1800. *December* 2. JAMES FARQUHARSON *against* ALEXANDER KEAY.

No. 3.
The clause of pre-emption mentioned in this case, found to fall under the 20th George II. C. 50 § 10. abolishing clauses *de non alienando sine consensu superiorum.*

BY feu-charter in 1611, John Lindsay of Kinloch feued to Andrew Mitchell, his heirs and assignees whatsoever, two parts of the sunny half of the lands of Wester Kinloch.

The feu-charter contained the following clause of pre-emption in favour of the granter: "And lykwayis with the special provisione and conditione, "sicklyke to be contenit in the said charter and infeftment above written, that "in cais it sall happen the said Andro Mitchell, his areis or assignais above con- "tenit, to sell, annailzie and dispone the heritable right and tytill of all and "hail the twa paret of the said sony half of all and sundry the above specifit "landis of Wester Kinloch, with the pertinentis afore rehersit, but the "consent of the said Mr. Johne Lyndesay, his areis and successouris, and als "not offer the samyne twa part of the said sony half landis to the said Mr. "Johne and his foresaidis, afore the alienatione and disposition thereof, "for refounding and paying back againe, he the said Mr. Johne and his "afore mentioned, to the said Andro Mitchell and his above specified, "the forenamit soume of ane thousand twenty-twa pundis, thre schillin- "gis four pennyis money above written, presently payit and deliverit be "the said Andro to the said Mr. Johne and his spous; than and in that cais, "and no utherwayis, the said chareter and infeftment of fue-ferme, with the "band and obligation above-written, for making yareof, sall be null, extinct, "expirit, cassit, and of nae farder avail, strength, force nor effect, with all that "may follow thereupon."

Andrew Mitchell was infeft on the feu-charter, but the clause of pre-emption was neither inserted in his seisin, nor the seisins of his successors, for upwards of a century after the date of the feu-right.

Prior to 1729, Alexander Mitchell, the vassal then in possession of the lands, granted a disposition of them to Blair and Yeaman, upon which the superior brought an action of reduction, improbation, and declarator, founded on the above clause of pre-emption, for having the sale reduced, and the feu right irritated, on account of the infraction of its conditions.

A good deal of litigation ensued, in the course of which it turned out that Blair and Yeaman, though their disposition was *ex facie* absolute, held the lands only in security of a debt due to them by the vassal; and accordingly, the latter having resumed possession of them, the process ended in a judgment of the Court, by which it was found, (13th June 1730) "That the pursuer, though "a singular successor in the superiority, has right to the clause libelled, con- "tained in the original feu-charter, in case of alienation; and found the same "binding upon the defender, the heir of the original vassal, as to the two-third "parts of the lands, and that the same must be engrossed in the charters and "seisins of the said lands, to be afterwards granted."

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No renewal of the investiture took place till 1748. In that year, the vassal obtained a precept of *clare* from the superior, containing the following clause, which in terms of the judgment of the Court in 1730, was engrossed in the sasine that followed on it: "With this special provision and condition, that in "case it shall happen the said Thomas Mitchell or his foresaids to sell, anal- "zie, and dispone, the two-third parts of the sunny half of all and sundry the "said lands of Wester Kinloch, with the pertinents, but the consent of me, my "heirs and successors, and also not offering the same to me and my foresaids, "upon the said disposition and alienation thereof, for refunding and paying "back again by me and my foresaids, to the said Thomas Mitchell and his "foresaids, of the sum of £1022. 3s. 4d. Scots money; then, and in that case, "this presents, and the said vassal's contracts of feu-charters and rights to "the two-third parts lands, shall be null, extinct, expired, cassed, and of no "further avail, strength, force, or effect, with all that might follow there- "upon."

Thomas Mitchell, a succeeding vassal in the lands, died considerably in debt. Alexander Keay, one of his creditors to the extent of £1600, obtained decree against the heir of Thomas, adjudging the lands contained in the feu-contract for this sum. Mr. Keay afterwards brought a judicial sale of these lands and of the whole of Thomas Mitchell's other heritable property.

James Farquharson had come by progress to be superior of the lands of Wester Kinloch, and in that character presented a petition to the Court, stating that, in virtue of the clause of pre-emption in the feu-contract 1611, and the precept of *clare* and infeftment 1748, he was entitled to redeem the lands contained in the feu-contract, on payment of the original price; and therefore praying, that they should be struck out of the process of sale.

In defence against this claim, Mr. Keay, the pursuer of the sale,

Pleaded: 1*st*, The original feu-charter is anomalous and contradictory. The lands are granted to the vassal, and his "assignees whatsoever," and yet the grant is afterwards qualified with a clause which amounts to a prohibition against alienation. It would be adverse, therefore, to every sound rule of interpretation, to give effect to a solitary clause of so unfavourable a nature, in opposition to the general tenor of the deed, conferring an unlimited right; Craig, *Lib.* 2. *Dieg.* 31 § 7.

