

1793. May 17.

FRANCIS PINKERTON DRUMMOND *against* WILLIAM ABERNETHY DRUMMOND, &c.

## No 45.

A charter and sasine, altho' containing a destination of heirs erroneously expressed, will be interpreted according to their warrant, so that the original intention may not be disappointed.

WILLIAM DRUMMOND, Elder of Hawthornden, in the marriage-contract of his only son William, in 1722, became bound to infest his son, and the heirs-male of his body; whom failing, the heirs-male of his own body; whom failing, the heirs-female of his son's body; whom failing, the heirs-female of his own body, &c. in the lands of Hawthornden, and others.

The contract contained procuratory and precept. Upon the precept, William, the son, took a base infestment in 1723, and, in 1724, he executed the procuratory, by resigning the estate into the hands of the Barons of Exchequer. The instrument of resignation, and the signature authorising a charter, were both in the precise terms of the substitution in the marriage-contract. But, by a mistake in translating the charter, its dispositive clause bore, that the lands were to devolve to William Drummond, Younger of Hawthornden, 'et hæredibus suis masculis; quibus deficient. hæredibus masculis dict. Gulielmi Drummond senioris; quibus deficient. hæredibus femellis dict. Gulielmi junioris; quibus deficient.' &c. whereas, in conformity to the contract, the words *de corpore* ought to have been added to each substitution.

To this charter a general clause was subjoined, confirming 'omnia jura et evidèntia per quoscunque fact. et concess. in favorem dict. Gulielmi Drummond junioris, ejusque prædict. eorumque authorum, et predecessorum quæ ad dict. terras aliaque supra mentionat. pertinent.' &c.

Upon the precept in this charter William the younger was immediately infest. His sasine recited the clause of destination in the same erroneous manner with the charter, and he possessed upon these titles till his death in 1760, when (there being no heirs-male of the body of William the elder) Mary Barbara Drummond, his only surviving child, soon afterwards married to Dr Abernethy, was of course entitled to succeed, in terms of the marriage-contract.

The blunder in the charter was then discovered, and, in order to correct it, she, without making up titles, brought an action of declarator and reduction, which concluded, *imo*, That it should be declared, that the mistake in the charter should not affect her right, but that the substitution should proceed, in terms of the marriage-contract, and that warrant should be given to the proper officers to alter the record; or, *2do*, That the charter should be set aside *in toto*.

In this action the Court did not reduce the charter, but found it erroneous, and that the pursuer was entitled to serve herself heir of provision in special to her father, in the same manner as if the charter had been properly expedè, 27th February, 1761, No 44. p. 6934.—*Supra*.

Mrs Drummond was so served and retoured accordingly, in March 1761. She immediately took infestment upon a precept from the Chancery, proceeding on the retour of her special service; and, at the same time, lest, in consequence of his base infestment, the property should be considered as *in hereditate jacente* of her father, she, *qua* superior, granted a precept of *clare constat* in her own favour, and on this she was also infest. And she afterwards resigned *ad remanentiam* in her own hands.

Mrs Drummond executed different deeds affecting the estate, and, in particular, after the death of her only child, a disposition in favour of her husband in liferent, and Mary Ogilvie, a distant relation, in fee.

Mrs Drummond died in 1789.

The heir at law, under the marriage-contract, brought a reduction of the charter 1724, the decree of declarator, Mrs Drummond's service and retour, and of the subsequent deeds she had executed; and

*Pleaded*, The charter granted in 1724, as being inconsistent with its warrant, is, no doubt, liable to reduction, but, while unreduced, it excludes Mrs Drummond from the succession: She, therefore, died in apparenacy, and her service and subsequent gratuitous deeds are inept.

The decree in 1761 is also nugatory, the judgment being such as the Court had no authority to pronounce; for, though they may reduce the titles to a landed estate, they cannot, without doing so, allow them to be disregarded.

*Answered*, A total reduction was unnecessary. The charter was faulty only in one particular, which the Court did no more than explain, according to the warrants on which it proceeded.

The defender further stated the following defences, unconnected with the decree in 1761, and

*Pleaded, 1mo*, Mrs Drummond was served heir in 1761. Her retour is therefore secured from challenge by the vicennial prescription, 1617, c. 13.

*2do*, By the clause of confirmation in the charter, Mr Drummond's base infestment became public. His infestment, therefore, upon the charter, together with the precept of *clare constat*, and the resignation *ad remanentiam*, executed by Mrs Drummond, were unnecessary.

