

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 infest upon a precept of *clare constat* containing this clause, disposed the lands of Willies,

with consent of Sarah Baillie his spouse, to Robert Johnstone of Wamphray ; and at the same time disposed the lands of Stenrieshill in special warrandice, with absolute warrandice both as to the principal and warrandice lands. The disposition bears to be granted for a certain sum of money, as the adequate value of the lands disposed.

Captain Robert Johnstone, the grandson of Robert Johnstone of Wamphray, the purchaser, being served heir *cum inventario* to his father and his elder brother, took out letters of horning, in terms of the late act of Parliament, against the Marquis of Annandale and his tutor-in-law, and charged them to grant him a charter in terms of the disposition granted to his father by their vassal.

The Marquis, and his tutor, obtained a suspension of this charge ; and *pleaded*, *imo*, That by the clause of return, the vassal was laid under a limitation, and could not dispose the lands in prejudice of the superior's right.

*2do*, That such a proviso was certainly effectual to prevent gratuitous alienations ; and there was no proof, in this case, that the disposition to Wamphray was granted for value.

*3tio*, If there were such proof, yet Wamphray was not in *bona fide* to make the purchase, when the vassal's right appeared upon record to be limited.

*4to*, At any rate, if the superior was at all bound to grant a charter to the disponee, it ought to contain the proviso in the charter 1596, by which the lands might return to the superior, in case of the after failure of heirs male of the vassal's body.

*Answered, imo*, A superior is considered as absolutely denuded of the property by a grant to a vassal, and the heirs male of his body. The vassal, under such a grant, can alienate at pleasure ; the right is descendible to his heirs male collateral ; and, upon failure of heirs male, the right will not return to the superior, but will devolve to the Crown as *ultimus hæres*. The superior's claim, therefore, in the present case, must depend entirely upon the clause of return, which can have no stronger effect in his favour, than it would have had between parties not standing in the relation of superior and vassal. In all such cases, if the clause of return was not inserted for a valuable consideration, it is defeasible at pleasure ; and here the vassal appears to have paid a price for the feu, and must have agreed to this clause out of mere favour.

*2do*, If it had even been inserted for a valuable consideration, yet it could only bar gratuitous deeds ; and here the sale to Wamphray was made for full value : The conveyance to him mentions this ; it is granted with consent of the vassal's wife ; it is granted with absolute warrandice ; and it disposes other lands in real warrandice.

*3tio*, The clause contained in the vassal's right, could not occasion any doubt or *mala fides* in the mind of the purchaser ; because the import of the clause was only to prevent gratuitous alienations.

No 39.

4to, The superior cannot insert in Captain Johnstone's charter any proviso, that the lands shall revert to him upon the failure of the heirs male of the body of the former vassal; because such clause would be inconsistent with the right of the vassal to sell the lands: A purchase of lands which was to continue only during the subsistence of the heirs male of another family, would be no purchase at all. If a change of the vassal is at all admitted, the limitations which were personal to the vassal and his family, must, when that change happens, fly off.

'THE LORDS found, That the suspenders were obliged to grant a charter to the charger, and his heirs and assignees whatsoever; and therefore repelled the reasons of suspension.'

Reporter, *Lord Colston.**Act. Fergusson.*Alt. *Sir Da. Dalrymple.**W. 7.**Fol. Dic. v. 3. p. 218. Fac. Col. No 194. p. 347.*

1762. December 9.

GEORGE-JAMES DUKE OF HAMILTON and his TUTORS, and DUNBAR EARL OF SELKIRK against ARCHIBALD DOUGLAS of Douglas, Esq; and his TUTORS.

No 40.

A party became bound in his son's contract of marriage, to infest him and the heirs-male of his body in certain lands; and failing heirs-male, the lands so provided to return to the granter and his heirs-male and of tailzie. The son was prohibited from selling, &c. without consent of his father. Found, that neither the clause of return nor the prohibitory clause disabled the heirs of the granter from gratuitously altering the succession appointed by the contract.

WILLIAM Earl of Angus, in the marriage contract of his eldest son William Lord Douglas with his first wife, daughter of Lord Paisley, settled the estate and earldom of Angus upon Lord Douglas, and the heirs male of his body; whom failing, on the Earl's younger sons, successively, and the heirs male of their bodies; whom failing, the other heirs male of the Earl's body; whom failing, the Earl's heirs male whatsoever, bearing the surname of Douglas, and the arms of Angus; upon which contract, charter and infestment followed, *anno 1602.*

William Lord Douglas, who, upon the death of his father, became Earl of Angus, obtained in 1633, the dignity of Marquis of Douglas, to him and his heirs male. Of the foresaid marriage he had issue one son, Archibald Lord Douglas, and three daughters.

After the death of Lord Paisley's daughter, Marquis William intermarried with Lady Mary Gordon, daughter of the Marquis of Huntly, by whom he had issue three sons. Of these, William, the eldest, having married the heiress of the family of Hamilton, was created Duke of Hamilton, and the present Duke of Hamilton is the lineal descendent of that marriage. The two younger branches are extinct.

In 1630, Archibald Lord Douglas, Marquis William's eldest son, was married to Lady Ann Stewart, sister of the Duke of Lenox; and in the contract of marriage with her, the Marquis, then Earl of Angus, upon a narrative that the sum of L. 48,000 Scots had been paid to him, as the said Lady's portion, 'became bound to infest and seise, by charter and sasine, *titulo oneroso*, in due