

1795. February 4.

IRVING and JOPP, and their Attorneys, *against* JOHN COLLINS.

No 119.

The right of the Crown-rentallers of Lochmaben may be transmitted by infestment.

THE rentallers of Lochmaben obtained their rights from the Crown at a remote period. Their lands now form part of the barony of Lochmaben, the property of the Earl of Mansfield. In an action of declarator brought by them against one of his Lordship's ancestors, it was found, (28th December 1726), 'That they have such a right of property in these lands, that they cannot be removed, and that they may dispone their right to extraneous persons,' *voce* TACK.

James Ker, senior, one of these rentallers, granted an heritable bond to John Collins, over part of the lands contained in his rental-right. Infestment followed on the precept of sasine in the bond, and the sasine was duly recorded.

James Ker, senior, afterwards conveyed his rental-right to James Ker his son, who again sold it to John Forsyth.

Messrs Irving and Jopp, creditors of James Ker, junior, having arrested the price of the subject in Forsyth's hands, he brought a multiplepounding, in which he called both Collins and Irving and Jopp, who also brought a reduction of Collins's bond and sasine. These actions having been conjoined, Irving and Jopp.

Pleaded; The proper and customary mode of creating a burden upon rentals, is by a wadset-bond, which, when followed by the attestation of a notary, certifying that the creditor was put in real possession of the lands, completes the security. The infestment taken by Collins is inept, because the granter of the heritable bond not being infest himself, he could not give a warrant for infesting another person. It is besides clear, that rentallers, whose rights are derived from a subject, cannot grant an infestment, because they may be removed at pleasure; 4th July 1781, Mackenzie against Gullen and others, No 118. p. 10310. ; and although the rights in question have been, by the decision in 1726, declared permanent and transmissible, they are in other respects of the same nature.

Answered; The granter of the heritable bond had the substantial right to the lands vested in his person, and as the law has laid down no precise form for the transmission of his right, there is nothing improper in his adopting the usual mode of conveying landed property; see Sinclair against Couper, *voce* VIRTUAL. Proprietors frequently grant feudal conveyances of subjects, particularly of patronages, which they themselves hold allodially.

The Lord Ordinary 'repelled the reasons of reduction, assoilzied the defender, and, in the multiplepounding, preferred the said John Collins.'

On advising a reclaiming petition, and answers, it was

Observed on the Bench; Although the subject in question be burdened and transmitted without infestment, yet it is capable of being feudalized.

The mode which has been followed in the present instance, is even preferable to the ordinary method of a wadset-bond and notarial instrument, in so far as it obliges the grantee to put his sasine on record, which renders the transaction public.

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The Court unanimously 'adhered.' See TACK.

Lord Ordinary, *Ankerville*. For Irving and Jopp, *R. Hamilton*. Alt. *Williamson*.
Clerk, *Pringle*.

R. D. *Fel. Dic. v. 4. p. 71. Fac. Col. No 153. p. 350.*

Clauses in Tacks, real or personal. See TACK.

Assignment to mails and duties, no real right. See COMPETITION.

Pension when real, when personal? See PENSION.

Faculty to burden, when made real? See FACULTY TO BURDEN.

Fraud good against the purchaser's creditors. See FRAUD.

Disposition with the burden of debts, with regard to questions betwixt the grantor's creditors and acceptors. See PASSIVE TITLE.

Payment or intromission, if good against a singular successor in an infertment of annualrent? See ANNUALRENT, INFERTMENT OF.

See APPENDIX.