

' THE LORDS found, That the disposition by John Miller to Thomas Johnston was a valid and sufficient right, notwithstanding the prohibitory clause in the feu-contract and charter.'

No 70.

Act. G. Brown.

Alt. *Johnstone, Ferguson,*Clerk, *Kirkpatrick.**Fol. Dic. v. 3. p. 131. Fac. Col. No 4. p. 6.*1767. *March 6.*

ROBERT IRVING, ARCHIBALD MALCOLM, and GEORGE WALLACE, *against* MARQUIS OF ANNANDALE, and the EARL of HOPETON his Curator.

IN 1661, the Earl of Annandale granted to Francis Scot a feu of the lands of Balgray. The charter bore to be granted in implement of a former disposition, and contained the following clause: ' Et similiter, si contigerit Francisco Scot, suisque prædict. vel vendere, alienare, aut disponere hæreditarie et irredimabiliter, terras aliaque supra nominat. aut aliquam partem earundem, personæ vel personis quibuscunque; quod tunc Franciscus Scot, sui que prædicti, tenebuntur legalem et realem oblationem earundem facere in præsentia notarii et testium, ut congruit, nobis, nostrisque præscriptis, pro summa 2500 mercarum monetæ prædictæ, et hoc tanquam pro pretio et valore earundem per nos nostrosque antedictos, pro iisdem, dicto Francisco Scot suisque predictis solvend. per spatium 8 dierum ante quemlibet terminum Pentecostes, aut festi Martini præcedent. qualibet hæreditaria seu irredimabili alienatione per dictum Franciscum Scot suosque prædict. terrarum aliorumque supra mentionat. vel aliquarum partium earund. faciend. Et si contigerit nos, nostrosque prædict. non accipere dict. oblationem, tunc licebit dicto Francisco Scot, suisque præscript. vendere, alienare, aut disponere hæreditarie et irredimabiliter, cuique alio personæ vel personis, ille aut illi videbuntur expediens, easdem totas terras aliaque superscript. aut aliquam partem earund. et hoc sine consensu nostro nostrisque prædict. ad hoc impetrand. ; ac etiam si contigerit dict. Francisco Scot suisque prædict. aliquo tempore futuro, vendere, alienare, aut disponere hæreditarie et irredimabiliter cuique personæ aut personis, terras aliaque superscript. aut aliquam partem earund. sine avisamento et consensu nostro nostrisque prædict. ad eandem in scripto obtento aut ante aliquam oblationem, sic nobis nostrisque prædict. ut supra faciend. ad recipiendum et emendum eadem super pretium supra specificat. tunc omnes tales hæreditariæ et irredimabiles alienationes, dispositiones, et jura, infeofamenta, et securitates per dict. Franciscum Scot ejusque prædict. in et ad favorem dict. aliis personæ seu personis earund. terrarum aliorumque supra nominat. sic concedend, una cum hac præsentis charta nostra et infeofamento desuper sequend. postea nullius erunt roboris aut effectus, ac si eadem et hæc charta nostra nunquam data nec concessa fuissent, et nullitas ejusdem admitten. et recipiend. per modum exceptionis

No 71.

A clause in a feu right, requiring the vassal, if he should propose to sell, to offer the subject to the superior, for a certain sum, before a notary and witness, found not to fall under the statute 20th Geo. II. abolishing clauses in charters *de non alienando sine consensu superiorum.*

No 71.

‘ seu replicationis, absque ulla judiciali declaratoria, seu juris processu, desuper sequen.’

Thomas Thomson having acquired right to two adjudications led against James Scot, the son and heir of Francis, first obtained a decret of expiry of the legal, and afterwards irredeemable dispositions from James’s Representatives, upon payment to them of a certain sum of money.

Thomas Thomson having conveyed the lands in trust for certain purposes to the chargers, they insisted for a charter without the clause above narrated, as falling under the act the 20th of George II. Lord Hopeton, as curator to the Marquis of Annandale, presented a bill of suspension ; and it having been remitted to the Lord Pitfour Ordinary to discuss the reasons on the bill, his Lordship took the cause to report upon informations.

