[*25th March* 1834.]

CHARLES FERRIER, Trustee upon the Estate of JOHN WHITE, Appellant. No. 8.

WILLIAM MOUBRAY and others, Trustees of PETER WOOD, and Mrs. VEITCH, Respondents.

Process—Appeal.—Circumstances under which an appeal against an interlocutor, which was not a final judgment, and was pronounced unanimously, and no leave to appeal had been obtained, was dismissed as incompetent.

Process—Ranking and Sale.—Held (affirming the judgment of the Court of Session) competent to grant interim warrant on a judicial factor, for payment of a preferable annuity out of the arrested rents of lands, the subject of a ranking and sale, before any common agent was appointed, or a state of the debts made up, or a proof of rental taken.

Sasine.—A crown charter of resignation in favour of a series of heirs of entail contained a clause of dispensation in favour of the heirs, for taking infeftment in diverse lands at the principal manor place;—Held (affirming the judgment of the Court of Session) to warrant an heir in possession to grant an heritable bond of annuity with a similar dispensation.

2D DIVISION. Lord Medwyn.

NICOL GRAHAM of Gartmore executed, on the 2d of March 1767, a deed of entail of that estate, under which Robert Graham succeeded. He made up titles under the entail, and expede a crown charter of resignation, dated 20th December 1779, which contained a clause of union and dispensation in the following terms:—"Et "præterea nos cum avisamento, et consensu prædict. "volumus, et concedimus, et pro nobis nostrisque regiis

No. 8.

25th March 1834.

FERRIER (White's Trustee) *v.* MOUBRAY and others (Wood's Trustees).

" successoribus decernimus et declaramus quod unica " sasina nunc per dictum Robertum Graham, et omni " tempore futuro suscipienda per prædict. hæredes tal- " liæ apud manerii locum de Gartmore vel super ulla " parte fundi dict. diversarum terrarum, baroniarum, " aliorumque per traditionem terræ et lapidis solum- " modo." On his death he was succeeded by William Cunninghame Cunninghame Graham; and in virtue of the charter he was infeft on the 6th of November 1799, and the instrument recorded on the 1st of January 1800.

In 1810 Sir John Lowther Johnstone became indebted to W. C. C. Graham in 2,000*l.*, and granted to him two English penal bonds for 2,000*l.* each, redeemable on payment of the 2,000*l.* Graham assigned them, in 1811, to John White, merchant in Edinburgh, with warrandice from fact and deed. On the death of Sir John Lowther, his trustees refused to pay the debt, on the ground that it arose out of a gambling transaction; and in resisting payment they were successful. White then instituted an action against Graham to make payment of the 2,000*l.*; and as White was not proved to have been in the knowledge of the true nature of the debt, he got decree.* On the dependence of this action White executed inhibition.

Thereafter, on 9th August 1819, Henry Wood advanced to Graham 13,000*l.*, and Graham granted to him an heritable bond of annuity of 1,352*l.* 12*s.* 6*d.* payable out of the barony of Gartmore and other lands half yearly, redeemable on repayment of the 13,000*l.* It contained a disposition of his interest as an heir of entail, an assignation to the rents, and a precept of sasine, in these terms:—" That on sight hereof ye pass

* See 5 S. & D., p. 40 (new ed. p. 38).

" to the manor place of Gartmore, or to the ground of " any part of the lands and others foresaid, by virtue " of the clause of dispensation contained in the foresaid " charter of resignation, in favour of the said deceased " Robert Graham, and there give and deliver heritable " state and sasine, real, actual, and corporal possession " to the said Henry Wood, or his foresaids, of the said " annuity," &c. Infeftment was taken on the 16th of October 1829, and the instrument set forth:—" Which " sasine the said bailie gave, by delivering to the said " attorney, for and in name of the said Henry Wood, " earth and stone of and upon the ground of the said " manor place of Gartmore, by virtue of the clause of " dispensation contained in the charter of resignation " in favour of the said Robert Graham before men- " tioned, and that for the said lands and other heri- " tages particularly herein-before described themselves." Thereafter the inhibition was renounced, in so far as affected this bond.

