

No 22. 'THE LORDS assolizied the defender;' upon which the pursuer appealed to the Parliament, where the decreet was turned into a libel, and reviewed.' See APPENDIX.

Fol. Dic. v. i. p. 198. Harcarse, (CONTRACT OF MARRIAGE.) No 398. p. 105.

No 23.

A father had taken a disposition in favour of himself and his wife, in conjunct fee and liferent, for the wife's liferent, and to their son in fee, with a reserved faculty, to burden without the consent of either. Afterwards, he took a disposition to other lands, in favour of himself and his wife in liferent, and to their son in fee; whom failing, to the father's nearest heirs or assignees in fee. On the failure of father and son, the succession devolved on the heir of line, not of conquest.

1774. June 28.

GEORGE BOYD against JOHN BOYD.

A PART of the lands of Wester Crounerland, which some time ago belonged to William Fisher, holden of a subject superior, were, in 1718, conveyed by him to John Kid, by a disposition containing procuratory and precept; and John Kid was accordingly infeft base upon the subject.

Mr Robert Boyd, in the year 1733, purchased these lands from John Kid, and took the disposition to them, 'in favour of the said Mr Robert Boyd, and Alison Douglas his spouse, in conjunct fee and liferent, for the said Alison Douglas her liferent use allenary, and to John Boyd their lawful son, his heirs or assignees, in fee,' under a faculty therein reserved to the said Mr Robert Boyd to burden the lands with any sum of money, without the consent of his wife and son.

Another parcel of the said lands of Wester Crounerland, which belonged to one John Scot, were, in the 1749, disposed by him 'in favour of the said Mr Robert Boyd, and Alison Douglas his spouse, in liferent, during all the days of their lifetime, and to Mr John Boyd their eldest lawful son, in fee; which failing, to the said Mr Robert Boyd, his nearest heirs or assignees whatsoever.'

The dispositions to both parcels contain procuratories and precepts; and Mr Boyd, his wife, and son, were infeft in virtue of those precepts, in the above terms.

John Boyd the son having predeceased his father and mother, and there being no other children, Mr Robert Boyd the father expedite a general service, as heir to his son; and, in the 1756, he obtained from the superior a charter and precept, to the purport following; The superior gives, grants, disposes, and for ever confirms, to and in favour of the said Mr Robert Boyd, and Alison Douglas his spouse, in conjunct fee and liferent, for the said Alison Douglas her liferent use allenary; and in favour of the said Mr Robert Boyd, his heirs and assignees whatsoever, in fee, all and whole the lands, as described in the first disposition above noticed; and to which said disposition, so far as the same was competent to, or conceived in favour of the said John Boyd, now deceased, the said Mr Robert Boyd his father has now right, as heir served to him; and which lands were, by virtue of the procuratory of resignation contained in Fisher's disposition to Kid, and assigned by him to Mr Boyd, his wife and son, duly and lawfully resigned in his the superior's hands, in favour, and for new

infestments of the same, to be given and granted in favour of the said Mr Robert Boyd and Alison Douglas, in conjunct fee and liferent, for her liferent use allenary, and in favour of him the said Mr Robert Boyd, and his heirs and assignees, in fee, as heir, and come in place of the said John Boyd, his deceased son, conform to authentic instruments in the said resignation. After this, the holding and *reddendo* are mentioned; and, last of all, there is a precept for infesting Mr Boyd and his wife; upon which infestment followed.

Mr Robert Boyd died in the year 1766, leaving no issue; and upon the death of his widow, who liferented the whole, the lands, contained in the foresaid two dispositions, were claimed by John Boyd, the nephew of Mr Robert Boyd by his immediate elder brother, and, of consequence, heir of conquest to both Mr Robert Boyd and his son; and they were also claimed by George Boyd, the son of Mr Boyd's immediate younger brother, and, of consequence, the heir of line both of Mr Robert Boyd and his son.

George Boyd and his curators accordingly brought an action before the Court against John Boyd, the heir of conquest, concluding to have it found and declared, that the pursuer had the only right to the whole of the foresaid lands, and to be served and retoured heir therein; and that the defender had no right thereto.

