RODERICK FINLAYSON, and Sixty Others, Tenants and Possessors of the several Farms belonging in property to Hugh Innes of Lochalsh, Esq., - } *Appellants;*

HUGH INNES, Esq. of Lochalsh, *Respondent.*

House of Lords, 28th Feb. 1803.

REMOVING—TITLE TO SUE—INFEFTMENT—CLAUSE OF BARONY, AND CLAUSE OF DISPENSATION—SUMMONS—CITATION.—Tenants held their leases for nineteen years, with a break in favour of the landlord at fixed periods. On sale of the estate, he gave notice to the tenants of his intention to avail himself of the break, and summons and decree of removing were obtained, on an understanding that they were to remain for another year. Thereafter the purchaser raised a removing against them, to which they stated objections to his title to sue, his infeftment in the lands disponed, not having been taken on the ground of the lands, but on others from which they were disjoined; and also, that the summonses were not signed by the clerk of court, but merely by a procurator of court, and that the citations were not executed by a Sheriff officer of court; but by a messenger at arms, without any authority to act as Sheriff officer. These objections repelled. Affirmed in the House of Lords.

The appellants were all tenants of Lord Seaforth, under leases granted in 1794, for the period of 19 years' duration. In the leases there was a clause entitling the landlord to be free of the leases at Whitsunday 1801 or Whitsunday 1808, upon warning being given to the tenants nine months previously thereto. Lord Seaforth having it in contemplation to sell the estate, availed himself of this clause in the lease; and gave notice of his intention of so doing at Whitsunday 1801, which intimation was afterwards followed up by action of removing, to which defences were lodged, but afterwards withdrawn and waived, and decree pronounced, on the landlord allowing the tenants to remain for another year; the tenants, on their part, signing a declaration giving up all opposition to the ejection.

The estate was, in the meantime, sold to the respondent, of this date, with right to the rents falling due after Martinmas 1800, in which he was infeft; and having different views with his estate, he gave all the tenants warning in Mar. 1802, by executing a summons of warning to remove at the expiry of that term; Action was raised before the Sheriff of Ross and Cromarty for ejecting them. Defences were

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lodged, stating, 1. That the respondent was not the letter of the lands, and therefore had no title to insist in that character; 2. That it was incompetent for the respondent to prosecute *qua* heritor, because he was not *legally* infeft in the lands, as it appeared, from his sasine produced as his title, that the infeftment had not been taken upon any part of the lands conveyed to him but at the manor place of Brahan, situated upon other lands still the property of his Lordship. 3. That the summons was irregular in point of form. It was not subscribed on each page, but on the last only; nor subscribed by a clerk of court, but only by a procurator of court. 4. That the executions and the citations were equally irregular, these having been executed by a person not an officer of the Sheriff court, but by a messenger at arms.

The respondent replied, 1. That, in point of fact, he was the letter of the lands to the defenders, who therefore had no right to object to his title, whether good or bad. 2. That his infeftment was perfectly unexceptionable, in respect that by the crown charters in favour of Lord Seaforth, infeftment taken at Castle Brahan, or any other part of the lands, was declared sufficient for all or for any of the different portions of the lands therein contained. 3. That the authority given by the Sheriff clerk to Mr. Cameron was sufficient to entitle him to sign the summons of removing, especially in the particular circumstances which rendered new summonses necessary, and that the practice of the Sheriff court did not require summonses to be signed on each page. 4. That the citations were perfectly regular, as being executed by a person who was furnished with the commission of a Sheriff's officer. It appeared that a first summons of removing had failed to be executed, in consequence of the officer being deforced, by the whole tenantry rising up and mobbing and assaulting him, under the impression that the landlord intended to extirpate them from the soil; whereas the fact was, he had offered them all a renewal of their leases at a small increase of rent, to which they would not agree.

