1756. *July* 28. MIDDLETON *against* FALCONER of Monkton.

THIS case is reported by *Kames, (Sel. Dec.* No. 114, *Mor.* 13,353,) and in *Fac. Coll. (Mor.* 13,355.) The debate was reported to the Court by Lord KILKERRAN in the following terms :—

"Patrick Middleton, druggist in Edinburgh, pursues James Falconer, now of Monkton, as representing Patrick Falconer his father, who purchased the estate of Hay of Monkton, at a judicial sale in 1695, for payment of a debt that was due by Hay of Monkton, on this ground, that, as he alleges, there is as much of the price yet remaining in the pursuer's hand as will pay the debt pursued for. On the other hand, it is said for the defender, That by debts paid by his father the price is already exhausted, and whether the one or the other is in the right just depends on the method of accounting. And that your Lordships may the better understand where the question between the parties lies, you will know that this estate was bought by Patrick Falconer, at a judicial sale, for the price of L.44,337, 10s. Scots, which, by his bond, he became bound to pay to the creditors having rights and diligences affecting the estate, with annualrent from Whitsunday 1695, and that at the first term of Whitsunday, Lammas, Martinmas, and Candlemas, after they should be ranked and preferred, conform to the decreet of ranking and preference to be obtained by them, with annualrent thereafter during the not payment. And in order to ascertain the preference of the creditors, Patrick Falconer brought a multiplepoinding, which was the method in those days when the sale preceded the ranking, and in this multiplepoinding, decreet was pronounced in July 1699, settling the preference of the several creditors, except ten adjudgers, who do not appear to have been ranked, whether because the price was thought to be wholly or to a trifle exhausted by the preferred debts, or for what other reason does not appear.

"These preferred creditors Patrick Falconer paid off at different periods, and got conveyances to their debts and diligences, and now pleads, That as by the conception of his bond for the price, he became bound to pay the same to the creditors at the first term after they should be ranked, so at whatever period he paid these creditors, he must, in accounting with the other creditors for the price, have credit for these sums, as a capital by him paid at the date of the decreet of ranking and preference. But this the pursuer controverts, and insists that the sums by him paid are only to be stated as a capital from the time he made that payment.

"As I could not know, supposing the defender to prevail for his method of accounting, whether there was any balance, or how much, nor supposing the pursuer to prevail for his method of accounting, could I know what the balance could be, until I saw an exact account framed, and which at any rate would be necessary before the case could be determined; I, before answer, remitted to Andrew Chalmer to consider the decreet of sale, and decreet of ranking, and vouchers of the payments made by the purchaser to the creditors ranked, and thence to frame a scheme or calculation, from which it may appear in either view, whether any or what part of the price yet remained in the purchaser's hand.

"And accordingly, Mr. Chalmer has made a very distinct report. He charges the purchaser with the price of the estate, with the interest from Whitsunday

1695 till Lammas 1699, at which term the price became payable by the bond, being the first term after the decreet of ranking and preference, which was obtained in July 1699, and then he states the calculation in two views.

" By the first view he gives credit to the purchaser at Lammas 1699, for the sums for which the creditors were ranked principal and interest, albeit not then paid, agreeable to what is pled for the defenders; and in this view the balance in the purchaser's hand comes out to be only L.252, 1s. 2d. Scots.

" By the second view he states a progressive account, charging the price and interest of it as before, and giving credit to the purchaser for the debts at the several periods, at which, by the conveyances, they appear to have been paid, agreeable to what is pled for the pursuer to be the proper method of accompting; and in this view the balance in the purchaser's hand comes out to be L.2751, 13s. 2d. Scots.

" And what occasions this difference is plain enough, when, in the first view, the whole sums for which the creditors were ranked, interest as well as principal, are stated as a capital paid by the purchaser, as at Lammas 1699; whereas, in the second view, the interest due to the preferred creditors is stated as a capital paid by the purchaser no earlier than the dates of the several conveyances made by them to the purchaser.

" The single point, then, for your Lordships' consideration is, which of these two methods of accompting are to be taken for ascertaining the balance in the purchaser's hand?

" It was ARGUED for the defender,—That a decreet of preference having been obtained by the several preferred creditors, each creditor did, from the date of his decreet of preference, become creditor to the purchaser in the sum for which he was preferred, his interest, as well as principal, in one capital, and so far as it went the purchaser was no longer debitor upon his bond to the creditors in general, but to the creditors preferred for their respective sums, for which they were preferred; and that it was, therefore, *perinde* to the not preferred creditors, at which time the preferred creditors were paid, or even whether they remained at this day unpaid; for that as these creditors were preferred for their interest, as well as principal, their sums, principal and interest, became a capital bearing interest against the purchaser, whereof had they made a present to the purchaser, the not preferred creditors should have had no title to complain.

" He further says, that the decreet of preference in the multiplepoinding, ascertaining to each creditor the precise sum to be received by him, and decerning the purchaser in payment thereof, had in those days the same effect which the scheme of division has now: And as now, after the scheme of division is made, the not preferred creditors cannot, after a distance of time, call the purchaser to account, and say that though by the scheme of division the price was exhausted, yet, as he had not paid the preferred creditors till long after, he must institute a new account with them, and have credit for the price only from the several periods at which he paid the preferred creditors; and as little could they say so to the purchaser after decreet of preference was obtained against him in the multiplepoinding, which in those days was in use.

