1753. *February* 3.

WILLIAM DOUGLAS, Esq; and THOMAS BELCHES his Trustee, *against* MRS ISOBEL DOUGLAS of Kirkness.

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A charter was granted, containing a clause of return. A subsequent charter was obtained without limitation. The estate was possessed on this unlimited title for more than forty years, by the person who was heir to the original limited right. He was found to have acquired an unlimited fee.

WILLIAM Earl of Morton, in 1595, granted a charter of the lands and barony of Kirkness, to be holden of himself, in favour of George Douglas his second son, and the heirs male of his body; whom failing, to return to the Earl of Morton and his heirs; and upon this charter the said George Douglas was infeft.

In 1607, William, then Earl of Morton, granted another charter of the foresaid barony to the said George Douglas, then Sir George, and therein designed the Earl's uncle, and to his heirs and assignees whatsoever; upon which charter Sir George was also infeft.

Archibald Douglas, son to the said Sir George, never made up any titles to the estate; but William Earl of Morton having acquired right to certain apprisings affecting the same, in December 1638, a contract was entered into betwixt the said Earl and Robert Lord Dalkeith his son, on the one part, and William Douglas, son to the said Archibald Douglas, on the other; whereby it was agreed, in consideration of the lands of Foussuquhie and others, which the said William Douglas obliged himself to dispone to the Earl, that the Earl should renounce the apprisings which he had affecting the estate, and should grant a charter of the said lands and barony 'in 'favour of the said William Douglas, and the heirs male of his body; whom 'failing, to return back again to the said Earl and Lord, their heirs, successors, 'and assignees.' And the contract contains a clause, 'declaring, that it shall 'be noways leisum nor lawful to the said William Douglas of Kirkness, or his 'heirs male foresaid, to sell, annailzie, or dispone, the foresaid lands and barony 'of Kirkness, or any part thereof, to and in favour of any person or persons 'whatsomever, directly or indirectly, in hurt, prejudice, or defraud of the said 'noble Earl and Lord, and their foresaids, anent their succession of the same, 'failing of the heirs male lawfully begotten of the said William Douglas his 'own body, as said is, in manner above-written.' And the said William Douglas obliged himself to accept from the Earl a precept of *clare constat*, as heir to his grandfather Sir George in the said lands, to infeft himself therein, and to resign the same in the Earl's hands, and take a charter from him in terms of the contract.

In pursuance of this contract, the Earl, 6th April 1639, granted a charter to the said William Douglas of the said lands, containing the clause of return and prohibitory clause above-recited; upon which William Douglas was infeft in said year.

The said William Douglas was succeeded by his son, also named *William*; who having died in 1682, was succeeded by his son Sir Robert Douglas.

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Some time before that period, Sir William Bruce had acquired right to the greatest part of the Earl of Morton's estate; and amongst others, to the superiority of the lands of Kirkness; and in 1686, Sir Robert Douglas obtained from Sir William a precept of *clare constat*, for infefting him as heir to his father in the said lands of Kirkness.

In 1687, Sir Robert resigned the said lands in the hands of Sir William Bruce, in favour, and for new infeftment to be granted to him, 'and his heirs 'and assignees whatsoever;' and Sir William thereupon granted a charter of resignation, containing a *novodamus;* upon which Sir Robert was infeft 19th April 1689.

Sir Robert was succeeded by his son General Douglas; and in 1741, the General disponed the said lands and barony of Kirkness, failing heirs of his own body, in favour of Mrs Isobel Douglas his eldest sister, and the heirs of her body, whom failing, to his other sisters, and the heirs of their body *successive*. After his death, the said Mrs Isobel Douglas obtained a charter of resignation from Sir John Bruce the superior, in virtue of the procuratory in her brother's disposition, and was thereupon infeft 22d November 1748.

William Douglas, grandson to William Douglas the second of Kirkness, and heir male to him, failing the said Sir Robert Douglas, and the issue male of his body, being advised that he, as heir male to the estate of Kirkness, was entitled to quarrel and set aside the settlements made in favour of the said Mrs Isobel Douglas, as contrary to the original grant of the estate in 1595, and to the said contract and charter following thereupon in 1639; he, for that end, granted a trust-bond to Thomas Belsches; who thereupon brought an adjudication of the barony of Kirkness. The said Mrs Isobel Douglas compeared and opposed the adjudication upon her titles to the barony; but agreed that her right should be tried in this state, as if the pursuer had completed his adjudication, and brought a reduction of the settlement in her favour.