In 1825 Henry Wood assigned this bond to Peter Wood to the extent of 936*l.* 8*s.* 8*d.*, and to John Veitch to the extent of 416*l.* 3*s.* 10*d.*, and they were infeft on the 1st of September. In 1826 Graham became bankrupt, and executed a conveyance of his estate in favour of trustees for behoof of his creditors. By those trustees the annuity was for some time regularly paid; and thereafter the bond-holders raised and executed an action of maills and duties. On the death of these bond-holders, the present respondents, as their respective testamentary trustees, made up titles to the bond, and were infeft. Thereafter, the appellant, as trustee on the sequestrated estate of White, obtained, in 1831, a decree of adjudication of the barony

No. 8.

25th March 1834.

FERRIER (White's Trustee) *v.* MOUBRAY and others (Wood's Trustees).

of Gartmore and others, subject to the usual declaration in adjudging entailed estates.

Founding on this adjudication, the appellant raised a summons of ranking and sale, in which he concluded for sale in the same terms as if the lands had not been at all affected by an entail.

In the meanwhile, Graham's creditors had instituted an action to have it found that the entail was ineffectual; and his son had raised an action of forfeiture, on the ground of contravention of the entail. The Court had also sequestrated the lands, and appointed a judicial factor.

The respondents lodged defences to the summons of ranking and sale, maintaining that it was premature, until it should be decided whether the lands were held in fee simple, or under the entail.

Lord Medwyn repelled the defences; but the Court pronounced this interlocutor on the 2d of June 1832: —" The Lords having considered this reclaiming note, " with the proceedings, and heard counsel thereon, remit " to the Lord Ordinary to sist further procedure under " the interlocutor complained of, and to hear parties on " any question that may be raised under the summons."*

In the meanwhile the respondents had presented a petition to the Court, praying for a warrant on the factor acting under the sequestration to pay them out of the rents the current and future annuities while they were unredeemed. This was opposed by the appellant, chiefly on the ground that, pending a ranking and sale, and before a judicial rental had been made up, a warrant for an interim payment was not competent; and that the sasine taken on the bond was inept.

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* 10 S. & D., p. 616.

No. 8.

25th March 1834.

FERRIER (White's Trustee) *v.* MOUBRAY and others (Wood's Trustees).

The Court, on the 6th of July 1832, after the usual remit to the Lord Ordinary, and on his report, granted warrant for an interim payment.*

The appellant presented separate petitions of appeal against the judgments in the ranking and sale and under the petition for the warrant.

To the competency of the former of these petitions of appeal the respondents objected; and the House, on the report of the Appeal Committee, directed the question of competency to be argued at the bar.

Respondents.—(Competency.)—The interlocutor of 2d June 1832 appealed against is not a judgment upon the merits of the cause, but a mere deliverance, remitting the case to the Lord Ordinary for further consideration. No leave to appeal was given by the Court; neither was there a difference of opinion among the Judges when the interlocutor was pronounced.† Had the Court intended to pronounce a final judgment in favour of the respondents, instead of remitting to the Lord Ordinary to sist procedure, and to hear parties further, they would have recalled the interlocutor, sustained the defences, and dismissed the action; but the judgment merely directs the Lord Ordinary to sist further procedure under the interlocutor, and "to hear "parties on all questions that may be raised under the "summons." It was quite competent for the appellant to have enrolled the cause before the Lord Ordinary, in order that parties might be heard on the objection to the formality of the summons, and the competency of the action. Even if no objection to the form of the

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* 10 S. & D., p. 773. † 48 Geo. 3. cap. 151. sec. 15.

No. 8.

25th March 1834.

FERRIER (White's Trustee) *v.* MOUBRAY and others (Wood's Trustees).

summons had occurred, and the Court, without remitting to the Lord Ordinary, had thought proper, de plano, to sist the process of ranking until the other actions for trying the validity of the Gartmore entails were decided, no appeal would have been competent without the leave of the Court.

