

harsh and unequal; but that in all his practice he never saw a total reduction or setting aside of marriage articles, where marriage actually followed; and mentioned one noted case, where that was attempted without success, though there was a strong inclination to give relief to the heir, who was of the poet Wycherley, who had an estate settled on the heir, not alterable, but a power reserved to give a jointure to a wife; and Wycherley being displeased with his heir, married a young woman on his deathbed, on purpose to load his heir with the jointure, by the means or procurement of a young man, who soon after Wycherley's death actually married the widow. Yet Lord Macclesfield, assisted by Lord Chief Justice Pratt and King, with the Master of the Rolls, after solemn hearing, thought they could give no relief."—Elchies "Fraud," vol. ii. p. 168.

1754.

DOUGLAS
v.
DOUGLAS.

WILLIAM DOUGLAS, Esq. and THOMAS }
 BELCHES, his Trustee, - } *Appellants.*
 MRS ISABEL DOUGLAS, - } *Respondent.*

House of Lords, 25th Jan. 1754.

PRESCRIPTION POSITIVE AND NEGATIVE—CLAUSE OF RETURN.

—Held affirming the judgment of the Court of Session, that an estate which was conveyed to a party and his heirs-male, failing whom to return to the family of the Earl of Morton (the donor) had become an unlimited fee in the possessor, free of such clause of return, by his possessing for forty years, on a charter giving him the absolute fee thereof.

By charter, 6th April 1595, William Earl of Morton made a grant of the barony of Kirkness to George Douglas, his son, *and the heirs-male of his body*; which failing, *to return to the Earl*, his heirs, successors, and assigns whatsoever. Upon this charter infestment followed.

Thereafter George Douglas, then Sir George, in

1754.

DOUGLAS

v.

DOUGLAS.

1607.

consideration of a large sum of money as the price thereof, purchased from William Earl of Morton, grandson to the former Earl, a new charter of the estate of Kirkness, “*to himself, his heirs and assigns whatsoever, heritably and irredeemably, without redemption, reversion, or regress.*” By this charter it was understood that the clause of return in his former rights was put an end to and extinguished.

1638.

But by an after contract or agreement entered into in 1638, by the said George Douglas and William Douglas his son, (who having contracted debts which were afterwards acquired by the Earl of Morton), they and the Earl adjusted mutual claims *pro* and *con.* between them, and William Douglas further bound himself to accept of a charter from the Earl conceived in terms to the said William Douglas, and the heirs-male of his own body; whom failing, *to return to the Earl, and Lord Dalkeith his son, their heirs, successors, and assigns, and containing a clause, prohibiting to “sell, annailzie, or dispone the said lands or barony of Kirkness, in hurt, prejudice, or defraud of the said noble Earl and Lord, anent their succession to the same, failing heirs-male lawfully begotten of the said William Douglas.”*

No infestment followed upon this contract; but William Douglas made up his title to the Barony of Kirkness by a special retour, as heir to his father, and after charging the then Earl of Morton to enter to the deceased Earl, that the said Earl might be in a capacity to enter him as his vassal; he upon the Earl's failure, obtained a charter from the Masters of St Leonard's College of St Andrews, the Earl's superior in these lands, in favour of *himself, and his heirs male and assigns whatsoever, and was thus infest.*

Sir William Bruce, in virtue of several apprisings of the Earl's estates, which were afterwards assigned to him, granted to Robert Douglas, William's son, a precept of clare of the lands of Kirkness, as heir to William his father, and Sir William Douglas his grandfather. He afterwards obtained a charter from Sir William Bruce as superior, in terms as follows:—To *Robert Douglas, his heirs and assignees whatsoever*, upon which he was infeft, and by which he obtained an absolute estate in the barony of Kirkness, *discharged* of the provision of *return* in favour of the superior.

