

1685. *December.*Sir DANIEL CARMICHAEL *against* JOHN WHYTFOORD of Miltoun.

No 39.
Whether the
possessor of
a sasine is
bound to see
it booked as
well as mark-
ed?

SIR JOHN WHYTFOORD gave in his sasine upon his retour, as heir to his father, within sixty days, to the register of sasines in the shire of Lanark, and got it out marked by the keeper, registered such a day, month, and year, in such a page of the register; but the same was never booked; and Sir John having wadset his lands to Sir Daniel Carmichael, who, at Sir John's decease, obtained a decret of removing against the son; the decret was suspended upon this reason, That Sir John the author's sasine was not registered conform to the act of Parliament 1617, which requires marking and booking.

Answered; That the possessor of a sasine is only bound to see it marked, the booking being the duty of the register and his deputes, whose omission ought not to prejudice the party, but only make themselves liable for damage and interest. And it were unreasonable to put men's securities in the power of the keeper of a register, who might neglect the booking, or commit error in the transcribing, or fraud, by abstracting of books, or tearing leaves out of them. And it is notour, that the filling up of the books is usually half-a-year behind the presenting and marking.

Replied; The act of Parliament is opposed, which prescribes the way and manner of registration by marking and booking the sasine; so that if the sasine be not booked, it cannot be said to be registered; and if it were otherwise, the act of Parliament would not answer the design of notifying incumbrances to the lieges by registers, seeing no person could know what sasines are marked; and any inconvenience in the annulling sasines not booked within sixty days, is but small in comparison of what would be the consequence of sustaining sasines not booked; and the omission to book a sasine given in to be registered is but a rare case. And the reason of marking seems to be, that at first view the sasines produced may be presumed to be registered, and be readily found out in the register; *2do*, The act of Parliament contains an exception, That sasines null for want of registration, in prejudice of third parties acquiring real rights, are good and valid against the granter, and his heirs and successors, *jure successionis designative*, in respect those who represent the granter would be liable in the warrandice of the disposition without the sasine. And Sir John, the father, having been infeft, his son could not be served heir to the grandfather, seeing it would appear to the inquest by the sasine, that Sir John died *ultimo sasitus ut de feudo*; and so could not be passed by.

Duplied; By the words *successors* we are to understand universal successors in a sense equivalent to heirs; and an apparent heir must be looked on in the same condition as singular successors; so that if the father's sasine had been reduced upon any lawful ground, the son might serve heir to the grandfather; and the act of Parliament declaring sasines null for want of registration, is

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equivalent to a reduction, since the father cannot be considered to have died *vestitus*, a null sasine being no sasine.

No 39.

THE LORDS delayed to give answer to the point, If the not booking imported a nullity of the sasine ; but found the suspender to fall under the exception of successors, as being an apparent heir, who had no disposition and infeftment from his father.

Harcarse, (INFESTMENT.) No 603. p. 167.

1687. *June.*

The Lord SOUTHESK, Supplicant.

No 40.

THE LORDS allowed a principal bond that had been registered against the Lord Annandale after he was dead, to be got out of the register upon the delivering back the extract. Here it was not known if the bond was booked.

Harcarse, (REGISTRATION.) No 834. p. 239.

1688. *February.*

A. *against* B.

No 41.

A SASINE taken in Zetland being sent in a ship to be registered in the general register at Edinburgh, and the ship being driven to Norway by stress of weather, so as the sixty days were elapsed before she arrived at Leith ; application was made to the Lords for an order to mark and book the sasine within sixty days of the date.

THE LORDS ordained the sasine to be taken in, and marked of the date of the ingiving, seeing it might be preferable to infeftments posterior to the registration.

Harcarse, (REGISTRATION.) No 835. p. 239.

1692. *December 27.*

BROWN *against* PORTERFIELD of Comiston and OLIPHANT.

THE LORDS had found the Commissaries had committed no iniquity in sustaining Brown's adjudication ; for they found it was before the out-running of the year and day of the liferent-escheat, and so would be preferable to the donatar ; and that it needed no infeftment to give it preference, because it was within year and day of the first adjudication whereon infeftment had followed ; and so it came in *pari passu* with it, and had a share by communication of its infeftment ; and that their neglecting to allow and record it for the space of nine or ten years did not debar it of the foresaid privilege ; because the not recording, by the act 1661, did only give it a posteriority to others adjudging after it, but

No 42.

Effect of registration on the *pari passu* preference of adjudication.

The want of allowance is no nullity.