Appellant.—One of the grounds on which the appellant complains of the interlocutor is, that it was incompetent; that the only competent order which could be pronounced in terms of the acts of parliament relative to actions of ranking and sale was the order pronounced by Lord Medwyn. It must therefore be assumed at this stage of the argument, that the objection of the appellant is well founded. In so far as relates to the matter of competency, the interlocutor is final. The Judges have decided finally that they had power to sist the proceedings. They have assumed a power which they did not possess; and the appellant was entitled to the judgment of this House on the competency of the exercise of any such power.

THE HOUSE dismissed the petition of appeal in the ranking and sale as incompetent. The further discussion was therefore confined to the appeal against the interim warrant.

Appellant.—(Merits.)—1. It was incompetent for the Court of Session to sustain the respondents claim at the time they issued the warrant consistently with the various acts of parliament and acts of sederunt which are in force regarding actions of ranking and sale. It is the clear intention of those acts to tie up the

estate of the bankrupt, whenever an action of this nature shall be raised, until it shall be ascertained what is the real amount of the debts claimed, with their respective preferences, and also what is the real value of the bankrupt's estate; in particular, that no payment of the principal sum claimed by any of the creditors shall be made until the rights of parties are ascertained, after a regular investigation with all parties in the field. With this view it is required that a common agent shall be appointed, whose duty it is to investigate the respective titles of the parties, and till that is done no creditor can receive any payment. Even when this is done, the act of sederunt, 11th of July 1794, enacts that "no "creditor, however preferable, shall, in time coming, be "entitled to draw, by interim warrants, any sum out of "the common funds, without sufficient cause shown to "the Court, and in no case shall draw full payment, and "no interim warrant shall be granted before decreet of "certification is extracted, except for interest or an-"nuities." But the Court have given decree in favour of the respondents, not only for the interest, but also for a part of the principal of their debt, before any decree of certification has been even allowed to be pronounced. The claim made by the respondents is not for that sort of interest or annuity contemplated in the act of sederunt, — it is a claim truly for part of the principal under the name of redeemable annuity, which is so calculated as to include payment annually partly of the principal and partly of interest of the debt.

It has been said by the respondents that they are not properly in petitorio, but in possessorio, and that it was unnecessary for them to apply to the Court to entitle them to draw the rents. This plea is founded on the

No. 8.

25th March 1834.

FERRIER (White's Trustee) *v.* MOUBRAY and others (Wood's Trustees).

allegation that they are in possession, in virtue of a decree of maills and duties. But that action is inept. The only party called was Mr. Graham, who was divested of the lands by a deed granted by him in favour of trustees for his creditors, in virtue of which deed these trustees were actually infeft and in possession of the lands, and yet these parties were never cited, and never appeared in the action.

2. The sasine, upon the validity of which the respondents claim depends, is null and void.

Nicol Graham granted a procuratory of resignation, under which a crown charter was issued in favour of Robert Graham and his successors, heirs of entail, under the limitations and conditions of the entail. The procuratory being merely in favour of heirs of entail, the superior had no power to insert in the charter any grant or privilege in favour of third parties. Accordingly, the Barons of Exchequer did not do so, and the clause in the crown charter authorizing infeftment to be taken at the mansion house for the whole lands is granted in favour of the heirs of entail exclusively. Now sasine was taken in favour of the original creditor, Henry Wood, not on the discontiguous estates, but at the manor-place of Gartmore alone, for which there was no warrant. The clause of dispensation being expressly limited to heirs of entails, and not being extended to singular successors or assignees, and still less to heritable creditors, it is a personal, not a transmissible, right.*

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* Stair, b. ii. tit. 3. sec. 44 and 45, Brodie's ed. p. 253; Erskine, b. ii. tit. 3. sec. 45; Scott v. Bruce Stewart, 21st Jan. 1777; Mor. voce "Sasine," App. No. 2; Bell on Completing Titles, 236, 240, 244, 252, 277, ed. 1815; Craig, lib. 3, Dieg. 7. sec. 13, 14, &c.; Drummond, 27th Feb. 1761, Mor. 6934, and 17th May 1793, Mor. 6936; Bell on Titles, p. 255, 271.