April 16, 1802. The Sheriff pronounced this interlocutor: "The Sheriff "having considered the libelled summons of removing, "Hugh Innes, Esq. of Lochalsh, and John Mackenzie of "Allan Grange, his commissioner, pursuers, against (the se- "veral tenants are here specially named), with the defences "given in for them respectively by John M'Rae and Robert

" Mackiel, procurators of court, of the same tenor and import, " with the foregoing answers for the pursuers, instrument " of sasine taken for Mr. Innes, and considered the disposition " whereon the said sasine proceeded, (an extract whereof " was produced to him), and the clause of dispensation in " the crown charter, which is particularly disponed to the " pursuer, whereby he was expressly authorized to take in- " feftment upon the portions of land which were disponed " at the manor place of the Castle of *Brahan;* and hav- " ing also taken into consideration the circumstances stated " in the answers, that those persons who are now defenders " in the present action of removing, were actually decerned " against to remove at the instance of Lord Seaforth and his " commissioners preceding the term of Whitsunday 1801, " and did continue in possession for the last year, in virtue " of a set or tolerance by the present pursuer; in conse- " quence of which he may fairly be considered as the last " letter of the lands upon them, the Sheriff depute there- " fore repels that part of the defence which rests upon the " pursuer's want of title to institute the present process of " removing. And having further considered the objections " stated by the procurators for the defenders to the copies " of the summonses of removing upon which the citations " against the defenders were made out, with the answers by " the procurators for the pursuers to these objections, find " that those regular formal summonses, made out and " signed by the clerk of court, which were sent by a regular " officer of court to be executed, who was maltreated and " deforced by a lawless mob of persons, obviously connected " with the defenders, who violently assaulted the officer and " robbed him of his warrants, to the disgrace of the parties " engaged in such a lawless proceeding, and the police of " that district of the country where such an outrage was " allowed to be carried on: and further, finds by the " warrant produced under the hand of the clerk-depute of " court, that Mr. Cameron, who did sign the summons, had " such authority as was sufficient, in the circumstances of the " case, to subscribe the said summonses; and still further " finds, that it would be an encouragement to such lawless " proceedings, if an objection which arose out of the illegal " and unwarrantable conduct of the defenders, their friends " and adherents, should militate in their favours; he there- " fore repels the whole objections founded on any pretend- " ed informality in the summonses or citations; and, in re-

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" spect no peremptory defences have been stated against " removal on the part of any individual defender, decerns " against them all, in terms of the libel, to remove."

On reclaiming petition, the Sheriff further pronounced this interlocutor:—" Finds there are many new facts stated " therein which were not formerly brought under his view; " that the law respecting the necessity of taking the infeft- " ment upon the ground of the land disponed, and the " objections to the mode pursued in the present instance, " are more fully stated than in the papers formerly given in. " He therefore repones the petitioners against the interlo- " cutor complained of, in so far that he allows them to " improve the executions which are alleged to be false, at " next calling, adheres to that part of the interlocutor com- " plained of, which respects the formality of the summonses, " it being the customary practice in this court, for the She- " riff clerk to sign only the last page of each summons, and " for the other reasons therein stated. He also repones " them against that part of the interlocutor complained of " which repels the defence founded upon the pursuer's " want of title; because, before finally determining on that " point, he wishes the pursuer to produce Lord Seaforth's " or his commissioner's disposition to him, of the lands in " question, that he may therefrom judge whether the clause " of dispensation in Kenneth, Earl of Seaforth's charter, " was actually disponed or not. And allows the pursuer to " state his view of the law upon the legality of the infeft- " ment taken at Castle Brahan, in answer to the within pe- " tition, before finally advising the question, ordaining that " if, at first calling of the cause, the defenders shall fail in " improving the execution whereon the action is founded, " that then, before entering into any further defence, they " and all of them must find caution, in terms of law, within " the space of eight days from said calling, with certification " that if they fail, their other defences will not be listened " to."