" It was on the other hand ARGUED for the pursuer,—That this method of accounting has no foundation either in law or equity; not in equity, for that when the conveyances are looked into, it appears that he paid no more than their principal sums and annualrents counted down to the time when he paid. Had he then

paid them their debts stated as a capital at the date of the decreet of preference, he might have had, at least, an equitable claim; but as it is evident from these conveyances that neither he nor the creditors had any such notion, it were contrary to all equity to give him that advantage in accompting now, which were to benefit him by his own fault and omission to pay the creditors at the time when they obtained decreet.

" But, *2dly*, As it is not equitable, so neither is he founded in law; for there is no other alteration of the law as it stood at the time of this sale than this, that at that time the sale preceded the ranking; whereas, now the ranking precedes the sale; and, in all other respects, the case was the same before as it now is; for as now, notwithstanding the creditors be ranked, they are not entitled to their sums, principal and interest, as a capital, till a scheme of division is made; and, therefore, should a purchaser acquire the debt of a ranked creditor, he could not state that debt as a capital from the date of the decreet of ranking, nor even from the date of the conveyance to the debt, but only from the date of the scheme of division. So formerly, when the sale preceded the ranking, and that a multiplepoinding was brought by the purchaser in order to rank the creditors, yet still, even then, a scheme of division was necessary before the purchaser could state any debt paid and acquired by him as a capital, for if before such division he acquired a debt, he could, in accompting with the postponed creditors, only state it as so much paid to the creditor of principal, and so much of interest, but as a capital he could not state it till from and after the time that the division of the price was made; and for this he appeals not only to the act 1681, which appoints a division to be made, but even to the decreet of ranking itself of the creditors of Monkton, which, after ranking the creditors, bears a remit to three Lords as to sell the lands so to distribute the price. And if this doctrine is just, the pursuer is entitled to plead the point even higher than he does. He is entitled to say that as hitherto there has been no division made of the price in terms of the remit, the purchaser cannot state the sums, principal and interest, paid to the creditors as a capital even at the time he made the payment, but must still state himself only as creditor, in so much principal sum as his author was creditor in, bearing interest, it is true, but not as a capital, till the ranking be completed and a division made of the whole price, yet, says the purchaser, I do not plead the point so high; I only plead that he cannot state his payment as a capital at the date of the decreet ranking the creditors, but only as a capital from the time that he obtained conveyances from the creditors.

" There is another matter in the pursuer's information. He, at some length, states objections to several of the debts, and to Mr. Chalmer's report about them; but these objections to the accountant's report fall to have been made to me, and I would have remitted to the accountant to reform his report if I had seen cause. I do not therefore trouble you with this, as what will be entire after your Lordships shall have determined the method of accompting, which is the only point I now lay before your Lordships."

[Here Lord Kilkerran's report ends.]

The Court at first found, " that, in accounting between the pursuer and defender for the bond granted for the price of the lands of Monkton, and annualrents thereof, the defender ought to have credit for the debts ranked of the date

of the decree of ranking 1699, and that he is only liable for L.21 Sterling, (the remaining balance in his hands of the price,) with annualrent thereof, from Whitsunday, 1695." But afterwards, on advising a reclaiming petition for the pursuer, 28th July, 1756, the Lords " found that the defender, James Falconer of Monkton, as representing his father, ought to be charged with the principal sum in his father's bond, and the interest thereof; as also that he should have credit for the sums paid to the creditors of the dates when these payments were truly made, and therefore that the second scheme or calcul in Mr. Chalmer's report should be the rule of accounting betwixt the pursuer and defender."

1756. *December* 29. SIR WILLIAM STIRLING *against* THOMAS JOHNSTON and JOHN MILLER.

PATRICK LINTON feued to the defender, Miller, a small tenement. The charter contained a clause, declaring that it should not be leisome to the said John Miller to sell the subject to any person without first making offer thereof to the said Patrick Linton, or his successors, at the price originally paid for them, besides the value of improvements.

This clause was not inserted in the seasine.

Linton conveyed his right of superiority to the pursuer, Sir W. Stirling; and some time afterwards, Miller, the vassal, sold the property to the defender, Johnston. Sir William brought a reduction of the sale, on the ground that the vassal had not previously offered the subject to him in terms of the above clause in the charter.

Lord Kames, Ordinary, found " That the defender, Thomas Johnston, was in *mala fide* to purchase from John Miller the pendicle of land in question, contrary to the prohibition in the feu-right: Finds the disposition quarrelled, void and null; reduces the same, &c."

In a reclaiming petition for the defender, it was pleaded, that the clause founded on in the charter was contrary to the enactment of the statute 20 Geo. II. declaring that claims *de non alienando sine consensu superiorum* be taken away and discharged; that moreover the clause could not affect a purchaser, as it was not inserted in the vassal's seasine; and, lastly, that it was ineffectual in itself, as it contained no irritancy of the vassal's right in the event of contravention.

ANSWERED for the pursuer,—That the clause in question was not struck at by the statute, which merely regarded prohibitions to sell *without consent* of the superior, whereas here the vassal might alienate at pleasure, under the condition, only of giving the first offer to the superior at a certain price: That the statute was intended merely to take away arbitrary prohibitions against alienation, but not clauses of reversion or pre-emption in favour of the superior: That as to the second objection, it was not necessary that such a clause should be inserted in the seasine; it was enough that it was contained in the vassal's title to the land, and the charter is a part of the infeftment as much as the seasine; *Earl of Sutherland* against *Gordon, Dec.* 1, 1664, (*Mor.* 7229;) *Smith* against *His Brothers and Sisters, July* 26, 1737, (*Mor.* 10,307:) And as to the last objection, it was an-