Respondents.—1. The first objection of the appellant is founded on the circumstance of his having brought an action of ranking and sale, and a warrant for payment having been granted before a common agent was appointed or a judicial rental made up. It would be strange if there had been any established rule of Court unknown to the judges by which no payment could under any circumstances be made till this was done; but the practice is directly the contrary of that alleged by the appellant. Indeed, if there were any such rule, it would often lead to consequences singularly severe and unjust. In a great majority of cases, annuities form the means of subsistence to the parties holding the securities. The respondents are first heritable creditors. It would be great injustice if the rents could be retained by a factor, or payment suspended by any process instituted by postponed creditors, the preliminary points of which may not be settled for a series of years.

No doubt, in many actions of ranking and sale (where the competency or relevancy is not disputed), it has been the practice not to apply for warrants till a proof of the rent and burdens is adduced, as such evidence is usually brought in an early stage of the cause, and (when there are no preliminary pleas to be settled) can be completed in a few days.

Here, however, it may be four or five years before the competency of the ranking and sale is finally determined; and it would be exceedingly hard and unjust to hold that the first and preferable creditor is to be kept out of his annuities during all that time. The Court did not grant the warrant de plano, but remitted to the judicial factor to report, and on his report they were satisfied that the warrant should be granted. Besides, the respondents were in possession of the rents

No. 8.

25th March 1834.

FERRIER (White's Trustee) *v.* MOUBRAY and others (Wood's Trustees).

under their action of maills and duties, and clearly preferable to the appellant. But, independent of this, they were entitled to payment from the judicial factor. Accordingly Mr. Bell says, "A creditor who is unquestionably preferable is not compelled to abide the final "settlement of the ranking and division; but he cannot "have his payment, either of principal or interest, without a warrant from the Court," &c. This is supported by all the older authorities and modern decisions.*

2. The second objection is, that the infeftment should have been taken on every separate and unconnected part of the estate; that the dispensation was only given to Robert Graham and the succeeding heirs of entail; and that as the heritable creditor was not an heir of entail he could not act upon the dispensation; and therefore that the sasine so taken is null. But this objection is not supported by any authority. Lord Stair says, that "if the lands united by the King be disponed "wholly together by the vassal to others subalternly "infeft, the union stands valid; July 12, 1626, Stuart "contra Howe; repeated Jan. 25, 1627, Stuart contra "Coldingham Feuars; which, for the same reason, "ought to be extended to subaltern infeftments of an "annual rent out of a barony or united tenement, "which was found to extend to a mill, and to lands "lying discontigue, though not taken in the place "designed in the union." — Spotis. Executors, Lady Ednem v. Tenants of Ednem.†

Union in Scottish charters is explained thus by

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* Bell's Com. vol. ii. p. 289; Stair, b. 4. tit. 35. sec. 26, 28; Inglis's Trustee against Goldie, 14th Jan. 1825, 3 S. & D., 435 (303, new ed.); Crombie against Napier, 9th Dec. 1824, 3 S. & D., p. 380 (new ed. 269.)

† 2 Stair, 3. 44; Bankton, vol. i. p. 549; Erskine, b. ii. tit. 3. sec. 46; Stewart against the Earl of Home, Mor. p. 10367; Skene against Ogilvie, 19th Jan. 1768, Mor. p. 8792.