It was *pleaded* for the defender, *first*, That the clause of return contained in the original grant in 1595, was allenarly in favour of the Earl of Morton and his heirs, and established no right or claim to the heirs male of Sir George Douglas; but as that return was discharged by the charter 1607, and the lands given absolutely to Sir George, his heirs and assignees whatsoever, there is now no place to plead on the original grant. That it is still more evident, the return, stipulated by the contract 1638, gave no right to the heirs male of William Douglas; the only parties contractors, in the year 1638, were the Earl of Morton and his cousin William Douglas of Kirkness, then unmarried: It was the Earl only who stipulated the return in favour of his own heirs and assignees, and took care to guard it by a prohibitory clause, that it should not be lawful to William Douglas or his heirs male, to dispone the lands in prejudice of the Earl and his foresaids. Here there was no *jus quæsitum* to the heirs male of William Douglas, nor were they made creditors by the clause: William Douglas might the next day have disponed the lands in favour of the Earl, and so might his

No 38. heirs at any time have disponed them to the Earl's heirs, or disponed them in any way they pleased, if the return was not thereby prejudged, for they were under no limitation in favour of the succeeding heirs male, but only in favour of the Earl, his heirs and assignees.

2*dly*, The clause of return contained in the contract 1638, and charter which followed upon it in 1639, was provided to the Earl of Morton, *his heirs, successors, and assignees*, the superiors of the lands; and therefore it can be considered in no other view than as a stipulation of that return which, by the ancient feudal law, was understood to take place in favour of the over-lord, upon the failure of the vassal's heirs called by the investiture; and if so, the family of Morton was divested of any claim they could have upon this clause, at the same time that they were divested of the superiority of the estate; and this right of return went alongst with the superiority of Sir William Bruce and his heirs, who gave it up, and discharged it, by granting the charter 1687 to Sir Robert Douglas, *his heirs and assignees whatsoever.*

3*dly*, As the lands have been possessed far beyond the years of prescription, viz. since 1687, upon titles descendible to heirs whatsoever, all claim which could be competent, either to the heir male of the family of Kirkness, or to the Earl of Morton upon the contract 1638, is thereby excluded, and Sir Robert Douglas and his heirs thereby acquired right to an absolute and unlimited fee, in terms of the 12th act of Parliament 1617, which declares, That infeftments followed by uninterrupted possession for 40 years shall not be liable to challenge, at the instance of any person whatsoever, upon any ground, reason, or argument, competent in the law.

It was *answered* for the pursuer to the *first* defence, That where a father gives a land estate to a younger son, limited to the heirs male of his body, and upon the failure of such heirs, to return to himself and his right heirs, in such a case it is understood, that the estate in effect remains with the family, as an appendage, for the second son, and the heirs male of his body; and as the grant is so limited by the donor, it can be diverted to no other use, but must go to the heirs male of the body of the second son, while any such exist; and upon their failure, must return again to the family. Such was the grant of this estate by the charter 1595; and though in 1607 Sir George Douglas obtained a charter with a different destination, yet it is apparent, that this last settlement was disapproved of by all parties interested therein; and the grant of the barony of Kirkness was, by the contract 1638, and charter thereupon, restored to its original tenor, and to the original intent of the grant. As the right competent to the granter and his heirs cannot gratuitously be defeated, so neither can the right competent to the heirs male of the younger son; it was for their sakes, and for supporting them as a separate family, that the lands were originally granted. This was the primary intention of the common parent, and which he is presumed to have had principally in his eye, and to wish that it might continue for ever; and the return is a secondary and unwished-for event; and there-

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fore, if the law has secured the right of succession in this last and undesired event, because of the intention of the granter, it must, *a fortiori*, secure the succession to the heirs male of the second son's body. It is most absurd to suppose, that remote substitutes, the *personæ minus delectæ*, should have a stronger and greater interest in an estate, than those who are confessed the *prædelectæ personæ*, and who have the prior and preferable right, by the consent of all parties. Besides, if the estate were not kept in the channel of heirs male, how should the granter's heirs know when these failed, and when their own right commenced?

To the *second* defence, *answered*, That, by the law of Scotland, the superior did not succeed to the feu upon failure of the vassal and his heirs, but the King did, and still does succeed as *ultimus heres*, Stair, Inst. lib. 3. tit. 3. *in fine*; and the clause of return to the Earl of Morton and his heirs, has no connection with the superiority; it is but a right of substitution, which would have had the same effect, supposing the Earl of Morton had disponed the lands of Kirkness to his son, not to be holden of the Earl, but of the Earl's superior; and consequently the Earl of Morton's being divested of the superiority of these lands, does not affect the succession of the vassal, neither in so far as conceived in favour of the heirs male of the vassal's body, or, upon their failure, in favour of the Earl of Morton and his heirs; for that right did not belong to the Earl as superior, but as donor of the lands for a particular purpose.

