

SECT. V.

Competition among Rights Confirmed.

No 18.

In a case of double alienation of lands, the first being to a bride, *secundum tenorem chartæ conficiendæ*, the last, though posterior, having obtained the first confirmation from the superior, the Lords preferred the same, and found that the date of the other confirmation could not be drawn back to the date of the alienation.

1580. July 13.

LADY POLMAISE *against* TENANTS.

THE Lady Polmaise Murray wairnit certain tenants to flit and remove fra certain lands. It was *alleged* be the tenants, That they aught not to flit; because, before the wairning, they were infest and seased in the lands, and be virtue thereof were in possession of the same. To this was *answered*, That, notwithstanding of their infestment, they aught to flit and remove; because she, before their infestments, was seased in the lands be her husband in the time of her virginity *et e contemplatione futuri matrimonii*, and thereafter obtained confirmation of the same; and so her husband denuded himself, first by seasing of her in the land, *secundum tenorem chartæ conficiendæ*, had no power thereafter to infest or sease the defenders in the said lands. To this was *answered*, That albeit she was seased before the defenders were seased, yet their exception ought to be admitted be reason of the act of Parliament made in King James the Fifth's time, anent double alienation, that where there are double alienations made to sundry persons of one land, that he that gets the last alienation *titulo oneroso*, with the first receiving of the superior, either by resignation or confirmation, and possession following thereupon, shall prevail over the first private alienation, albeit it have the priority. To this was yet *answered* be Polmaise, That her sasine that was first was not private, because it was afterwards confirmed be the superior, and she obtained infestment conform to her sasine; whilk infestment and confirmation aught to be drawn back to the time of her sasine, because the same was given *secundum tenorem chartæ conficiendæ*. To this was *answered*, That it could not be drawn back, *quia obstabat interim medius obex*, whilk was the sasine and infestment given to the defenders, and it was before the Lady's infestments confirming.—THE LORDS admitted the exception of the defenders, and that in respect of the act of Parliament, and repelled the alleageance made be the Lady.

Fol. Dic. v. i. p. 194. Colvil, MS. p. 287.

No 19.

An infestment for re-

1611. January 25.

GRAY *against* PITFERRAN.

THE Laird of Parbroath, in *anno* 1608, disponed heritably the lands Gillets, &c. to be holden of the Queen. Shortly thereafter Parbroath, by contract,

bound himself to infest Pitferran in the saids lands, for his surety and relief of 3300 merks, for the which he was cautioner for Parbroath to Bogie, conform to a contract passed betwixt them thereanent; and that Pitferran would have full right and possession of the said lands at the feast of Whitsunday 1609, in case he was not relieved of his contract and cautionry before that said term; and should thereafter bruik and possess the lands, ay and while he was relieved by payment to Bogie. Which contract, betwixt Parbroath and Pitferran, contained a precept of sasine of the said lands to be holden feu of the Queen, whereupon Pitferran took sasine of the lands, and obtained his contract and sasine confirmed by the Queen in *anno* 1608 or 1609. At Whitsunday 1609, Pitferran being charged with horning by Bogie, and not relieved by Parbroath, was forced to satisfy Bogie by new security. And, at Whitsunday 1610, Pitferran is relieved by payment to him of the principal sum; and, in that same year 1610, Robert Gray's infestment of the Gillets is confirmed by the Queen; and, because Pitferran paying Bogie at Whitsunday 1609, and not being relieved till Whitsunday 1610, a question arises in a double pointing, raised by the tenants against Pitferran and Robert Gray, both pretending right to the farms *anno* 1609. Robert Gray *alleged* he should be preferred, because he was infest and in possession, and that Pitferran could have no right, his infestment being only an infestment of warrandice depending upon a distress, and not relief, whereupon no declarator was obtained thereupon; next, Robert Gray's sasine was anterior to his adversary's. It was *answered*, That his infestment, which was conditional in the beginning, was purified and made absolute by the failzie committed by Parbroath in not relieving of him at Whitsunday 1609, at which time his infestment became prior and perfect. And albeit Robert Gray's sasine was anterior to his, yet both their infestments being granted to be holden of the superior, and Pitferran's, being first confirmed, was most perfect, and that no impediment stayed that Robert Gray's confirmation could not be drawn back to his sasine. At last, Robert *alleged*, that Pitferran could pretend no farther interest but his not relieving of the sum for a year, seeing he was relieved at Whitsunday 1610 of the sum which should have been paid at Whitsunday 1609, and so his interest being only the profit of 3300 merks for one year, he was content to refund to him the said interest *cum omni causa*. Pitferran *answered*, That his infestment not being an annualrent, but proper wadset of the lands, he would not alter his security and enter in paction. In respect whereof, the Lords found Pitferran's allegiance relevant. Thereafter Robert Gray *alleged*, That Pitferran could have no right, because albeit he was not relieved at the day appointed, yet he was not distressed, at least he had not made payment for his own relief and Parbroath's. Pitferran *answered*, and offered to prove, That he, being charged by Bogie, was forced to make him new security, and took an assignation to his brother. It was *replied*, That the assignation kept the debt above Parbroath's head, and so he was not relieved, and consequently Pitferran could

No 19.
 lief of cautionry becomes perfect, if the failzie be committed, and it being first confirmed, it will prevail against an anterior infestment confirmed thereafter.

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 astructed 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