No. 3.

3. § 38; Bankt. B. 4. Tit. 24. § 7.; Erskine, B. 4. Tit. 1. § 14.; 22d February 1793, Tod against Thomson*.

The Lord Ordinary assoilzied the defenders.

The Court were divided in opinion. Some Judges were favourable to the claim, on the ground that the granting of the precept implied warrandice from fact and deed, and that the object of the action being merely pecuniary reparation, it was competent against the present defenders.

But a great majority of the Judges were of an opposite opinion. This was founded partly on the action being considered as penal against the defenders, and partly on a complex view of the whole circumstances.

The Lords, on advising petitions, with answers, by two consecutive interlocutors, "adhered."

Lord Ordinary, *Balmuto.* Act. *Craigie, D. Douglas.* Alt. *Hope.* Clerk, *Pringle.*

D. D. *Fac. Coll. No. 237. p. 534.*

*** This cause was appealed. The House of Lords ORDERED and ADJUDGED, that the interlocutors complained of should be affirmed.

1808. *June* 17.

MAGISTRATES of ABERDEEN, *against* JOHN BURNET of Countesswells.

No. 4.

A singular successor of the vassal, in a feu, on payment of one year's rent to the superior, (a royal burgh,) has a right to demand a charter to himself and heirs whatsoever, though the charter of his author was to heirs male, burgesses of that burgh, with a clause in the reddendo, that they should perform burgh services, and

IN the year 1764, the town of Aberdeen granted a charter of the lands of Countesswells to George Chalmers. This charter was in an ancient form. Accordingly it conveyed the lands 'to George Chalmers merchant in Edinburgh, burgess of Aberdeen, his heirs male and assignees, burgesses, brethren of guild, and actual indwellers within the burgh of Aberdeen, using and frequenting the trade and interchange of merchandise within the same,' &c. And in the *reddendo* it declared, 'That the said George Chalmers, his foresaids, shall be subject, and subject themselves, to the courts, suits, and jurisdictions of the Magistrates of this burgh; and that they shall perform and give due obedience to the officers and governors of the same, conform to the customs of the citizens and inhabitants thereof; and that it shall not be in the power of the said George Chalmers, or his foresaids, for the future, to enjoy two lands, or two fishings, cruive, or whole nets salmon fishing, holden of us at one and the same time; and that the said lands and others above

* Not reported. In that case, the heir of a notary was sued for damages on account of a blunder in a notorial instrument, executed by his father thirty nine years before. The Court gave judgment against him. But a petition against this interlocutor was appointed to be answered, and the case, it is believed, was compromised.

No. 4. that the fee should not devolve on the feminine sex.

'mentioned, with the pertinents, shall nowise devolve to the feminine sex, upon 'any law or pretence whatsoever,' &c.

George Chalmers sold these lands to Mr. Burnett, who, without getting an entry from the superior, transmitted his right to his son John Burnett. George Chalmers died; and the town of Aberdeen brought an action of declarator of non-entry against John Burnett. He offered to enter, and to pay one year's rent as a singular successor, but demanded a charter with a destination to himself and his heirs whatsoever. This the Magistrates refused to grant, unless, in addition to the usual allowance of one year's rent for entry, he would pay another year's rent as a fine or composition for this change from the old form of the charter of the vassals in these lands.

The interlocutor of the Lord Ordinary was, 'Finds, that if the defender, 'John Burnett, requires a charter to a different series of heirs from those con-'tained in the former investitures, he must pay the two years rent demanded 'by the pursuers.'

The defender reclaimed. On advising his petition with answers, the interlocutor of the Court was, 'Alter the interlocutor reclaimed against, and find 'that the petitioner, John Burnett, is entitled to be entered as a singular succes-'sor in the usual manner, on payment of the composition of one year's rent 'only.'

The pursuers reclaimed; and their petition, with an additional petition, was answered.

Argument for pursuers.

