No 46. February 1698, Bancrieff and the Creditors of Park, No 44. p. 13560. THE LORDS considered the case here, and some thought the current of decisions not so consonant to the express terms of that 31st act; yet the LORDS observed an exception reserved in the end of it, but prejudice of any further diligence by infeftment or charging the superior; so that, if one procure himself infeft without an allowance, it is as valid as if he had been allowed, the design whereof is only to obtain infeftment. THE LORDS would not resile; but, by the plurality, sustained the adjudication as they had oft done before.

Fol. Dic. v. 2. p. 332. Fountainhall, v. 2. p. 101.

1703. *December* 17.

Sir WILLIAM KEITH of Ludwhairne *against* SINCLAIR of Diren.

No 47.
A competition betwixt a purchaser from a son infeft on a precept of *clare* and the sasine not registered, and a purchaser from the daughter also infeft upon a precept of *clare*, as heir to her father, passing by her brother, and her infeftment registered. The purchaser from the son preferred.

IN the mutual reductions and competitions for mails and duties of certain lands in Caithness, which sometime belonged to one John Keith, it was *alleged* for Sir William Keith; That the said John Keith being common author and undoubted heritor of the lands in question, he dying, left only two children, Hugh and Elizabeth Keiths; and Hugh, his only son, being infeft upon a precept of *clare constat*, disponed to Nathaniel Keith, from whom Ludwhairne has right by progress, and thereby is undoubtedly preferable to Diren, whose father, after the decease of Hugh Keith, obtained a right from Elizabeth the sister, and procured a precept of *clare constat* to her, as heir to John Keith her father, passing by Hugh Keith, Ludwhairne's author, as appears by his progress produced.

It was *answered* for Diren; That John Keith being the common author, he, as deriving right from the daughter, was preferable to Ludwhairne; because the brother's sasine was never registered, and so was null as to him, a third party, acquiring from the sister *bona fide*, and for an onerous cause.

It was *answered*; The act of Parliament anent registration of sasines does not concern the case in question; for, 1*mo*, The narrative of the act bears, that, considering the great hurt sustained by the fraudulent dealing of parties, who having annailzied their lands, concealing former rights made by them, &c.; so that the act was only designed to regulate double rights flowing from a person truly infeft; whereas here there is no competition of real creditors deriving right from the brother infeft; 2*do*, The certification of the act in case of not registration, is not simple nullity, but only that the sasine shall make no faith in prejudice of a third party acquiring a perfect and lawful right to the lands and heritages in question, without prejudice always to use the said writs against the maker thereof, his heirs and successors; so that the brother's sasine was sufficient against the sister, and those deriving right from her, who could not pass by her brother, and enter heir to her father.

No 47.

It was *replied* for Diren; That he is clearly in the case of the act of Parliament, which, in the statutory part, is general, and requires registration of all sasines, and the certification operates in his favour, because he is a singular successor, noways representing either Hugh or Elizabeth; and the registration of sasines being instituted for the security of purchasers, finding no sasine in the register in favour of the brother, he was *in bona fide* to acquire from the sister, and serve her heir to her father.

It was *duplied;* The brother's sasine unregistered was good against the sister, who was the heir of blood, and ought to have served heir to her brother; and her passing by her brother, puts her in no better condition, than if she had served; for it is unquestionable, if she had become heir to Hugh, the want of registration of his sasine would have been no defect in the conveyance; or, if she had offered to serve heir by an inquest, Ludwhairne's author, who had denuded Hugh, might have compeared and produced Hugh's unregistered infeftment, and thereby would have stopped the service; but Diren having the management of the sister, who was never worth a sixpence, he first gets her to interdict herself, then procures a precept of *clare constat*, as heir to her father *periculo petentis*, then obtains a disposition, which, in the designation of the lands, mentions them to have been sometime possessed by her brother Hugh; so that he could not pretend ignorance, either of Hugh's survivance, or his possession; and, whatever might have been pretended in favour of a purchaser *bona fide*, if he had acquired from the sister retoured and infeft as heir, and in peaceable possession; yet cannot be pretended for Diren, who at once made up her title and his own, to pass by the brother and his successors.

