

1739.

BILLERS, &c.

v.

DUKE OF  
NORFOLK,  
&c.

SIR WILLIAM BILLERS, *et alii*, *Appellants* ;  
THE DUKE OF NORFOLK, *et alii*, *Respondents*.

1st May, 1739.

INFESTMENT.—GENERAL BURDEN.—FRAUD.—LITIGIOUS.—

A disposition to a creditor, and infestment thereon, set aside, having been granted during the currency of a term, which the debtors had taken to produce a progress in an action of adjudication which had been raised against them at the instance of another creditor.

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[Elchies, *voce* Adjudication, No. 21 ; *voce* Service and Confirmation, No. 8.]

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THE respondents, who were lessees of certain No. 50. lead mines in Argyleshire, granted a sub-lease thereof (January 1730,) to the York Building Company for the term of twenty-five years, at the rent of L.3600 a year, and the company bound themselves to infest the respondents on their estates in security of the rent.

In 1731, it became necessary for the company to borrow the sum of L.100,000, and in the proposals published for raising this sum by subscription, it was declared that the estates of the company should be made over to trustees, for behoof of the subscribers, when the sums should be advanced.

The sum of L.72,785 was then subscribed for, and the company directed their secretary to subscribe for the remaining L.27,215, for the behoof

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of such persons as should afterwards agree to advance money upon the proposed security. This sum was afterwards subscribed for, and advanced to the company, who granted bonds of L.100 each to the amount of L.100,000.

In these circumstances, the respondents raised inhibition against the company, and, at the same time, executed a summons of adjudication against them; but before decree was obtained, the company took a term to produce a progress, with a view to a special adjudication which was then in use.

While this term was current, the company granted a disposition to the appellants (the trustees for the creditors who had advanced the money) of all their lands and estates within Scotland, with precept and procuratories, neither of which enumerated the lands; but the precept bore a general warrant to infest in all their lands in Scotland.

Oct. 1732.

Infestment was accordingly taken in all and singular the lands and tenements acquired by the company in Scotland,—and, in order to supply the defect, the notary, in extending the instrument of seisin, after reciting the act of the bailie in execution of the precept, proceeded to recite that to all the lands, &c. on which infestment had been taken, the company had right by infestments of such and such dates; but the infestments themselves were not produced or read by the bailie himself in giving infestment.

The company not having produced, as craved for by them, the term was circumduced, and decree of adjudication was pronounced, upon which the respondents obtained a charter from the crown, and were infest in the estates belonging to the

company ; and, in the same year, they were again infeft in virtue of the original obligation granted by the company in their favour in 1730.

The respondents then instituted an action of reduction, improbation, and declarator,—on the ground that the conveyance in favour of the appellants was a fraudulent contrivance to invalidate their security, (having been granted after the sub-lessees had taken a term to produce in the action of adjudication at the respondents' instance,) and that the disposition, with the infeftments following thereon, being voluntarily granted in prejudice of the respondents, who were prior and lawful creditors, ought, therefore, in virtue of the act 1621, c. 18. to be set aside. The action was also founded upon the objection to the generality of the terms of the precept and infeftment.

The Court, (12th Jan. 1739,) upon the report of the Lord Ordinary, “ Sustain this reason of re-  
 “ duction, (viz.) That there is no enumeration of  
 “ the lands, lordships, and baronies belonging to the  
 “ said company in the precept of sasine in the said  
 “ disposition, nor in the disposition itself, which was  
 “ the only warrant produced and published for tak-  
 “ ing the said infeftments; and they also sustain  
 “ this reason of reduction, That while the pursu-  
 “ ers were in the course of obtaining an adjudica-  
 “ tion against the company, which was obstructed  
 “ by the company taking a day or term to produce  
 “ a progress, (which they did not do, but suffered  
 “ the term to be circumduced,) the said company  
 “ did, while that term was current, grant the dis-  
 “ position in question, in prejudice of the pursuer's  
 “ diligence by adjudication, founded on anterior

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“ and lawful debts contracted by the company in  
 “ the year 1730, by which the company was oblig-  
 “ ed to infest the pursuers in an annualrent of  
 “ L.3600 ; and find the same relevant to reduce the  
 “ disposition aforesaid ; and they also find, that the  
 “ company could not set up the sum of L.27,215,  
 “ subscribed, in consequence of their order, by  
 “ their secretary Henry Strachey, nor secure the  
 “ same by infestments, to the prejudice of the pur-  
 “ suers, their anterior and lawful creditors, &c. ;  
 “ and they find the pursuers preferable to the  
 “ mails and duties of the company’s estates, at  
 “ least to the extent of L.3600 yearly, &c. and  
 “ they reduce and decern accordingly.”

Entered  
Feb. 19, 1739.

The appeal was brought from this and several interlocutors of the 26th of July, 1737, and 7th of February, and 17th of November, 1738.

Judgment,  
May 1, 1739.

After hearing counsel, ‘ It is ordered and adjud-  
 ‘ ged, &c. That so much of the several interlocu-  
 ‘ tors complained of in the appeal, whereby the  
 ‘ Court of Session sustained the reasons of reduc-  
 ‘ tion following, viz. “ That while the said plain-  
 “ tiffs were in the course of obtaining an adjudica-  
 “ tion against the company, which was obstructed  
 “ by the company’s taking a term to produce a pro-  
 “ gress, which they did not do, but suffered the  
 “ term to be circumduced, the said company did,  
 “ while that term was current, grant the disposi-  
 “ tion in question, in prejudice of the plaintiff’s di-  
 “ ligence by adjudication, founded on an anterior  
 “ and lawful debt, contracted by the company in  
 “ the year 1730, by which the company was bound  
 “ to infest the plaintiffs in an annualrent of L.3600  
 “ sterling, and that the company could not set up  
 “ the sum of L.27,215 sterling, subscribed in con-

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“ sequence of their order by their secretary Henry  
 “ Strachey, nor secure the same by infeftment, to  
 “ the prejudice of the plaintiffs, their anterior and  
 “ lawful creditors,” and also so much of the seve-  
 ‘ ral interlocutors, whereby the said Court of Session  
 ‘ found, “ That the plaintiffs were preferable to the  
 “ mails and duties of the company’s estates of  
 “ Marischall, Southesk, and Linlithgow, at least  
 “ to the extent of L.3600 sterling yearly, being  
 “ the annual rent in which the company was oblig-  
 “ ed to infeft the plaintiffs, in virtue of the con-  
 “ tract in the year 1730 aforesaid, until the com-  
 “ pany’s rights to these estates shall be completed  
 “ by infeftment therein, reserving to themselves  
 “ then to consider whether the plaintiffs’ prefer-  
 “ ence shall continue after such infeftment shall be  
 “ taken or not ;” and also so much of the said in-  
 ‘ terlocutors, whereby the Court of Session hath  
 ‘ reduced, decerned, and declared accordingly, be  
 ‘ affirmed ; and as to the other reasons of reduc-  
 ‘ tion mentioned in any of the said interlocutors,  
 ‘ and sustained by the said Court of Session, it is  
 ‘ hereby declared, That the said last mentioned  
 ‘ reasons of reduction were not necessary to be ad-  
 ‘ vised, or determined in this cause ; and therefore  
 ‘ it is hereby further ordered and adjudged, That  
 ‘ so much of the said several interlocutors as relates  
 ‘ to the said last mentioned reasons of reduction,  
 ‘ be reversed, without prejudice to any of those  
 ‘ points, when the same shall become necessary to  
 ‘ be determined.’

For Appellants, *Ch. Areskine, A. Hume Campbell.*

For Respondents, *James Erskine, W. Murray.*