Sir William Bruce could well acquire from the Earl of Morton the right of the superiority of Kirkness, which was vested in him; but could not acquire a distant hope of succession, which had not opened to the Earl, and possibly never may; and therefore Sir William Bruce had no power to discharge the return, or alter the course of succession. But, had the vassal's heir male failed when General Douglas died, the Earl of Morton would have been entitled to have served heir of provision to the General, and to have obtained an infeftment from the General's superior.

To the *third* defence, *answered*, There were not here *termini habiles* for prescription; it is implied in the notion of a positive prescription, that one who is *non dominus* acquires the property by possession, upon a proper title; but it is not intelligible how Sir Robert, or his son, could acquire a right of property in this estate by the positive prescription, when they had the right of property antecedently vested in them; and as the estate has been uniformly possessed since the date of the contract by heirs male descended of the body of Sir William Douglas till the 1747, it cannot be maintained that the right of the heirs male is cut off by the negative prescription. Sir Robert and his son could not, in their character of heirs of line, prescribe against themselves in their character of heirs male; no prescription could commence till the lines divided, which only happened in 1747; and, till that period, the remoter branch of heirs male were *non valentes agere*, and therefore no prescription could run against them. The remoter branch had no access to look into the charter-chest of the prefer-

No 38. able branch, or to know upon what title they possessed the estate; and, though they had known of the charter of resignation 1687, and infeftment following upon it, yet it was neither competent nor necessary for them to have brought a reduction of the infeftment. Sir Robert, and the heirs male of his body, had a preferable title to the estate, and the remoter branch, the pursuer's grandfather, could have had no benefit by such an action; for, suppose he had so far prevailed as to obtain a decreet, finding that the infeftment was irregular, and that the same ought to have been granted to Sir Robert, and the heirs male descended of the body of his grandfather Sir William Douglas, yet this would not have hindered Sir Robert to have made a new resignation in his superior's hand, in the same terms with the former; and this could only have been set aside by a second action, and so on without end: Our law does not authorise, much less require, such actions to be carried on, where the pursuer has no established interest, and where the effect of the action must be so ineffectual.

It was *replied* for the defender, in support of the *first* defence, That it is in vain for the pursuer to argue upon the clause of return contained in the original grant, for that clause was discharged by the charter 1607; so that, at the time of the contract 1638, the estate of Kirkness was no appendage, nor burthened with a clause of return, but was the absolute and unlimited property of William Douglas; and therefore the return stipulated by the contract can have no stronger effect, than if such a contract had been entered into with a stranger who never had right to the lands. And it is evident, that the parties to the contract 1638 had no intention to create a limitation in favour of the heirs male of William Douglas; for the prohibitive clause, by which the return is guarded, is allenarly in favour of the Earl and his heirs, 'That it shall not be lawful 'to William Douglas, or his heirs male, to sell, &c. in prejudice of the Noble 'Earl and his foresaids.' And, though the heirs male of William Douglas be called before the Earl of Morton and his heirs, and that the substitution in favour of the Earl could not be gratuitously defeated, yet it will not from thence follow, that any right was created to the heirs male; for instances of this kind often occur, particularly in marriage-settlements, where land estates are provided to the heir male of the marriage, whom failing, to the heir male of an after-marriage, whom failing, to the heir female of the marriage then contracted: The heir female in such a case has a right which cannot be disappointed by the father; but though the heirs male of a second marriage are preferred to her, and as it were *in conditione positi* before her right can take place; yet it is undoubted, that the father is under no limitation in favour of such heir male, but, on failure of his male issue of the first marriage, may give his estate to any of the sons of the second marriage he has a mind.

Replied in support of the *second* defence, That the right which the Earl of Morton and his heirs had by the clause of return, was altogether different from an accidental hope of succession, which depends entirely on the will of the proprietor; for the Earl was creditor by the clause, and was entitled to name

his own heirs and assignees, who were to be benefited by it. And whatever may be the present constitution of our law, it is certain that the return was no other than what anciently was understood to be implied in the superior's right, *Feudorum, lib.* 1. *tit.* 14. § 2.; and is observed to be so by Craig, *lib.* 2. *dieg.* 17. § 11. It is sufficient for the defender to show, that as such was the ancient feudal law, so it was still considered as our law at the date of the contract, and for long after it by some of our ablest lawyers; Dirleton, title, LIMITATION OF FEES; and therefore the return provided by the contract 1638 must be understood to be connected with the superiority, and transmitted *simul et semel* with it to the purchaser. No 38.

