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DRUMMOND v. DRUMMOND, &c.

[M. 6936.]

CAPTAIN FRANCIS PINKERTON DRUMMOND, *Appellant;*

DR. WILLIAM ABERNETHY DRUMMOND, Liferenter of the Estate of Hawthornden, and MARY, wife of Lieut. JOHN FORBES, of the Royal Navy, Fiar of the Estate of Hawthornden, ... *Respondents.*

House of Lords, 26th April 1797.

CHARTER AND SASINE—ERROR—SERVICE—VICENNIAL PRESCRIPTION.—A charter and sasine expede as flowing from the crown, contained a destination, by mere accident or ignorance of the writer, in terms different from its warrant: Held, that these deeds were to be interpreted according to their warrant, and that the service *in special* of the next heir who succeeded was not null and void, founded on such erroneous charter and sasine, it being protected by the vicennial prescription.

On the occasion of the marriage of William Drummond, younger son of William Drummond, elder of Hawthornden, an antenuptial contract was entered into, whereby William Drummond, elder, the father, who stood regularly infeft in the estate of Hawthornden and others, by an investiture holden of the crown, became bound, "duly and validly, and "sufficiently, to infeft and seize the said *William Drummond, his son, and the heirs male of his body;* which failing, the heirs male of the said William Drummond, elder, "his body; which failing, the heirs female of the said William Drummond, younger, his body; which failing, the "heirs female of the said William Drummond, elder, his "body; which all failing, the said William Drummond, "younger, his heirs and assignees whatsoever, heritably and "irredeemably."

June 7, 1722.

The contract contained a procuratory of resignation by which the son, William, might have resigned into the hands of the Crown, as his immediate superior, and obtained charter and been infeft. But he preferred to avail himself of the precept of sasine, also contained in the contract, and was base infeft in the precise terms of destination as above.

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Afterwards he expede a charter from the Crown, proceeding in the usual way by signature and resignation. The signature was duly passed in Exchequer, ordaining a charter to

be expede in the precise terms of the destination in the marriage-contract as above. But when the precept came to be made out for expeding the charter, in place of framing it so as to be an exact translation of the signature, which was its warrant, and from which it ought not to have deviated, yet through the ignorance or inattention of the writer, the dispositive clause ran as follows:—" Dedisse, concessisse, " et dispossuisse, dilecto nostro Gulielmo Drummond, *ju-* " *niori*, de Hawthorden, filio natu maximo Gulielmo Drum- " mond senioris ejusdem, et hæredibus suis musculis; qui- " bus deficien. hæredibus masculis dict. Gulielmi Drum- " mond, senioris; quibus deficien. hæredibus femellis dict. " Gulielmi Drummond, junioris; quibus deficien. hæredibus " femellis dict. Gulielmi Drummond, senioris; quibus de- " ficien. dict. Gulielmo Drummond juniori, hæredibus suis " seu assignatis quibuscunque hæreditarie et irredeemabi- " liter."

The discrepancy between the charter and its warrant, consisted in this, that the words in the signature, " Heirs " male of his body," are translated " hæredibus suis mascu- lis," which probably arose from the framer of the precept conceiving that these terms had precisely the same meaning, and, therefore, that the very important addition of the words " *de corpore*," were unnecessary. Upon this infeftment followed; and the son possessed on this during his life.

William Drummond the elder had no other son, but had five daughters; the first, second, third, and fifth died without issue. Ann, the fourth, had issue by her husband, the Rev. John Pinkerton, namely, a son, who is the pursuer in the action of reduction, and appellant in the present appeal.

William Drummond the younger died, leaving issue of his marriage, Barbara Mary Drummond, afterwards married to Dr. William Abernethy Drummond, one of the respondents. In her marriage-contract with him, she disponed the estate " to, and in favour of herself in fee, and the said " doctor her husband, in liferent, for his liferent use allenarly." In making up her titles, the error in the dispositive clause of the charter was discovered, whereby the estate was devised *hæredibus masculis et femellis* of William Drummond younger and elder, without limitation, in place of the heirs male and female *of their bodies* respectively; and to prevent the estate from being carried off by the *heirs male whatsoever* of her father and grandfather, she raised an action of reduc-

tion and declarator, to have it found that the charter and infeftment were erroneous and disconform to the procuratory of resignation, contained in the contract of marriage. Decree was pronounced, declaring accordingly, and that she had good right to make up her titles, as heir of provision to her father. But the difficulty came to be, how, and by what effectual mode, she was now to make up her title. The procuratory in the contract of marriage, it was said, was already executed and exhausted, so could not be executed a second time; but the plan recommended by the Court was, to pronounce a special interlocutor, finding her entitled to serve heir of provision to her father, which would be a direction to the inquest to serve her; the interlocutor, at same time, being inserted in the service.