Erskine:—" Where lands lie discontiguous, though all " the tenements should be of the same kind, and " holden by the same tenure, and derived from the " same author, under the same superior, there must be " a separate seisin for each, unless the King shall have " united them into one tenantry by a charter of union, " *i. e.* by a charter in which the sovereign dispenses " with the necessity of taking a separate seisin upon " every discontiguous tenement, and declares that one " seisin shall be sufficient for the whole." Again he says, " it is implied in the very notion of union that " the lands united by the charter receive the same " quality as if they had been conterminous or naturally " united; and if a clause of union be not allowed to " have this effect it can have none."*

The plea of the appellant, that the dispensation is personal to the heirs of entail, and not transmissible to creditors or other third parties, is quite untenable. Accordingly, Lord Stair says, " Assignations are " effectual, not only of such rights as are granted " to heirs and assignees, but generally to all rights, " though not mentioning assignees, which by their " nature are transmissible."† And in like manner Mr. Erskine says, " The general rule is, that whoever is " in the right of any subject, though it should not bear " to assignees, may at pleasure convey it to another, " except where he is barred either by the nature of the " subject or by immemorial custom."‡

LORD WYNFORD.—My Lords, I do not know how this House can feel itself competent to say, upon a mere

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* Erskine, b. ii. tit. 3. sec. 45; Bell's Principles, sec. 875.

† 3 Stair, 1. 16.

‡ Erskine, b. iii. tit. 5. sec. 2.

No. 8.

25th March 1834.

FERRIER (White's Trustee) *v.* MOUBRAY and others (Wood's Trustees).

matter of practice, that the Court below has done wrong. They are the best judges of the ordinary mode of proceeding in a case of this sort. I know not that there is any question of practice in Westminster Hall which can be brought under the consideration of this House. The Courts in which these points of practice arise are the final judges, and it is convenient that that should be the case. This case seems to have been considered by the Court of Session as so perfectly clear that the judges do not give any reasons for the judgment pronounced, whereas, upon other occasions, when any serious question comes before them, they do give the reasons; but in this case the judges said (as in a thousand instances I have said in one of the Courts below), it is a point of practice, and is so and so, without attempting to give any reason. I recollect one of our learned judges, when at the bar, on being pressed to give a reason upon a matter of this sort, said, "It is so, but I cannot tell why, any more than I can why great A is made in the shape it is—it has been made so a great many years, and we had better continue to make it in that shape;" and in truth no better reason can be given for many points of practice. Now what are the objections in this case? The first is, that the Court did not appoint a common agent to examine the titles of the different claimants; but they have taken another course, which seems to me warranted by practice, and to be equally effectual for the purposes of justice. They have referred it to the officer of the Court to inquire into those points which the common agent would have inquired into; and they have referred it to the judicial factor to inquire into the value of the property and the extent of the estate to be disposed of. Now, the only question is, whether they

were bound to have the inquiry made by this agent, or whether it was not perfectly sufficient to do what they have done,—to refer the case to the officer of Court? I should think the course adopted by the Court was the more convenient one, and the one more likely to attain justice in this particular case. Then it is said, they have issued a warrant for a part of this money before any judgment has been given; and we have been referred in support of this objection to the act of sederunt of the 11th of July 1794, which I will read to your Lordships: "Whereas it has been usual for the pre-
" ferable creditors to apply for interim warrants upon
" the factor for payment of sums due to them, and
" sometimes by such interim warrants preferable cre-
" ditors get the whole or most part of the sums due to
" them before the order of ranking is finally settled,
" which practice has by experience been found to be
" attended with inconvenience; no creditor, however
" preferable, shall in time coming be entitled to draw
" by interim warrant any sum out of the common
" funds without sufficient cause shown to the Court."
Now, are we not to suppose that sufficient cause was shown to the Court when they granted that interim warrant, and that the Court had satisfied itself of the propriety of so doing? Then it goes on,—"and in no
" case shall draw full payment, and no interim warrant
" shall be granted before decreet of certification is
" extracted, except for interest or annuities;" so that, generally speaking, the decreet of certification must be extracted before the interim warrant is granted. But the question is, whether this case does not fall within the exception, " except for interest or annuities." This is a case of interest,—a case of annuity. It was argued

No. 8.

25th March 1834.

