against an apparent heir who was not himself infest, and therefore could not possibly

No. 3. grant an infeftment ; the apparent heir should first have been charged to enter, and if he refused, the next superior should have been required to enter the adjudger.

“ The Lords found, that the heritable bonds and writs in favour of the annual-renters and infefters being prior to the adjudications, the infeftments on the rights of annual-rents, though posterior to the adjudications and charges thereon, were preferable to the said adjudications.

*Edgar, p. 41.*

*Arch. Stewart* for the Adjudgers.

*Alt. Ja. Fergusson.*

\* \* Lord Kames' report of this case is No. 69. p. 2831. *voce* COMPETITION.

1725. *January 26.*

WILLIAM PRINGLE *against* DR. JOHN MURRAY of Cavens.

No. 4

IN a competition betwixt these parties, it was objected against a sasine of an annual-rent produced for Dr. Murray, that it was null, in respect that it bore not delivery of the proper symbol, but of earth and stone :

To which it was answered, That the sasine in question had been clad with possession for above 40 years ; and though it mentioned the delivery of earth and stone, yet it was said to be in manner and conform to the precept, which bore a penny money ; and in such cases the delivery of the proper symbol had always been presumed, particularly in that of Somervile against Somervile, 23d March, 1631. Sect. 3. *h. t.*

The Lords repelled the objection.

*Lord Newhall,* Reporter.

*Mackenzie,* Clerk.

*Fol. Dic. v. 4. p. 263. Edgar, p. 157.*

1729. *January.*

MARQUIS OF CLYDESDALE *against* CREDITORS OF MENZIES.

No. 5.

It was objected against an infeftment of annual-rent, that it was null, in respect that the sasine, instead of the ordinary symbol of a penny money, bore only the delivery of earth and stone. It was answered, That there is no statute fixing the symbol of sasines ; that the delivery of sym-