Argued for the suspender, The act the 20th of Geo. II. as it deprived superiors, without their consent, of certain rights and privileges which they had acquired either by the established law of the country, or express covenant, must be considered as a correctory law, in the strictest sense ; and therefore is not to be extended to any cases not expressly provided for. It is clear, the clause in question does not fall under the words of the statute, which only mentions clauses *de non alienando, sine consensu superiorum* ; but here there is no prohibition to alienate, without the superior’s consent. Neither does it fall under the intention. The preamble bears, that it was only meant to take away such rights as were more burdensome to the vassal, than beneficial to the superior. A prohibition upon the vassal to alienate, without the superior’s consent, was evidently of this kind ; for, however it might add to the superior’s feudal state and authority, or put it in his power to distress his vassal, it could not be the source of any real or solid benefit to himself. The clause in question is of a very different kind. By it the superior reserves to himself a substantial patrimonial interest, viz. a right to redeem the lands, in case the vassal shall incline to dispose of them. This must be considered as a part of the price originally paid for the feu, as no doubt the vassal would have paid a higher consideration for his right, had it not been burdened with this condition. Had the superior reserved an absolute right of reversion, there would have been no pretence for bringing the clause under the act ; and it cannot alter the case, that the reversion is conditional. Besides, the act was only meant to relax the connection between superiors and vassals, but the clause is by no means peculiar to that connection. It may take place in a contract between any two persons whatever, and in fact the *pactum de retrovendendo et jus negotiorum* were known in the Roman law, before the feudal customs had existence.

Contended for the Chargers, The scope of the act was not so limited as the suspenders maintain. The country had suffered much from that dependence and subjection vassals were by the ancient law kept in to their superiors. It was the purpose of the legislature to put an end to this dependence, and to discharge every clause in feudal contracts, that might have that tendency. Hence, though in the preamble, mention is only made of simple prohibitions to alienate

without the superior's consent, yet the statutory part discharges, in general, all prohibitory clauses, restraining the power of alienation. The clause in question is certainly one of that kind. Indeed, when the circumstances are attended to, the effect of it will be found the same as of a simple prohibition to alienate without the superior's consent. The price at which the vassal must offer the lands to the superior, is but 20 years purchase of the present rent. Now, as the vassal never will offer his lands to the superior, at this rate, more especially, as by wadsetting, or granting heritable securities, he may command a larger sum; so the lands never will be sold, unless the vassal, in terms of the other alternative of the clause, obtain allowance from the superior to sell them to another. The same view of the case shows, that it cannot be said, That any patrimonial interest arises to the superior from this clause, and that it is indeed, in the words of the statute, a clause more burdensome to the vassal, than beneficial to the superior.

No 71.

Replied for the Suspenders, It is clear from the statute, that it was only meant to discharge the express prohibitions to alienate without the superior's consent. Upon the charger's construction, it would even cut down the stipulations for doubling the feu-duty, or paying a year's rent upon the entry of a singular successor; for these are, in a certain degree, restraints upon alienations. The rise of the value of the land ought not to have any weight. This is accidental, and the lands might have sunk in their value, as well as risen.

'THE LORDS found the clause did not fall under the statute, and remitted to the Lord Ordinary to proceed accordingly.'

For the Chargers, *Crosbie*.For the Suspenders, *Mr Solicitor*.

A. R.

Fol. Dic. v. 3. p. 131. Fac. Col. No 62. p. 106.

1791.

CLAYTON *against* GRAHAM.

JAMES CLAYTON conveyed certain lands to his son Thomas, and to the children of a marriage; whom failing, his son's heirs by any other marriage; and failing these, to the heirs of the granter. The disposition contained a clause, that in case of the failure of heirs male of his son, and that the succession should devolve to females, a right of redemption of the lands from the heir female should be competent to the granter, and to his heirs-male, for six years after the succession thus opening to an heir female. Thomas Clayton having sold the lands, a doubt occurred to the purchaser, that as Thomas had an only daughter, and a brother of the disponent, who was his heir male, was yet alive, the right of redemption might still be competent, on Thomas's death, to this heir male

No 72.

A clause of redemption in favour of heirs male, in the event of an estate devolving on females, found unavailing against an onerous sale by the institute.