2*dly*, The 10th section of the 20th Geo. II. C. 50, abolishing wardholdings, is in the following terms: "And whereas there are certain lands in Scotland "held by the tenure of feu, *cum maritagio*, or with clauses *de non alienando sine "consensu superiorum*; it is also hereby enacted, by the authority foresaid, That "in all such holdings, from and after the said 25th day of March, the casualty "of marriage consequent upon such holdings, *and all such prohibitory clauses re- "straining the power of alienation*, be taken away and discharged; and it shall "and may be lawful, in like manner as is herein before directed in the case of "wardholding, for the respective subject superiors, or vassals in lands or heri-

No. 3. "tages that are held feu *cum maritagio*, or with *such prohibitory clauses as afore-*
"*said*, to apply to the Court of Session to modify such additional feu-duty by the
"vassal as they shall judge a reasonable recompense to the superior for such
"casualty of marriage, or prohibitory clauses as aforesaid, hereby taken away
"and discharged." Now, the restriction in Mitchell's investiture, if it is not within the very words, falls clearly within the spirit of this clause, the preamble of which bears, that its object was to do away and abolish burdens "which "were much more grievous and prejudicial to the vassal" than beneficial to the superior. For the giving effect to the clause, would operate as a severe hardship on the vassal and his creditors, while the superior could derive no benefit from it, as it is absurd to suppose that the vassal or his creditors, if they are precluded from selling to the highest bidder, would allow the lands to fall into the superior's hands for a sum, in name of price, which is not more than their present yearly rent.

3dly, The clause is ineffectual at common law. The *dominium utile* is absolutely conveyed to the vassal, and, the right of property, unless in the case of strict entails, always implies the power of alienation. Accordingly, on this ground, even offices, which strongly imply a *delectus personæ*, may be adjudged when the grant is in favour of assignees; Ersk. B. 2. Tit. 12. § 7. Even on the supposition, therefore, that the clause was not cut off by the statute, in order to be effectual against creditors, it must be fenced with all the clauses requisite in a strict entail. Now, although the clause resolves the right of the vassal, in the event of his contravention, it does not irritate the conveyance by which he may have disponed the subject to a third party, and therefore it must be good; 27th January 1744, Gairdner, No. 84. p. 15501. See also 4th January 1757, Sir William Stirling, No. 70. p. 2342.

Answered: 1*st*, There is nothing incongruous in the charter, giving the lands to the assignees of the vassal, and at the same time a right of pre-emption to the superior. The vassal is not thereby denied the power of alienation; it only obliges him, if he sells at all, to offer the lands to the superior at a certain price.

2*dly*, The 20th Geo. II. C. 50. being correctory of the common law, and having been passed to meet a particular exigency, it must receive a strict interpretation. Now, the statute strikes only at clauses by which the vassal is prohibited from selling without the superior's consent, which is perfectly different from the clause in question; by which, in the event of his intending to sell, he is obliged to make the first offer to the superior at a certain price. By the last, the superior reserves to himself a beneficial patrimonial interest, which the statute certainly did not mean to take away. It is probable, too, that the superior paid a price for it, as the vassal would give less for this limited right than he would have given for an absolute one; and although in consequence of the rise in value of lands, it is not likely that the vassal will part with the subject, in terms of the clause, yet, being a fair paction, inserted in the investure

for an onerous consideration, the superior is entitled to make the most he can of it, and has accordingly an obvious interest to insist that it shall not be defeated in the manner which is now attempted *. No. 3.

3dly, The rules by which strict entails are construed, cannot be extended to the present question. As entails are generally gratuitous destinations in favour of the granter's nearest relations, the restraint upon alienation imposed by them ought to be less favourably regarded, than where, as in this case, it arises from an onerous *bonâ fide* contract. Clauses of pre-emption were accordingly effectual by the civil law against the purchaser and his representatives; *L.* 12. *De. Præscript. verb. L.* 2. *Cod. de Pactis*; and with us, if they are engrossed in the seisin, they are also good against third parties; Bankton, B. 2. Tit. 11. § 50.; 6th March 1767, Irving against the Marquis of Annandale, No. 71. p. 2343.

Besides, if a clause, irritating the rights granted to the purchaser, were necessary, it occurs in the present instance. For the clause not only irritates the vassal's charter and infeftment, in the case of his contravening it, but also "all that may follow thereon," which last words can bear no other interpretation than deeds or obligations in favour of third parties, by which he may attempt to defeat the right of the superior.

The Court first ordered a hearing in presence, and afterward memorials.

One Judge thought, that the clause of pre-emption in question was essentially different from the general clause *de non alienando* in feudal investitures, which had been abolished by 20th Geo. II.; that this was a special covenant between a seller and a purchaser, which contained nothing illegal or *contra bonos mores*, and being duly published to third parties by its insertion in the investiture, it ought to receive full effect.

The rest of the Court, however, on the grounds stated for the respondent, were clearly of opinion, that it fell under the 20th Geo. II.; and that the case, 6th March 1767, Irvine against the Marquis of Annandale, No. 71. p. 2343. had been ill decided.

The Lords refused the desire of Mr. Farquharson's petition.

For the Petitioner, *Lord Advocate Dundas, Hay, Geo. Ross. Ch. Hope, Keay.* Alt. *W. Robertson.* Clerk, *Home.*

R. D. *Fac. Coll. No.* 202. *p.* 463.

1802. *May* 21. STEWART *against* STEWARTS.

No. 4.
What is to be understood by the term "*personal representatives*"

JOHN STEWART, victualler in London, in the year 1769, executed a settlement, leaving his effects in the first instance to his son; failing whom, one half

* Although it was necessary for Mr. Farquharson's plea, that he should contend that he had a right to purchase the lands at the price which his authors received, yet he at the same time signified his willingness to give twenty-four years purchase of the present rental.