

- No 12. Whitekirk *contra* Ednem, (No 33. p. 25. *voce* COMPENSATION.—RETENTION.) But the LORDS found nothing but a public registrate writ could here militate against a singular successor. (See LEGAL DILIGENCE. See PAYMENT.)
Fol. Dic. v. 1. p. 46. Fount. v. 2. p. 253.

1714. June 8.

PATRICK M'DOWAL of Freugh, *against* WILLIAM FULLERTON of that Ilk, and His TUTOR.

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A creditor in an infestment of annual-rent, conveyed it by assignation; but before intimation of infestment by the assignee, discharged it. This discharge was found *funditus* to extinguish the infestment.

ROBERT FULLERTON of Craighall, having granted an heritable bond, for 2000 merks, in the year 1635, to William Fullerton, his brother, upon which he was infest in the year 1691, William, 4th February 1702, granted a bond for the like sum of 2000 merks, to Patrick M'Dowal of Freugh, containing an assignation and disposition to the foresaid heritable bond and infestment, in security thereof, but without precept of fine, and procuratory of resignation. And 1st June 1706, the said Patrick M'Dowal procured from the said William Fullerton a new bond corroborating the former bond and assignation, with a precept of fine, whereupon he was infest the 22d of the said month. Robert Fullerton disposed his lands of Craighall, to the said William Fullerton, 3d June 1702; and the foresaid sum of 2000 merks was allowed out of the price, and expressly discharged.

William Fullerton of that Ilk, acquired right, by progress, to two heritable bonds, granted to his authors, by the said William Fullerton of Craighall, and cloathed with infestment anno 1704, whereof one was for 5700 merks, and the other for L. 1623:13:4.

In a ranking of the creditors of William Fullerton of Craighall, Freugh craved to be preferred to Fullerton of that Ilk, upon his right by assignation to the old heritable bond, granted by Robert Fullerton to the said William Fullerton, in the 1685, completed by infestment in the 1691, several years prior to the contracting of his competitor's debt.

Answered for Fullerton of that Ilk: That Freugh could never compete upon his assignation to that bond; because *imo*, Though infestment thereon followed, in the person of William Fullerton, before the date of the bonds, whereupon Fullerton of that Ilk doth compete; yet before Freugh was infest upon his assignation thereto, or that assignation made public any manner of way, by intimation or possession, the debt was extinguished by payment; or, which is the same thing, by the lands being disposed by Robert Fullerton, the debtor, to William Fullerton, the creditor; and that sum allowed and discharged as part of the price: *2do*, *Esto* the debt had afterwards subsisted in the person of William Fullerton, yet it would accrue to Fullerton of that Ilk, and support his infestment, which were complete long before any infestment in the person of Freugh: It

being a principle in law, that whenever any person grants an infestment, whether of property, wadset, or annualrent, all the rights, standing in the person of the granter, accrued to, and may be made use of by the obtainer of the infestment for the support of his right.

Replied for Freugh: 1^{mo}, Robert Fullerton's disposing the land to his brother, in this manner, and giving allowance of the 2000 merks bond, as a part of the price, was a fraudulent contrivance betwixt two brothers; which could not prejudice him, a lawful creditor, to whom the bond had before been assigned and delivered: 2^{do}, Albeit his right was not completed in his own person by infestment, yet William Fullerton's becoming proprietor of the lands, could not hinder Freugh, at any time after, to infest himself; and, whenever he took infestment, that infestment behoved to be drawn back *ad suam causam*, viz. the old infestment 1691: For the disposition of the infestment to him, though without a precept, gave him *jus ad rem*, upon which he might adjudge the said infestment from the disponer, or his heirs, at any time. Nay, William Fullerton's becoming proprietor, is so far from extinguishing his right, that it rather strengthens it, as being *jus superveniens auctori*: 3^{tio}, Freugh, by William Fullerton's assignation to him, of Robert Fullerton's heritable bond, in February 1702, became creditor to Robert Fullerton; and so hath interest upon the act of Parliament 1621, to reduce the disposition of the property granted by the said Robert to William, in June thereafter, as a fraudulent contrivance betwixt two brothers, to his prejudice; the bond to which he was assigned being thereby extinguished: 4^{to}, Fullerton of that Ilk's authors, to whom the bonds he founds upon were granted, being conjunct persons, viz. cousin-german to the common debtor, he ought to instruct the onerous cause of those bonds, otherwise Freugh, as creditor to the granter, can reduce them upon the act of Parliament 1621: For it is the opinion of Sir George M'Kenzie upon that act, that such relations are comprehended under the general of conjunct persons; and the narrative of the said statute bears, *Children, kinsmen, and allies*. Now, it cannot be denied, that cousins-german, are near kinsmen; and our law doth not allow them to bear witness for one another.