Thereafter the property and superiority, which, in consequence of William Drummond, the younger's, original base infeftment, were supposed to be separate, were conjoined; and soon thereafter, Mrs. Abernethy Drummond, her own issue having died, adopted the other respondent, Mrs. Forbes, and disponed the estate "to her husband in liferent, and to Mrs. Forbes in fee." The estate went thus into the hands of strangers, although there was issue of William Drummond, elder, still alive.

Notwithstanding all the steps taken by Mrs. Drummond to make her title unexceptionable, action of reduction was raised, first by Mrs. Nairn, the daughter of William Drummond, elder, and sister of William Drummond, younger, and afterwards continued by the appellant, the son of another sister. The grounds of the reduction were, that notwithstanding the decree of the Court of Session, and the special service following thereon and infeftment, that the whole were void and null, as in competition with the appellant's rights; that, in point of fact, Mrs. Drummond died in a state of apparency. That her service and infeftment in 1761, under the charter and infeftment 1724, obtained by William Drummond, younger, *other* heirs were called by him, in preference to Mrs. Abernethy Drummond. That this charter and infeftment being disconform to its warrant, ought to have been reduced before any of the heirs could, under the contract 1722, have a proper and complete title as heir of provision to the estate; and, consequently, that the appellant had good right to reduce the erroneous charter and infeftment taken by William Drummond, younger, which had never been reduced. In defence.—1. Even sup-

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posing Mrs. Abernethy Drummond's service, which was expede in 1761, had been erroneous, it was secured from challenge, by the vicennial prescription. 2. That independently of the charter and decree of the Court in 1761, finding that William Drummond's charter of 1724, was erroneous, and that Mrs. Drummond was entitled to serve heir of provision to her father, as if that charter and infeftment had been properly expede; yet, by the clause of confirmation, in the charter 1724, whereby the base or subaltern infeftment of 1723, in favour of her father, became a public one, was sufficient to support her service. And, 3d. That Mrs. Abernethy Drummond had a *jus crediti,* or personal right vested in her, under the contract 1722, which was fully competent to render effectual any settlement executed by her of the estate of Hawthornden.

May 18, 1793. June 6, ——

The Lords, of this date, repelled the reasons of reduction;* and, on reclaiming petition, they adhered.

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* Opinions of Judges :—

Lord President Campbell.—" This is a question upon family settlements, where there occurs an erroneous charter. The decree 1761 was meant as an explanation of the true import of the charter, and, if it has that effect, the question is at an end. Every circumstance attending this charter, and particularly the clause of confirmation, shows that no alteration of the line of succession was meant, as indeed none would be made in that form. Words are often used improperly by ignorant conveyancers. Vide case of Linplum.

" 1st Point.—Whether the present action is barred by the vicennial prescription of retours is a little nice. It is not exactly the case which the statute had in view, and the other heirs female were not adverse parties, nor would have maintained any competition, so that they were truly *non valentes agere.*

" 2d Point is, Whether the proceedings in the action brought for rectifying the mistake were not very accurate? It would have been better if Mrs. Drummond, to pave the way for it, had made up a title by general service as heir of provision under the contract. However, as she afterwards expede a special service as heir of provision under the contract and charter together, which includes a general service, this may be considered as accrescing. It would likewise have been better that the conclusions in the declarator had been more distinct, and that the judgment of the Court had been more clearly adapted to them. But the interlocutor seems founded on the first conclusion or a part of it. But supposing these inaccuracies in point of form were fatal to the decree 1761, it would still be com-

Against these interlocutors the present appeal was brought.

Pleaded for the Appellant.—The charter expede by William Drummond, younger, was the only feudal investiture of the estates in question, as held immediately of the Crown, ever made up in his person, and, consequently, till that in-

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petent for the Court to explain the charter 1724, by finding and declaring that the general words *heredes masculi* are to be construed agreeably to the signature and contract which were its warrants ; and this is evidently the sense of the matter, for the charter, being the operation of the writer, would not alter the distination, nor be in any respect different from its warrants. Vide Burn *v.* Adam, 17th Feb. 1779 (Mor. 8852.) A court of freeholders may be tied down to the charter alone, but the Court of Session is not. The Court therefore ought to have found, and may still find, that *heredes masculi* in this charter must receive a limited construction, so as to mean heirs-male of the body alone ; and upon that construction we ought next to find that the special service of Mrs. Drummond, under the charter so constituted, is good. There are cases in which the Court has limited the construction of *heirs female*, Dict. vol. iii. p. 73 ; and the same may be done as to heirs male, if circumstances require it, though, in general, it is a delicate matter to meddle with technical words.

3d Point is the confirmation.—This is attended with difficulty, as the base infeftment under the contract does not seem to have been in view nor produced ; yet it would rather seem that the confirmation was good.