The pursuers admit that a singular successor has, by the act 20th Geo. II. a right to demand, on payment of one year's rent, a charter to himself and heirs of line, though his author had a charter with a destination to heirs male; and the reason is, that a superior has no interest in the form of a mere destination.

But the clauses in the investiture of Countesswells do not contain a mere destination; they are conditions of the feu. Under these express conditions, the town are authorised to grant feus of their lands by their own charter from Queen Mary in 1555; and accordingly have universally inserted them in all their feu charters; nor has any of their vassals ever pretended to get quit of them without the consent of the town. In these conditions the town have a valuable interest; and at any rate they are part of the feudal contract essentially affecting the right of the vassal. Singular successors, therefore, must take that right as it is, and cannot expunge the conditions of it without the consent of the superior. Stair, B. 2. Tit. 2. § 10.—Bankton, B. 2. Tit. 3.—Ersk. B. 2. Tit. 3. § 11.

These clauses do not fall under the act 1st Geo. I. C. 54, because that act, which was made after the rebellion 1715, related only to personal services of a warlike nature, that gave feudal authority to superiors. This was found in the case of Sir Harry Munro of Foulis against M'Kenzie, 20th June 1763,

No. 4. No. 6. p. 14497, where a condition in a charter of delivering peats was found not to fall under the act; and in the case of the Duke of Argyle against Tarbet, 5th February 1762, where a condition of furnishing a boat and rowers to the superior was found to be equally valid, No. 5. p. 14495.

Nor do they fall under the act 20th Geo. II. C. 50, abolishing wardholdings, and taking away clauses *de non alienando.* They do not prohibit, but allow the alienation of the fee under its conditions. They are of the same nature as a clause of pre-emption, which does not allow absolute alienation; yet, in the case of Sir Charles Preston against Earl of Dundonald, 20th Dec. 1781, No. 22. p. 6569, it was found that a condition of pre-emption did not fall under this act.

The case of Governors of Heriot's Hospital against Ferguson, No. 33. p. 12817, is not in point, since that went upon an interpretation of the intention of the granter of the charter; and that of Johnston against Magistrates of Canongate, 30th May 1804, was of the same description, No. 104. p. 15112.

But if the other conditions of this feu are legal and valid, that of the exclusion of heirs-female must stand along with them, since on it the others depend for their effect.

It is not, therefore, a destination, but a proper and legal condition of the feu.

Argument for the defender.

The conveyance to heirs-male, in the dispositive clause, is plainly a mere destination, made just like all other destinations in charters. There is no clause of return to the superior, nor any clause *de non alienando sine consensu superioris*, so that the fee was completely granted away, and this could be no more than a mere nomination of heirs.

The exclusion of females in the reddendo is of the same nature, and for the same reasons.

Indeed, if it had been an absolute limitation of the feu, it would have been invalid; for law never did, nor does, admit a clause simply excluding women, by which a woman purchaser or adjudger would be excluded. A clause might as well be introduced, simply excluding men or children, or clergymen, or soldiers, &c. or simply excluding all but people of a certain family, and in a certain series, which would just be a strict entail. But entails cannot be made by clauses of this sort in a reddendo.

The other clauses are quite consistent with this view.

A destination was sufficient to support them originally, for they were binding while a male was in the fee; and when they were made, (prior to the act 20th Geo. II. Ch. 56.) the destination to heirs male could not be changed without the superior's consent, for no singular successor could regularly be admitted without his consent. The act of Geo. II. took away the power of refusal, but it gave the superior a full year's rent as an equivalent. Then, to be sure, the other clauses became less applicable, but they still are not wholly inappli-

cable, if they were in their own nature valid; and it is not to be supposed that the defender, after paying a year's rent, in terms of the act of Geo. II. is to be refused a charter to himself and heirs of law, merely because there was an old destination to heirs male, and some clauses made upon the notion that this was not to be changed. No. 4.

As to these other clauses, the defender has nothing at present to do with them. He regards them as obsolete and ineffectual; but he does not insist to have them struck out of the investiture, because he thinks they are not inconsistent with a destination to heirs whatsoever.