1754.
DOUGLAS
v.
DOUGLAS.
1686

The said Robert, now created Sir Robert Douglas, being involved in considerable debts, which had descended to him with the estate, did, of this date, dis-^{21st Nov.} 1721. pone the estate to General Douglas his son, and *the heirs of his body*, whom failing, to *Isabel Douglas the respondent*, and the heirs of her body; whom failing, to his other sisters successively, and the heirs of their bodies; whom failing, to his nearest heirs and assigns whatsoever.

By this disposition the estate was diverted from the line of heirs contained in the previous investiture; and William Douglas, the appellant, was the heir-male of George Douglas the first of Kirkness, entitled to succeed by that investiture, who, to try the question of his right to succeed, under the clause of return, granted a trust-bond to the other appellant, Mr Thomas Belches, who thereupon brought a process of adjudication and a reduction. The defences were, 1. That the original clause of return was discharged and altered by a charter of the next earl; and, 2. Prescription both positive and negative upon a charter to heirs and assignees in 1687.

“ On report of the Lord Woodhall, the Lords repel Feb. 3, 1753.

1754.

DOUGLAS,
v.

DOUGLAS.

“ the reasons of reduction, assoilzie from the process
“ of adjudication, and decern.”

Against this interlocutor the present appeal was brought to the House of Lords.

*Pleaded for the Appellants:—*That by the charter of 1595, the estate of Kirkness was given by the family of Morton as an appanage to the younger son, and the heirs-male of his body, and upon failure of such heirs-male, *to return* to the donor and his right heirs. And the contract of 1638 restored this estate to its original constitution, although in the interval it had been possessed free of this clause of return. By this deed William Douglas agreed to hold it as an appanage to him and the heirs-male of his body; whom failing, to return to the Earl of Morton and his heirs. Such being the import of both these deeds, and the intention by them being to settle Kirkness as an appanage to the second son and the heirs male of his body, it could not be diverted from that use, but must go to the heirs of the body of the second son while any such existed, and on their failure, it must return to the family. It was therefore not in the power of any of the heirs-male of the body of George or William Douglas gratuitously to alter the provisions in prejudice of the heirs-male of the family of Kirkness, so as to defeat this clause of return to the family of Morton; and the attempt to alter the original limitation by a pretended purchase or otherwise, made by Robert Douglas in 1687, by obtaining a charter on his own resignation to himself, his heirs, and assigns whatsoever, was ineffectual and void, by reason that the said Robert was not previously seized or infeft in the lands as heir of the former investiture.

*Pleaded for the Respondent:—*That no argument

could be founded upon the original grant of the estate of Kirkness in 1595 to George Douglas and the heirs-male of his body, with a return upon their failure to the Earl of Morton and his heirs; because that was entirely extinguished by the charter 1607, whereby Sir George did, for several large sums of money and other valuable considerations, purchase from the Earl of Morton a fee simple in the estate of Kirkness, that charter being taken to Sir George Douglas, his heirs, and assigns, without any limitation or clause of return to the family of Morton; and having upon this title enjoyed possession for more than forty years, so as to constitute an unexceptionable and unchallengeable title, in terms of the Act 1617, he was not liable to be disturbed in the same.

After hearing counsel, it was

Ordered and adjudged that the said appeal be, and is hereby dismissed this House, and that the said interlocutor therein complained of be, and the same is hereby affirmed.

For Appellants, *W. Grant, W. Murray, A. Hume Campbell.*

For Respondent, *Al. Forrester, C. Yorke.*

Note.—Unreported in Court of Session. But Elchies has this note on the case. “The Lords sustained both these defences. We agreed that the charter 1595 was effectually altered, and the clause of return discharged by the charter of 1607, and that the limitations 1638, were only in favour of the family of Morton, and not of the intermediate heirs-male, there being no *jus quæsitum*, to the intermediate heirs, otherwise Earl Morton could not have discharged it. As to prescription, I thought the charter 1687 and sasine, as they were without any limitations, a good title both positive and negative.”—*Notes*, p. 378.

1754.

DOUGLAS,
v.
DOUGLAS.