" The 4th Point is, connected with the second point, and is well-founded. Mrs. Drummond either had a *jus crediti* under the contract which she could carry without service, though perhaps not transmit (see Kilkerran, p. 464) ; or she was heir of provision under that contract, and by a service might connect herself with it. The last was rather the case. In fact, laying aside the charter altogether, and supposing it inept, she was served heir of provision under the contract ; for her special service under the charter, and referring to the contract as its basis, was tantamount to a general service under the contract. So that in every view she carried the right of succession, and either the feudal right under the charter, properly construed, or the personal right under the contract, if the charter be null, is complete in her. In this last view, however, the base infeftment would remain to be taken up."

Lord Justice Clerk.—" The right could not go without a service. But the confirmation was good. A general confirmation was sufficient to take up every thing. The execution of the procuratory was absurd. The vicennial prescription would not do."

Lord Eskgrove.—" I think the former judgment conclusive."

Lord President.—" I think the same."

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vestiture was actually set aside, a service as heir *in special* to him by one who was not called by the destination *therein,* and not the next heir according to it, entitled to succeed, was irregular and inept. The service, therefore, of Mrs. Abernethy Drummond, as heir-female of provision, was undeniably so, unless the decree of the Court of Session 1761 operated to alter that charter, which it did not or could not do; because the destination being to heirs-male general of William Drummond, there could be no room for the succession of a female, unless it had been proved that no heirs-male existed, which was impossible, as such heirs-male did exist. The decree of the Court of Session in 1761 did not and could not in law remedy the defect. Such decree could not alter the ordinary rules of law in regard to a service. The service is for the jury to give a verdict, as answers to certain questions of fact. If Mrs. Abernethy Drummond served herself heir of provision to her father, then, the first question was, "In what lands her father died last vest and seized?" which answer can only be made by production of the deceased's charter and sasine. And the next question is, Whether the claimant be the nearest and lawful heir under that investiture, so as to show that she was heir of provision? Now, the investiture did not show that she was the nearest heir; and had it not been for the decreet of the Court of Session, and the direction therein, the jury could not have served her. But this direction of the Court, compelling the jury to find contrary to fact and evidence, being bad, the whole service was inept.

Pleaded for the Respondent.—That the destination in the charter of 1724, of William Drummond, younger, said to be erroneous, might be soundly construed, when read with reference to its warrant, to import the same heirs as those specified in the contract of marriage. That it was from the contract of marriage Mrs. Abernethy Drummond's right flowed, whereby, on failure of heirs-male of the body of her father and grandfather, she succeeded as heir-female under the marriage contract; and had, before she succeeded as heir of that marriage, a *jus crediti,* and afterwards an absolute right as fiar, entitling her to dispose of the estate in any manner she pleased, notwithstanding the substitution therein. Supposing her service to her father, and her title otherwise made up, were defective, still there was a right in her, under the contract of marriage, sufficient to support the conveyance to the respond-

ents. But her service now was protected from challenge by the vicennial prescription introduced by the statutes 1494, c. 57, and 1617, c. 13. Besides, this service was supported by the solemn decree of the Court of Session in 1761, upon which it proceeded: And, independently of this, the service ought to be sustained, because the charter taken by William Drummond, her father, in 1724, was a charter of resignation and *confirmation.* It confirmed his previous base infeftment, the destination of which was conform to the destination in the marriage-contract; and, upon this right alone, she was entitled to serve heir in special to her father.

After hearing counsel, it was

Ordered and adjudged, that the interlocutors be affirmed.

For the Appellant, *W. Adam, Wm. Honyman.*

For the Respondents, *Sir John Scott, Sir Wm. Grant, J. Anstruther, Chas. Hay.*

GEORGE JONES, Proprietor and Manager of the Amphitheatres of Edinburgh and Glasgow, *Appellant;*

MESSRS. LINDSAY & Co., Wood-merchants in Glasgow, ... *Respondents.*

House of Lords, 17th May 1797.

BUILDING CONTRACT—NON-FULFILMENT.—A written contract for building a circus, to be finished and ready for opening on the 11th November 1792, under a penalty of £500, was entered into:—Held it not a breach of this contract entitling the party to damages, that the circus was not finished for five or six weeks later than the time stipulated.

This was an action raised before the Magistrates of Glasgow, by the respondents against the appellant for payment of the balance due on a building-contract, for building an amphitheatre in Glasgow, to which the appellant stated the defence of breach of contract, in respect that, by the contract, the respondents had become bound, under a penalty of £500, to finish the said building by the term of Martinmas (11th November 1792). That the same was not completed until Christmas following, while great expense, loss, and damage was thereby occasioned to the appellant, from entering