If, however, they were of any consequence, they are invalid, and might be thrown out of the investiture,; 1*st*, Because they are noxious to the vassal, and useless to the superior; 2*dly*, Because they are abolished, at least on payment of a trifling fine, by act 1st Geo. I. C. 54.

The first reason was sustained in the case of Heriot's Hospital against Ferguson; for it is absurd to say 'the ordinary labour of the plough and spade' could be interpreted into building a huge pile of houses; and in the case of Johnson aginst Magistrates of Canongate, which could as little be justified by mere interpretation. It will be observed, too, that the pursuers themselves regard that part of their own Crown charter, which enjoined the insertion of these clauses, as nugatory, since, without asking leave of the Crown, they offered to strike them out if paid for so doing.

2*dly*, All these clauses fall under the act 1st Geo. I. C. 54. because they are *personal services*. Watching and warding, obeying Magistrates residing in the town, being of a trade, &c. are strctly personal services. The cases of the Duke of Argyle and Sir Harry Monro are not in point; for furnishing peats or a boat are not personal services, but mere prestations, having no connection with the vassal's person.

On advising this petition and answers, the Court ordered the defender to give in a minute, stating explicitly on what terms he would receive a charter from the town; and the pursuers to answer it. He gave in a minute accordingly, stating that he would be content to receive a charter similar to that of Mr. Chalmers, excepting, first, that the words, in the dispositive clause 'heirs-'male and assignees, burgesses, brethren of guild, and actual indwellers within 'the burgh of Aberdeen, using and frequenting the trade and interchange of 'merchandize within the same,' should be left out, and the words 'heirs and 'assignees whatsoever,' be inserted in their stead. And that the words of the reddendo, 'that the said lands and others shall nowise devolve to the feminine 'sex upon any or pretence whatsoever,' should also be left out. In answer, the pursuers refused to grant such a charter for one, or less than two years rent.

On again advising the reclaiming petition for the pursuers, with answers, along with the minute for the defender and answers to it, it was observed on the Bench, and seemed to be the opinion of the majority, that the whole

No. 4. clauses in the charter were ineffectual now: That, in so far as they required personal service, they fell under the act of Geo. I. and where they did not require this, but created restrictions on the vassal in the use of the fee without service to the superior, they were void on the principle of the decision in the case of Heriot's Hospital against Ferguson: That notwithstanding this, the superior might perhaps be allowed to retain the rest of these clauses in the investiture, *valeant quantum*, though it was not necessary to determine that now; but as to the destination of succession in the fee, when the act 20th Geo. II. C. 50. allowed free alienation to singular successors, under certain regulations adjusted by an act of sederunt 10th March 1756, it was impossible the superior could pretend any right to retain that, and it must be made such as the singular successor, paying a year's rent for a charter, chose to make it.

On the other hand, several Judges thought that the clauses did not fall under the act of Geo. I. and that a singular successor had no right, by the act of Geo. II. to insist for any thing more than this, that his own name should be substituted in place of the name of the former vassal, leaving the whole form of the charter untouched, or, at the utmost, that a mere regulation of the succession, which had been inserted by the vassal for his own pleasure solely, might be changed by a singular successor; but that no clause which had been put in by the superior could be taken out by the vassal, whatsoever might be its effect.

The interlocutor of Court was, (17th June 1808,) "Adhere to the interlocutor reclaimed against, in so far as to find that the dispositive clause of the charter must be to heirs and assignees whatsoever; but of consent alter their interlocutor as to the other provisions of the charter, and allow them to be inserted in the investitures; reserving to the vassal all legal objections to their validity, as accords."

Lord Ordinary, *Craig*. Act. *John Burnet*. Alt. *J. H. Mackenzie*.
Masterton Ure and *Alex. Grant*, W. S. Agents. *S.* Clerk.

M. *Fac. Coll. No. 54. p.* 199.