1732.

ARGYLE
v.
BREADALBANE, &c.

JOHN DUKE of ARGYLE and GREENWICH, - - - - } *Appellant;*

JOHN EARL of BREADALBANE, JOHN CAMPBELL, Younger of Kintraes, *et alii*, Creditors of ARCHIBALD CAMPBELL of Barbreck, - } *Respondents.*

6th May, 1732.

PERSONAL AND REAL.—The irritant and resolutive clauses contained in a charter, not being engrossed in the instrument of sasine which only bore to be given "with and under the conditions and provisions in the charter particularly mentioned;" —It was found that this was sufficient to make the clause in the charter effectual against creditors and singular successors. Judgment for the appellant *ex parte*.

[Fol. Dict. II. p. 70. Mor. Dict. p. 10306.]

No. 20. ARCHIBALD Earl of Argyle granted a feu charter of the lands of Barbreck, with various irritant, prohibitory, and resolutive clauses, in favour of certain substitutes, failing whom, the lands were to return to the Earl, his heirs male and of tailzie.

By the precept of sasine contained in the charter, infeftment is directed to be given "with and "under the conditions and provisions in the said "charter particularly mentioned:" And the instrument of sasine bears, that infeftment was given "under the provisoes and conditions in the said "charter particularly mentioned."

Adjudications being led against the estate, a competition arose between the creditors of the vas-

sal and the Duke of Argyle as superior, in which it was insisted by the former that they could not be affected by these prohibitory, irritant, and resolutive clauses contained in the charter, inasmuch as they were not particularly engrossed either in the precept of sasine, or in the infeftment which had followed thereon. The Lords found "that the "clause in the seisin ('with and under the condi- "tions and provisions in the charter particularly "mentioned') is not sufficient against creditors or "singular successors, in respect the same does not "expressly repeat the irritancies in the charter." February 13, 1738.

In a petition against this interlocutor, the Duke argued that if it were necessary that the irritant clauses in a charter should be recited *verbatim* in the instrument of sasine, then a sasine taken without such a recital by the grantee, (who has the whole management of that transaction,) must be void; and therefore prayed that it might be found, either that there was no necessity for the recital, or that the infeftment taken without it was void.—The interlocutor was adhered to.

The appeal was brought from the interlocutor of 13th February 1730, two interlocutors of the 25th June 1730, and one of the 24th February 1731. Entered March 18, 1731.

Pleaded for the Appellant:—The property of a land estate is vested by charter and sasine. The charter does not create an estate without sasine, and sasine cannot be given so as to be effectual, without express warrant from the granter contained in the precept of sasine, and the grantee cannot thereby take a greater estate than is conveyed to him in the charter and precept. A purchaser or

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creditor cannot be in a better condition than the vender or debtor.

The vassal or grantee himself is always possessed of the charter, which contains the precept of sasine, and takes infeftment, so that he has the instrument of sasine drawn up by a notary of his own choosing, in such form as he thinks fit to direct, without the knowledge or consent of the superior.

The form of all precepts of sasine is to give full power and authority to [*blank*] to give real and heritable state and sasine to the purchaser of the lands described, and the blank is left to be filled up with the name of any person whom the disponee shall think fit to appoint. The choice, therefore, of the person, who, upon the part of the granter, is to execute this order, as well as of the notary, who is to attest the execution of it, being left to the grantee, it is incumbent on him to see that the sasine taken is pursuant to the charter and precept. And if it be not so, either the sasine must be limited to the conditions under which the precept directed it to be granted, or it must be void, as being not warranted by the precept. Otherwise this absurdity would follow, that the grantee could by artifice or error create to himself a greater estate than was granted or intended to him, and divest his superior, the granter, of the estate expressly reserved to him and his heirs.

In the present case it is expressed in the instrument of sasine, that the same was given with and under the provisions in the charter mentioned; so that if the creditors had looked into the register of sasines, they would have learned that their debtor's

estate was fettered; and although the charter was not registered, they might have seen it in the debtor's custody, and thereby discovered what those conditions were, and that in consequence of them the estate would not be a security for their debts. But, as it is to be presumed that they trusted him upon his personal security, they can have their remedy only against him, and the estate ought to revert to the heirs of the granter, in terms of the original grant.

No creditor or purchaser can rely on such infeftments as they find in the registers, as evidence that the borrower or seller has really and effectually such an estate in him as the infeftments express; because an infeftment without the charter and precept is of no validity to secure any estate. But the lender or purchaser must see the charters and precepts on which the infeftments are founded. This imposes upon neither party any difficulty, because it is to be presumed that the proprietor is in possession of his own titles, and if he does not exhibit them, no money will be paid or lent.

But after a man is satisfied by inspection of the titles, that he from whom he would purchase, or to whom he would lend, is the full proprietor of the lands, the real and only use of the register is that he may be secured against latent claims or incumbrances; and this purpose is effectually answered by the register, for no claim or incumbrance that is not recorded can affect the purchaser or creditor; but still, notwithstanding the register, he must be able to support the validity of the recorded infeftment under which he purchased, by

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producing its warrants, and therefore ought not to have purchased or lent his money without seeing those titles.

The appellant stands infeft, as immediate vassal of the crown, in the very lands in question, which the respondents must have seen from the register. They must likewise have known (because it is the undoubted law) that the infeftment to the vassal, which they saw on record, would not defend against an action of reduction and improbation at the appellant's instance, without producing for its support the charter and precept on which it followed. They could not therefore lawfully rely on the infeftment alone for their security, without having seen the charter in which the precept was contained; and if they saw the charter, they must have seen in what manner the estate was limited to the vassal, and consequently could not have contracted with him *bona fide* on that security.

For the Respondents—No appearance was made, but their argument in the Inferior Court is thus shortly stated in the appellant's paper.

The irritant clauses contained in the charter are not repeated in the precept of sasine, or in the instrument of sasine which is recorded in the register of sasines. Therefore although the grantee and his heirs are bound by the conditions in the charter, yet the same will not extend to creditors and purchasers, unless repeated in the sasine and appearing in the register, which was established for their security, and is the only place to which they can resort for information as to the state of the right on which they are about to rely.

" Counsel appearing for the appellant, but none " for the respondents, the appellant's counsel was " heard ; and having stated the matter at large, and " prayed a reversal of the said interlocutors, and " such relief as to the house should seem meet ; " and being withdrawn,

" It is ordered and adjudged, &c. that the said " interlocutors complained of be reversed ; and it " is farther ordered and adjudged that the clause " in the vassal's sasine, (*videlicet*) [' with and un- " der the conditions and provisions in the charter " particularly mentioned, granted by Archibald " Earl of Argyle, the 5th January 1678,'] is sufficient to secure to the superior against creditors " and singular successors, all the conditions and " provisions in the said charter contained."

For Appellant, ***P. Yorke*** and ***Dun. Forbes.***

This judgment proceeded *ex parte ;* but by the above extract from the journals of the House of Lords, it would appear to have been as solemn and mature a decision of the point of law as the circumstances of the case admitted of. The judgment of the Court of Session is founded on by Lord Bankton, B. II. t. 3. § 44. and by Erskine, B. II. t. 3. § 51. Neither author seems to have been aware of the reversal.