Replied, in support of the *third* defence, That nothing can be a more proper effect of prescription than to cut off burdens or limitations, under which third parties might have claimed against the possessor or his heirs-general; and to render the titles of his possession for ever free and secure from all challenge on such pretence in any time coming: In such a case, the heir male is not excluding his own right by prescription, for he had no right by these prescribed titles, but what he has more amply, by those on which he founds his possession; and he is not here prescribing against himself, but against the persons interested in the limitation.

Neither can it be pretended, that the remoter heirs male were *non valentes agere*, so long as the prior line of heirs male subsisted; for if the substitution to heirs male be understood to make them creditors, (which must be supposed in this argument,) then it was certainly competent to any heir male to challenge an alteration of the investitures to his prejudice as soon as it was made, and to require it to be restored to the ancient channel. The remotest substitute may even declare an irritancy against the present possessor; and much more may he insist that the possessor rectify any breach he has made in the investitures, contrary to the obligation he was under. How soon the alteration was made, there was *actio nata* to every heir who was creditor under the former settlements, to correct the innovation made by the present heir; and the remoter heir might have raised a process and used inhibition or any other diligence to secure his right. But if the present heir continue to possess the estate upon unlimited titles, without challenge, for 40 years, the fee becomes absolute and unlimited. If this were not the effect of prescription, there would be no dealing in safety with any proprietors of lands, had they possessed upon the most unexceptionable titles for centuries backwards; for still it is possible, that in some of their more ancient titles, there might appear burdens conceived in favour of third parties which had never been expressly discharged, or of which the discharges could not be recovered. But as the defender's argument is founded on the express words and meaning of the statute, so it has been supported by the Lords' decisions as often as the case has occurred, particularly in the case of Innes of Auchlunkart, observed by Fountainhall, 31st December 1695, *voce* PRESCRIPTION; and in the case of Macdougal of Mackerston, decided 12th

No 38. July 1739, IBIDEM; in both of which it was found, that an estate possessed during the years of prescription, upon absolute and unlimited titles, devised in favour of heirs whatsoever, became thereby an unlimited fee descendible to such heirs, and free of the limitations formerly conceived in favour of heirs male, although those who possessed the estate, during that period, were the heirs male as well as the heirs of line.

'THE LORDS repelled the reasons of reduction, and assoilzied from the process of adjudication.'

N. B. In the above case, most of the Lords who spoke were for sustaining the first defence; they gave no opinion on the second, and were unanimously for sustaining the third; and therefore a question was not put on each defence, but the interlocutor worded in the general terms above-mentioned. *See* PRESCRIPTION.

Reporter, *Lord Woodhall.* Act. *Advocatus, Rō. Craigie, J. Grant, et alii.*
Alt. *Ferguson, And. Pringle, Bruce, et alii.* Clerk, *Gibson.*

B. *Fol. Dic. v.* 3. *p.* 217. *Fac. Col. No* 59. *p.* 87.

*** This cause was appealed:

THE HOUSE of LORDS ORDERED that the interlocutor complained of be affirmed.

1759. *July* 31.

CAPTAIN ROBERT JOHNSTON, *against* GEORGE MARQUIS of ANNANDALE, and his TUTOR-IN-LAW.

No 39.
Clause of return in a vassal's charter, is not good against an onerous purchaser.

UPON the 25th January 1596, Sir James Johnstone, predecessor of the Marquis of Annandale, granted a feu charter of the lands of Willies, to James Johnstone, therein designed *his servant*, 'et hæredibus suis masculis de corpore 'suo legitime procreandis.'

This charter bears, as its inductive causes, the improvement of the country by feuing, certain sums of money advanced, and faithful services done and to be done.

It contains the proviso following: 'Quod si defecerint hæredes masculi 'procreandi de corpore præfati Jacobi legitimi, eo casu dictæ terræ, cum pertinentiis, erunt, et revertentur, ad dictum Dominum Jacobum, Militem, præfatis hæredibus suis et assignatis mansuræ in perpetuum.'

The lands were possessed by James Johnstone the vassal, and his descendents, in terms of this charter; and the investiture was renewed by three several precepts of *clare constat*, in which the clause of return was repeated.

Upon the 21st September 1709, John Johnstone, who stood infeft upon a precept of *clare constat* containing this clause, disponed the lands of Willies,