

1741. November 17. KING of Newmilns *against* INNES of Dunkinty.

No 32.

The first charge on an adjudication renders it the first effectual one, though the adjudger do not offer to the superior a charter and a year's rent.

IN the ranking of the creditors of Castlehill, the question occurred between King of Newmilns and Innes of Dunkinty, which of them should be found to have the first effectual adjudication, and be entitled to his expenses from the other adjudgers? The one who had the first adjudication, and who thereon had charged the superior, but without offering a charter to be signed by the superior and a year's rent, or the other, who, though a posterior adjudger, had obtained a charter from the superior, and thereupon was infest.

It was *argued* for the adjudger infest, That his competitor had not done exact diligence in terms of the act 1661, in respect that, without the offer of a charter to be signed, and a year's rent, the superior is not bound to comply with the charge; in so much, that such simple charge was found not even sufficient to stop the superior's casualties, 9th February 1669, Black *contra* French, No 30. p. 6511.

Nevertheless, the LORDS thought that no more was requisite to make an effectual adjudication, than a simple charge against the superior; and therefore found, 'The first adjudger entitled to the expenses of leading his adjudication, and charging the superior; reserving to the adjudger infest to *age* as accords against the other adjudgers for his expenses, how soon they should reap benefit by his infestment;' by saving them, for example, against the lands falling in ward through the death of the debtor.

The offer of a charter and year's rent is properly no part of the diligence, but only what obviates a reason of suspension; and the error was said rather to lie in the decision between Black and French, in that a simple charge was not found sufficient even to stay the superior's casualties, than that it should from analogy be extended to the case of a competition among adjudgers themselves.

It was further said to have been a great omission in the act 1661, that some record was not appointed to be made of the diligence to obtain infestment, whereby the lieges might have been certiorate thereof; but that as the act is conceived, requiring nothing that enters any record, and as the offer of a year's rent does not make the charge a bit the more public, there was no reason why the charge itself should not make the adjudication effectual.

Kilkerran, (ADJUDICATION.) No 12. p. 8.

** See C. Home's report of this case, No 37, p. 265. *vide* ADJUDICATION.