Duplied for Fullerton of that Ilk: 1^{mo}, 'Tis not here the question, whether William Fullerton acted fraudulently with regard to Freugh or not, in first assigning him to the heritable bond, and then extinguishing it, by receiving payment; or, which is the same thing, getting the sum allowed to him by the debtor, as a part of the price of the lands. Freugh may recur against William Fullerton, upon the warrantice, in the manner he thinks proper. But this is certain, that Freugh having only a personal right to the heritable bond and infestment, William Fullerton was not thereby denuded: And so the bond was extinguishable by payment made to him, the only person standing infest; which is agreeable to the nature of redeemable rights; 4th February 1671, Wishart *contra* Arthur; Stair, v. 1. p. 714. *voce* PAYMENT. Stair, Inst. b. 2. t. 5. It is true, if the question were betwixt Freugh and William Fullerton, his cedent, William Fullerton might be debarred, *personali objectione*,

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from founding upon this extinction : But that says nothing as to Fullerton of that Ilk, a singular successor nowise answerable for William Fullerton's deeds, who cannot be prejudged by his granting a bond of corroboration to Freugh, as if the old infestment had been extinguished four years after the rights in favour of Fullerton of that Ilk were completed : So that *2do*, Seeing payment made to, and a discharge, by the cedent, before the assignee is infest, doth extinguish the right, any infestment taken, or title made up by the assignee thereafter, is but a null extinguished right that can have no effect against singular successors and creditors, whose rights are lawfully completed by infestment. *3to*, Freugh did not become creditor to Robert Fullerton by the assignation, the same having never been intimated or completed by infestment, before granting the disposition : For until infestment, the right, as hath been noticed, stood in the person of William Fullerton, who being therefore creditor the time of the disposition granted by Robert to him, that disposition is not reducible upon the act of Parliament 1621 ; it being a deed in favour of the creditor, and not to his prejudice. *4to*, Cousins-german are not reckoned in law conjunct and confident persons : And it is a mistake to say, that our practice doth not allow such to be witnesses ; nor doth Sir George M'Kenzie rank them in the number of conjunct and confident persons. He indeed states the question as debateable, and sets down some arguments that might be used for their being reputed conjunct persons, as he frequently does in other cases, contrary to his own opinion ; but does not give it as his judgment, that the statute should be so far extended. And my Lord Stair, Instit. tit. REPARATION, § 15. is plainly of opinion, that it should not, when he says, *the act has been extended to uncles and nephews, where other circumstances concurred.* Now, if other circumstances be necessary to make it extend to uncle and nephew, how much less can it be extended to cousins-german, without any such concurring circumstances, or the least suspicion, except what arises from the relation.

The LORDS preferred William Fullerton of that Ilk, according to the dates of his sasines ; and repelled the grounds of preference pleaded for M'Dowal of Freugh.

Eol. Dic. v. 1. p. 46. Forbes, MS.

REQUISITION OF CHARGE, when Requisite in order to Diligence. See LEGAL DILIGENCE.

After DILIGENCE by ADJUDICATION, &c. Whether the ANNUALRENTER can recur to his real Right? See RIGHT in SECURITY.

ANNUALRENTER uplifting more than his annualrents, Whether the Surplus will impute in payment of the Principal? See PAYMENT.