1781. *January* 23. ANDREW HOUSTON *against* JAMES FERRIER.

No 173.
Freeholders cannot reject a claimant, because his author's right is fettered by a strict entail, although the fetters appear from the titles produced.

A a meeting of the freeholders in the county of Dumbarton, in 1780, Mr Houston claimed to be enrolled upon certain lands, part of the barony of Cumbernauld. For instructing his qualification, he produced, *inter alia*, the charter of Lady Elphinstone, proprietrix of that barony; and a disposition from her, in his favour, containing an assignation to the charter and precept of sasine inserted in it, so far as respected the particular lands upon which his claim was founded.

As Lady Elphinston's charter, however, contains strict prohibitory, irritant, and resolutive clauses; to this claim it was

Objected by Mr Ferrier; The rights produced are of a precarious and resolvable nature, the charter bearing *in gremio*, that the claimant's author shall not grant such rights, and, if she attempt it, that the grants shall be, *ipso facto*, void and null.

In deciding the merits of this objection, the freeholders do not go begond their proper sphere, by judging of a progress of titles, or of the rights of third parties. *Ex facie* of the titles produced, they only convey a limited or qualified right, subject to a power of defeasance, competent, by the tailzie engrossed in the charter, to every heir of entail. On this account, this case differs from that of Campbell of Shawfield against Mure of Caldwall, No 8. p. 7783, where the entail did not appear from the production made by the claimant.

It is against the principles of the constitution, that rights entirely pendent on the will of third parties, should give a right of representation in parliament.

The statute 1681, in affirmance of these principles, renders all redeemable or defeasible estates ineffectual to create a qualification. The exception of wadsetters, and others, particularly mentioned in the act, confirms the rule as to other rights; and the statutes of Queen Anne, of 7th and 16th Geo. II. were enacted to reform the abuses which had crept into this part of our law by the devices of persons desirous of having more than their due share of the legislation.

It has been found, in numberless instances, that dispositions, reserving power of burdening, or revocation, do not establish a freehold claim. It can make no distinction, whether these powers are in favour of the granter, or of a third party; whether they are to operate upon payment of a sum of money, or without any such consideration; whether they are expressly stipulated, or arise from the nature of the transaction itself. This may be clearly collected from the terms of the oath imposed on electors by 7th Geo. II. The party called upon must swear, ' that he has come under no obligation, diricly or

indirectly, for re-disponing or re-conveying the lands, in any manner whatsoever; or making the rents or profits effectual, to the use or benefit of the person from whom he has acquired the estate, or from any other person whatsoever.' No 173.

If a person were to burthen a disposition with a clause, declaring, That, as he stood bound to convey the lands to a third party, it should be therefore lawful to the disponer's eldest son to redeem, upon payment of an elusory sum, or to set aside the right so granted; such conveyance surely could not give a right vote. Yet the present case is, in substance, precisely similar; the only difference being, that the stipulation occurs in a tailzie, and is implied, instead of being expressed.

Answered for Mr Houston; To found the present objection, it is necessary to shew, 1*mo*, That the qualities and limitations affecting the claimant's right are intrinsic, and such as the freeholders can competently discuss; and, 2*do*, That they deprive him of a freehold qualification.

The author's charter, indeed, contains a very strict entail; but the precept of sasine, which is assigned to the claimant, is fettered by no litimation, and he is not concerned with any other part of the charter.

Nor do the irritancies contained in the charter, afford a complete evidence of the defeasibility of the claimant's right. To render an entail effectual against singular successors, it must be inserted not in one charter, but in all the investitures. It must likewise be recorded in terms of the statute. The decision, Campbell against Mure, is precisely in point. Indeed, it would be highly absurd, that country gentlemen should be either obliged, or entitled, to determine the validity of entails, and their effects as to the singular successors.

Neither is a defeasible right, on that account, exceptionable, as the foundation of a freehold claim. The statute 1681 only respects rights which are subject to redemption, either of their own nature, or by the stipulation of parties; and the act of Queen Anne only extends the prohibition to 'dispositions redeemable for payment of sums of money.'

There are many rights subject to personal challenge, or defeasance, at the instance of third parties, which are nevertheless absolute in their nature, which were never intended to be the subject of discussion before freeholders, and which have been held to establish an indisputable right to a qualification. For instance, a disposition to lands, granted on death-bed, is subject to reduction *ex capite lecti*, and a gratuitous conveyance, by a person insolvent, is subject to challenge at the suit of creditors; But, was it ever heard that these faculties, competent to heirs and creditors, were assumed by a court of freeholders, as reasons for keeping from the roll the party favoured by these conveyances? In the same manner, a deed of entail founds a *jus crediti* in the substitutes, in consequence of which, they may set aside alienations in contravention of the

No 173. entail; yet these alienations are good against every person, till reduced by the heir of entail, and may be secured even against him by the positive prescription.

THE LORDS repelled the objection.

For Mr Houston, *Lord Advocate, Niel Ferguson.* Alt. *Fay Campbell.*

Fol. Dic. v. 3. *p.* 424. *Fac. Col. No* 20. *p.* 30.

1790. *February* 23. CHARLES GREY *against* CHARLES HOPE.

No 174.
In transcribing a sasine into the record, certain lands were omitted in the clause where the notary attests that delivery was given. This mistake was signified to the keeper, and he was required to insert the omitted lands, but did not think himself warranted to do so. An objection on this ground, to the enrolment of the proprietor, was sustained by the Court.

THE estate in virtue of which Mr Grey claimed to be enrolled as a freeholder in the county of Linlithgow, was partly composed of the lands of Drumbowie, which were rated in the cess-books of the county at L. 166: 13: 4.

Mr Grey had been duly infeft in these lands on 18th September 1788; and on 22d September, he received from the depute-keeper of the register the instrument of sasine, with the usual attestation on the back of it, bearing, that it had been duly recorded.

But in transcribing the instrument of sasine into the record, the lands of Drumbowie, though specified in the precept of sasine inserted in the introdictory part of the instrument, were omitted in the clause where the notary attests that delivery was given. This was not observed till 24th September 1789, and it was immediately intimated to Mr Grey's agent, who insisted, that the keeper of the record should insert the omitted lands in a marginal note, which should be authenticated by his subscription. This, however, the keeper did not think himself warranted to do. The record-book in the particular register where Mr Grey's sasine was ingrossed, is not kept by a deputy of the Lord Clerk Register, as is directed by the statute of 1617, but by a clerk appointed by the Crown. At the time when this oversight was observed, it had not been signed by the keeper.

At the Michaelmas meeting held on 1st October 1789, when Mr Grey's claim was exhibited, an objection, arising from the circumstances already mentioned, was stated by Mr Hope, one of the freeholders. And this objection having been sustained, Mr Grey complained to the Court of Session, and

Pleaded: For the purpose of intimating to the public the alienation or burdening of lands, our law has required the registration of sasines, and other writings of the same kind, and that within forty eight hours after they are presented to the keeper of the record. Nor has the interest of the private party been less the object of attention; it being provided, that within the same short space, the sasine or other writing shall be returned to him by whom it was presented, with an attestation, bearing the day, month, and year of the registration, and in what part of the record the particular writing is to be found. Act, 1617, cap. 16.