Answers by the above interlocutor being ordered to be given in, and answers having been given in, the Sheriff again May 21, 1802. pronounced this interlocutor:—" Having considered the re- " claiming petition, with the Sheriff's interlocutor thereon, " of 30th April last, the proceedings in court of 3d May, " the answers now given in to said reclaiming petition, and " within replies to the said answers, and having again con- " sidered his several interlocutors of the 16th April, on the

" different processes of removing, and which were reclaim-
" ed against, with the utmost attention, he, in the first
" place, refuses to allow the execution of the summonses to
" be improved, on the pretext that *Alexander Bain* was only
" a messenger at arms, and not a commissioned officer of
" court, undertaking the duty of a Sheriff officer to all in-
" tents and purposes, liable to the authority and regulations
" of the court, under whose authority and sanction he did
" act; the Sheriff therefore repels that ground of defence,
" as he also does that which respects the formality of the
" last executed summons, for the reasons stated in the
" interlocutor of 16th April; and having weighed and
" considered the objections stated to the pursuer's title
" to prosecute the actions of removing, finds, first,
" That it is admitted, and not denied, that the hail pre-
" sent defenders were decerned to remove, as at the
" term of Whitsunday 1801; and that by their disclamation
" of the defences there made for them, they did completely
" acquiesce in that decree of removing. 2dly, That the sale
" of Lord Seaforth of the lands in question took place in
" January 1801, and that the defenders could not hold their
" possessions after Whitsunday through any right derived
" from his Lordship, and, of course, it could only be by
" tolerance of the succeeding proprietor, pursuer in the ac-
" tion of removing, that they did continue their possessions.
" And, 3dly, That the defenders, as holding their posses-
" sions from him, have no right to question the pursuer's
" title, whether it be legally perfected by sasine or not;
" and therefore (without discussing the question of law as
" to the legality or formality of the sasine taken at Castle
" Brahan, which he considers to be *jus tertii* to these de-
" fenders,) he adheres to his interlocutor of 16th April *in*
" *omnibus*, and decerns."

On advocation, Lord Glenlee refused to pass the bill. On second bill of advocation, the same was refused by the Lord Ordinary on the Bills, stating that he saw no reason for departing from the opinion of the Lord Ordinary in the former bill. Thereafter, a bill of suspension was presented, which met with the same result by the Lord Ordinary, and the Court. July 20, 1802. Nov. 20, 1802.

Against these several interlocutors the present appeal was brought to the House of Lords.

Pleaded for the Appellants.—The respondent has no title to sue, 1st. Because he is not the letter of the lands; these having been let by Lord Seaforth to the appellants, on a

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lease for nineteen years, of which many years are yet to run; 2d. Because the respondent has brought the present action as *heritable proprietor*, founding on his infeftment on the estate; but that infeftment gives him no right as heritable proprietor, because it is altogether null and void. It is not taken upon the ground of the lands conveyed to him, but upon the ground of other lands not acquired by him. It was taken at Castle Brahan, upon lands still the property of the former proprietor. And this was done upon the principle, that a dispensation clause contained in a charter of union from the crown, authorized infeftment to be so taken; but this is a mistake, for it is fixed law, that when a vassal of the crown has executed his precept of sasine and is infeft, and afterwards divests himself of part of those lands, alienating them absolutely, the lands so conveyed become disjoined, are dissolved from the union, and therefore lose the benefit of the dispensation clause. Therefore, the infeftment, in this case, ought to have been taken upon the ground of the lands conveyed and severed from the others. Besides, the disposition from Lord Seaforth did not convey the dispensation contained in his Lordship's charter of union. On the contrary, it sets forth, that sasine is to be taken at the village of Audelve for the whole lands disponed, denominated the barony of Lochalsh; and the precept of sasine requires the bailies of Lord Seaforth to pass to the *ground of the lands conveyed*, and to give possession by delivery of earth and stone on the ground of the said lands. *Separatim.* The present action cannot be sustained, on account of the objections in point of form; 1st. The summons of removing was not subscribed by any clerk of court, but by a person having no valid commission, and acting as procurator for the pursuers in that very action. 2d. The summons was executed by a messenger at arms in the character of Sheriff officer, while he was not a Sheriff officer, and had no authority to act in that capacity.