FERRIER (White's Trustee) *v.* MOUBRAY and others (Wood's Trustees).

that this warrant gives the whole value of the annuity; —it does no such thing,—it does not give the value of the annuity, but only the half-year's annuity; and the value of the annuity is left untouched by any thing done by the Court below or by your Lordships. But it is said, this is not one of the annuities to which the act of sederunt applies; that it only applies to annuities given for aliment. If that had been so the judges who drew the act would have said so; but the reason upon which it proceeds applies to one annuity as much as another, whether that annuity has been granted upon the consideration of natural love and affection to a wife or child, or whether it has been granted for a valuable consideration. The principle is this, that the whole sum is not to be paid,—that remains untouched;—all that is to be paid is the actual annuity becoming due at the end of the current year. The Court by this act of sederunt have thought it right to except those cases out of the general rule which they have prescribed; and I cannot point out to my own mind any possible distinction between one description of annuity and the other. Then the next point made is, that the action of mails and duties did not give the party a complete right, because the trustees were in possession. But that is sufficiently explained. The trustees were in possession for the party who had the judgment of mails and duties; and instead of turning them out, he says, "It is "more convenient for you to remain in, but remember "you remain in, not under the original appointment "as trustees, but as my agents, and upon condition of "paying me first," which is as complete a possession under the action of mails and duties as it is possible for the parties to have.

No. 8.

25th March 1834.

FERRIER (White's Trustee) *v.* MOUBRAY and others (Wood's Trustees).

The only other point is, that the sasine was not taken upon different parts of the estate; and it is said, that the act of consolidation, or whatever Scotch term it is called by, only applies to the heirs of entail entitled to the estate, and it is not to be extended to parties who derive right from, and who claim under them, and, therefore, that the sasine taken at the manor place in virtue of the clause of dispensation in the bond of annuity granted by one of these heirs is inept, as it was not taken on the separate lands. We have not been referred to any authority to show that this indulgence given to the heirs is not to be extended to persons who claim under them, and I think that the opinions referred to from Lord Stair govern this case. He says, " Union is the conjunction or incorporation of lands or " tenements lying discontigue, or several kinds unto one " tenement, that one sasine may suffice for them all," (so that this union is to have that very purpose which has been given in this case, that a great number of sasines, accompanied with unnecessary trouble, and attended with useless expense, may be rendered unnecessary), " in which there is sometimes expressed a special " place where sasine should be taken; and when that is " not, sasine upon any part is sufficient; for the whole " lands lying contiguous are naturally united, and need " no union, so that sasine taken upon any one of them " extendeth to the whole; but where they lie discon- " tiguous, other tenements being interjected, there must " be sasine taken upon every discontiguous tenement," unless there is a license, as in this case. Then he goes on: " Union can be constituted originally by no other " than the sovereign authority conceding the same, and, " therefore, union being constitute by a subject not

No. 8.

24th March 1834.

FERRIER (White's Trustee) *v* MOUBRAY and others. (Wood's Trustees).

" having the same from the King was found null by " exception at the instance of the possessors, though " pretending no right; and when there is a place for " the sasine of the union, a sasine taken elsewhere reaches " none of the lands lying discontigue, but if the lands " united by the King be disponed wholly together by " the vassal to others subalternly infeft, the union stands " valid, which, for the same reason, ought to be extended " to subaltern infeftments of an annual rent out of a " barony or united tenement which was found to extend " to a mill, and to lands lying discontigue, though not " taken in the place designed in the union." I can only say, my Lords, I have a desire upon a subject of this sort to adhere to that authority, which I think lays down the principle, from which we may collect the usual extent of this indulgence, of dispensing with the necessity of sasines upon different parts; and I can see no reason why one sasine for the mansion should not answer for the whole estate. The judges below thought that was sufficient, and your Lordships will not be disposed to disturb that decision. I therefore move your Lordships that the appeal may be dismissed, and the costs paid, after taxation.

The House of Lords ordered and adjudged, That the said petition and appeal be and is hereby dismissed this House, and that the interlocutor therein complained of be and the same is hereby affirmed: And it is further ordered, That the appellant do pay or cause to be paid to the said respondents the sum of 175*l.* for their costs in respect of the said appeal.

RICHARDSON & CONNELL—SPOTTISWOODE & ROBERTSON—MEGGISON, PRINGLE, & MAINSBY, Solicitors.