The pursuer, in support of his claim to the *first* parcel, maintained, That, by the conception of the disposition 1733, the fee of the lands was vested in John Boyd the son; and that the father's general service, with the charter and infestment following thereupon, was sufficient to vest the right in the person of the father, as being a virtual confirmation of the base infestment in the son's person, and a precept of *clare* in favour of the father, as heir to the son; and as these lands became therefore heritage, and not conquest, in the person of the father, he having taken them up by succession to his son, the same does now devolve upon the heir of line, and not upon the heir of conquest.

With respect to the *second* parcel, it was *pleaded*; That the lands having been specially provided to the father and wife in liferent, and to John Boyd in fee, which failing, Mr Robert Boyd, his nearest heirs or assignees whatsoever, the heir-general of Mr Robert Boyd, *designative*, was entitled to take the succession, as heir of provision to John Boyd the son.

As to the *first* parcel, it was *pleaded*, on the part of the defender; That, if the fee was in the son by the conception of the disposition, it remained in *hereditate jacente* of him at this day; for that the charter of resignation, and infestment following thereupon, could carry no more than the blanch superiority, the procuratory in the disposition having remained unexecuted after the son's death; and as it was a *feudum novum* in the person of the son, and which, *quoad* the property, fell to be taken by a service, as heir to him, it behoved to devolve upon his heir of conquest, and not upon his heir of line.

No 23.

As to the *second* parcel, it was *contended*, That, as the same were conquest in the person of him to whom titles fell to be made up, the father's heir of conquest, and not his heir of line, could alone take up the succession.

THE LORD ORDINARY pronounced the interlocutor following: ' Finds, that, by the disposition granted by John Kid in the year 1733, the fee of his part of the lands of Wester Crounerland was vested in the deceased John Boyd; and that the titles, which were afterwards made up by Robert Boyd, his father, were insufficient to carry the property of the said lands, which must still be considered as *in hæreditate jacente* of John Boyd; and therefore, and in respect that the said land was a *feudum novum* in him, finds, that the property thereof does now devolve and fall to the defender, as heir of conquest to him; but finds, that the titles made up by Mr Robert Boyd, the father, were sufficient to carry the superiority of said lands; and being therefore to be considered as heritage in him, must, of consequence, devolve and fall to the pursuer, his heir of line: Finds, that, by the disposition granted by John Scot in the year 1749, the fee of his part of the lands of Wester Crounerland was vested in John Boyd, the son, and is to be considered as a *feudum novum* in him; but, in respect that the substitution in said disposition is not in favour of his own heirs whatsoever, but in the favour of the heirs whatsoever of Mr Robert Boyd, his father, which might have been different from the heirs whatsoever of the son, finds, that the pursuer, as heir of line to the father, is entitled to take John Scot's part of said lands, as heir of provision called by said substitution, and decerns and declares accordingly.'

Upon a report, the COURT unanimously (one Judge excepted, who had some difficulty with regard to the first parcel of lands, whether the taking this parcel in that way was not to be considered as a kind of *præceptio hæreditatis* in the son, and, therefore, this particular subject not to be considered as conquest, but as heritage *quoad* him, and as such to go to his heir of line) approved of the Lord Ordinary's judgment upon both points, and pronounced their own in the precise terms thereof.

Reporter, Colston.

Act. Baillie.

Alt. M^cQueen.

Clerk, Ross.

Fol. Dic. v. 3. p. 163. Fac. Col. No 117. p. 315.

No 24.

The Lords found, that where conquest lands have been sold, the *jus representationis* takes place upon the price.

1779. March 9. MARY RUSSEL and Others *against* JOHN RUSSEL.

RUSSEL of Arns, in his son William Russel's contract of marriage, disposed the lands of Arns to his son, and the heirs of the marriage. On the other part, the son obliged himself to take the rights and securities of the whole heritable and moveable conquest which he should acquire during the subsistence of the marriage to himself, and the heirs thereof; which failing, to his own