Pleaded for the Respondent.—The respondent has an undoubted title, independent of the infeftment, to institute and carry on the removing against the appellants, as being the person under whom they held their possessions for the year subsequent to Whitsunday 1801. At this term of Whitsunday 1801 all connection between the appellants and Lord Seaforth entirely ceased; for, although they have attempted to deny this fact in the proceedings before the Court of Session, yet it is pointedly admitted in their pleadings before

the Sheriff, which they cannot now retract. In alluding to the action of removing raised by his Lordship against them, they state, that after defences were lodged, "they signed a "disclamation of the law proceedings, and a decree of re- "moving passed against them of course." The old lease having thus ceased, and they having procured a tolerance to sit for a year longer, the respondent was entitled to consider their right so to sit as being derived from him alone, because, by express contract, Lord Seaforth had conveyed to him all right which he had in the decree. If, therefore, their last year's possession was held under the respondent, they have no right to call in question his title to the lands, it being established law, that a person from whom a tenant derives right, may insist in a removing against such tenant, although his title is so defective as not to sustain process if insisted against a tenant in other circumstances. Ersk. Inst. B. ii. tit. 6, p. 57.

The respondent's title to insist in the processes of removing, as heritable proprietor, is equally unquestionable in regard to the infeftment objected to as taken at Brahan Castle. The infeftment was taken in precise terms of the authority and warrant contained in the title deeds assigned to him by his author, Lord Seaforth. Even if the clause in the crown charter of 1781 had been a simple clause of union, it would have warranted the infeftment at Brahan Castle. But, superadded to the clause of union, there is a clause of dispensation, in very special and comprehensive terms, which frees the question of all doubt. These two clauses must not be confounded, as the appellants attempt to do, just because they are distinct, and their legal virtues and effects not the same. Union is effected either by an express clause in a charter flowing from the crown; or by an erection of a barony, in which latter case union is implied without any special clause in the charter; and the effect is, to hold the lands comprehended within it, as one entire contiguous estate, although containing different tenements of land lying separate from each other. One sasine taken on any part, or the place mentioned in the charter, is good for the whole. In such case, of course, the moment a part of the united lands is sold, the union is dissolved as to those parts, and infeftment must then be taken according to the usual form; but still it is in the power of the crown vassal to communicate the benefit of the union by a subaltern right; and, accordingly, this was expressly done in the present case. But, superadded to this clause of union, there is

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a special clause of dispensation, which entirely obviates the objection stated, arising from the dissolution of that union by selling a part, because such a clause, not resting on any such principles, is adapted to the event of the land's being disunited; and provides expressly that a sasine taken on any one part shall be sufficient for the whole, however locally separated. By the charter from the crown 1781, such an infeftment was authorized.

The summonses of removing were in all respects regular, and agreeable to the usage in the Sheriff courts. It has not been said that any objection lay to the original summonses which were subscribed by the clerk of court himself. The objections only apply to those which Mr. Cameron, acting under the authority of the clerk of court, has subscribed, after the Sheriff officer had been despoiled of those received from the Sheriff clerk, but the messenger who executed had a special commission to do so.

After hearing counsel, it was

Ordered and adjudged that the interlocutors be, and the same are hereby affirmed.

For the Appellants, *Wm. Alexander*, *Alex. Maconochie.*
For the Respondents, *Wm. Adam*, *Thomas Baird.*

NOTE.—Unreported in the Court of Session.

The Most Hon. JOHN, MARQUIS OF BUTE, and HERBERT WINDSOR STUART, Esq., commonly called LORD HERBERT WINDSOR STUART, second son of the said Marquis of Bute, ... } *Appellants;*

The Hon. JAMES STUART WORTLEY, second son of JOHN, late Earl of Bute, . } *Respondent.*

House of Lords, 4th March 1803.

SERVICE — COMPETITION OF BRIEVES — ENTAIL — CLAUSE OF DESTINATION — DEVOLUTION CLAUSE. — From the intermarriage of Sir George Mackenzie of Rosehaugh's family with the Bute family, Sir George executed an entail of his estate of Rosehaugh, and provided, that if one and the same person should happen to succeed both to his estate, and the Bute estate, then, in that case, if the person so succeeding should happen to have a second son, he and his heirs were taken bound to denude the Rosehaugh estate in favour of such second son. A cadet of