*3tio*, Mrs Drummond was a creditor under the marriage contract, whom her father could not gratuitously disappoint; Nov. 1717, Feb. 1718, Fea against Traill, *voce* PROVISION TO HEIRS AND CHILDREN; 15th June 1710, Leslie against the Creditors of Leslie, *IBIDEM*. If he has not fulfilled his obligation so as to entitle her to carry the estate by a special service, as heir of provision, that service, as including a general one of the same description, was at least sufficient to enable her to transmit her *jus crediti*.

*Answered, 1mo*, Before the statutes 1494, c. 57, and 1617, c. 13, no lapse of time prevented the legal heir from asserting his right. By the former, it was enacted, that after three years; by the latter, that after twenty years, from the date of the service, the person served should not be disturbed at the in-

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stance of the legal heir. Both apply only to the case where there is a competition between the person actually served, and him, who, had he claimed in proper time, was alone entitled to have been so; Bankton, b. 3. tit. 5. p. 353; Erskine, b. 3. tit. 7. § 19. In the present case, there was no competition: While Mrs Drummond was alive, no person had an interest to challenge her service; and as she herself might have brought a reduction of it after twenty years, 11th July 1701, Lady Edinglassy, *voce* PRESCRIPTION, so may the pursuer.

*2do*, The few general words thrown in at the end of the charter of resignation, cannot be presumed to confirm an infestment not specially mentioned. The charter 1724 has all along been considered as a charter of resignation.

*3tio*, As the marriage contract was carried into effect by an actual conveyance of the lands upon which infestment has followed, there remained no *jus crediti* in the heirs of the marriage, which could be transmitted without a special service; 9th March 1757, Livingston against Lord Napier, *voce* TAILZIE, 9th Dec. 1760, Porterfield against Gray, *voce* PROVISION TO HEIRS AND CHILDREN, 21st July 1676, Hay against the Earl of Tweeddale, *IBIDEM*; 23d February 1682, Clerk against his Sisters and David Forbes, No 3. p. 6330.; 28th November 1684, Irvine against Macitrick, *voce* PROVISION TO HEIRS AND CHILDREN; 26th July 1715, Lyon against Garden, *IBIDEM*; 27th December 1716, Macintosh against Laird of Aberairder, *IBIDEM*.

*Replied, imo*, It would be singular, if Mrs Drummond, whose right is not alleged to have been defective, except in point of form, should be in a worse situation than a person not entitled to succeed. The statutes make no such distinction. The passage from Mr Erskine, founded on, relates to the case of an heir wishing to set aside his own service, where it has very properly been found, that the vicennial prescription does not run against him.

*2do*, It is not necessary that a charter of confirmation should mention the deeds confirmed. The infestment on the contract was a "right and evident" in favour of William Drummond, and therefore was included in the general clause of confirmation.

The Lord Ordinary ordered informations; upon advising which,

The Court were unanimously of opinion, that the decree pronounced in 1761 was liable to no objection; that even if no process had been brought, the charter in 1724 must have been interpreted according to its warrant, the discrepancy between them having arisen merely from a mistake, and that therefore Mrs Drummond's retour and subsequent deeds would have been effectual.

The Court had therefore no occasion to give a special judgment upon the separate defences; but it was observed, that the vicennial prescription does not apply to the case of inaccuracies in the service of the true heir, and that the charter 1724 was truly a charter of confirmation, and effectual as such,

though it did not specify the deeds confirmed. The after infestment, as on resignation, was therefore useless.

It was further observed, that as the contract of marriage contained a disposition of the lands upon which infestment had followed, there remained no personal *jus crediti* in the heir of the marriage, which could be carried without a special service.

THE LORDS repelled the reasons of reduction.

A reclaiming petition was refused without answer on the 6th June 1793.

Lord Reporter, *Dreghorn.*      A&. *Dean of Faculty, Honyman.*      Alt. *Solicitor General.*  
Clerk, *Menzies.*

*D. D.*      *Fol. Dic. v. 3. p. 319. Fac. Col. No 53. p. 109.*

\* \* \* This case was appealed.

THE HOUSE OF LORDS, 26th April 1797, "ORDERED and ADJUDGED, That the appeal be dismissed, and that the interlocutors therein complained of be affirmed."

Infestment as to lands holding of the Prince. See PRINCE OF SCOTLAND.

Formalities of Infestment. See SASINE.

Infestment not requisite to establish a servitude. See SERVITUDE.

See APPENDIX.