"The Lords preferred Ludwhairne, as deriving right from the brother."

Fol. Dic. v. 2. *p.* 331. *Dalrymple, No.* 42. *p.* 54.

*** Forbes reports this case:

1705. *July* .—Sir William Keith, as deriving right from Hugh Keith, who in the year 1620 was infeft upon a precept of *clare constat*, as heir to John Keith, his father, in the lands of Half Scotland and Harland, having raised an action of mails and duties against John Sinclair of Diren, the defender founded upon a right to these lands flowing from Elizabeth Keith, sister to Hugh, the pursuer's author, who was likeways infeft upon a precept of *clare constat* as heir to John the father, passing by the brother, which was alleged to be preferable to the right granted by the brother, in regard his sasine was never registered, and the defender had been near 30 years in possession.

Answered for the pursuer; Elizabeth could not be entered heir to her father as dying last vest and seised, when Hugh her brother stood truly last infeft, though his sasine was not registered; since an unregistered sasine is declared by act of Parliament to be good against the granter's representatives.

No 47.

THE LORDS preferred Ludwhairne's right; and found the defender liable for the rents since citation, with allowance of public burdens paid for the lands during that time.

Forbes, p. 22

1705. *November* 29.

THE CREDITORS of EARNESLAW *against* MR ALEXANDER DOUGLAS.

No 48.
Lands being disponed by a father to his son, whose sasine was not registered, nor he in possession, and, after his decease, the daughter, as heir in special to her father, having disponed the lands to her husband, the creditors adjudging from the husband were preferred to the creditors of the son of the daughter adjudging from him, as lawfully charged to enter heir in special to his mother's brother, and thereby competing upon the said disposition with the unregistered sasine, upon which no possession had followed.

JOHN GREDEN of Earneslaw, dispones the said lands to John Greden his son, with certain burdens, redeemable upon payment of 20 merks; whereupon the son is infeft, but the sasine never registrated. The son dying before his father, Grace Greden, as the only surviving child, becomes heir served and retoured to her father, without taking notice of John her brother, whose infeftment attained no possession; and she, by contract of marriage, disponed the lands to Mr James Douglas, from whom they were adjudged. The Creditors having now right to that adjudication, pursue a declarator of their right, and of the expiration of the legal,

It was *alleged*, for Mr Alexander Douglas: That he had adjudged the same lands from Robert Douglas, son of the marriage betwixt Mr James, and Grace Greden, as lawfully charged to enter heir in special in these lands to John Greden his uncle; whereby he being in the place of the said John Greden younger, had right to the disposition and infeftment of the said lands, granted to him by his father, which were never redeemed; and albiet Grace Greden, the sister, by her service, had right to the superiority, because John was only infeft base, yet the property belonged to John, and the pursuer as in his place.

It was *answered*, John's sasine was not only base, but never registrated, and so null in competition with creditors and third parties, for onerous causes, by act of Parliament 1617.

It was *replied*, unregistrated sasines are good against the granters and their heirs by the same act; and though the Creditors of Earneslaw be third parties, yet in this case they can only be considered as heirs, because the right they found upon is a voluntary disposition made by Grace Greden the heir, in favours of the husband, whereby she dispones them *talis qualis*, according as she herself had right, which resolved only into a right of superiority; and her husband, or his creditors, can be in no better condition than she was in before she disponed. It is true, if John Greden her father had made a posterior disposition, whereupon infeftment had followed duly registrated, or if he had been denuded by his creditors, the posterior rights or diligences would have been preferable to this son's infeftment; but seeing the posterior right flows from his heir, her singular successors *utuntur jure auctoris*, and whatever can be ob-