of the decree of ranking 1699, and that he is only liable for L.21 Sterling, (the remaining balance in his hands of the price,) with annualrent thereof, from Whitsunday, 1695." But afterwards, on advising a reclaiming petition for the pursuer, 28th July, 1756, the Lords "found that the defender, James Falconer of Monkton, as representing his father, ought to be charged with the principal sum in his father's bond, and the interest thereof; as also that he should have credit for the sums paid to the creditors of the dates when these payments were truly made, and therefore that the second scheme or calcul in Mr. Chalmer's report should be the rule of accounting betwixt the pursuer and defender."

1756. *December* 29. SIR WILLIAM STIRLING *against* THOMAS JOHNSTON and JOHN MILLER.

PATRICK LINTON feued to the defender, Miller, a small tenement. The charter contained a clause, declaring that it should not be leisome to the said John Miller to sell the subject to any person without first making offer thereof to the said Patrick Linton, or his successors, at the price originally paid for them, besides the value of improvements.

This clause was not inserted in the seasine.

Linton conveyed his right of superiority to the pursuer, Sir W. Stirling; and some time afterwards, Miller, the vassal, sold the property to the defender, Johnston. Sir William brought a reduction of the sale, on the ground that the vassal had not previously offered the subject to him in terms of the above clause in the charter.

Lord Kames, Ordinary, found "That the defender, Thomas Johnston, was in *mala fide* to purchase from John Miller the pendicle of land in question, contrary to the prohibition in the feu-right: Finds the disposition quarrelled, void and null; reduces the same, &c."

In a reclaiming petition for the defender, it was pleaded, that the clause founded on in the charter was contrary to the enactment of the statute 20 Geo. II. declaring that claims *de non alienando sine consensu superiorum* be taken away and discharged; that moreover the clause could not affect a purchaser, as it was not inserted in the vassal's seasine; and, lastly, that it was ineffectual in itself, as it contained no irritancy of the vassal's right in the event of contravention.

ANSWERED for the pursuer,—That the clause in question was not struck at by the statute, which merely regarded prohibitions to sell *without consent* of the superior, whereas here the vassal might alienate at pleasure, under the condition, only of giving the first offer to the superior at a certain price: That the statute was intended merely to take away arbitrary prohibitions against alienation, but not clauses of reversion or pre-emption in favour of the superior: That as to the second objection, it was not necessary that such a clause should be inserted in the seasine; it was enough that it was contained in the vassal's title to the land, and the charter is a part of the infeftment as much as the seasine; *Earl of Sutherland* against *Gordon, Dec.* 1, 1664, (*Mor.* 7229;) *Smith* against *His Brothers and Sisters, July* 26, 1737, (*Mor.* 10,307:) And as to the last objection, it was an-

swered that all bargains may be made under such conditions as parties agree upon, and there can be no reason why the stipulation in favour of the superior in this case should not be effectual: That although the sale may not irritate Miller's right, yet still the superior has a right and interest to reduce the sale, which is injurious to him, and contrary to his privilege of pre-emption: That the case is the same as happens in tacks with clauses secluding assignees, for though the assignation of such tacks will not irritate the right of the cedent, yet it never was doubted that the proprietor might reduce the right of the assignee."

The Lords altered the Lord Ordinary's interlocutor. Lord KILKERRAN has the following note of the grounds of the judgment.

"*December* 29, 1756.—The Lords altered the Ordinary's interlocutor, and preferred Johnston.

"They were not moved with the observation, that the prohibiting clause was not in the seasine, for the seasine referred to the clause which was *in eodem corpore juris*, and the infeftment consists of the charter and seasine. Nor were they moved with the arguments from the late act of Parliament, which does not forbid rights of pre-emption; but what they went on was this, that there was no irritant clause in case of contravening the prohibition. It is a principle in law, that a proprietor must have a power to dispose, and he remains proprietor until his right be irritated.

"The Ordinary, who alone argued and voted for adhering, agreed in the principles, but put it on the *mala fides* of the singular successor. He said that Miller was in *pessima fide* to transgress the prohibition, and as the purchaser knew it, he was *particeps;* but the answer to this was, that as he knew of the prohibition, so he knew it was ineffectual in law."

1757. *January* 4. ROBERT SHEDDAN *against* JAMES MONTGOMERY SHEDDAN, a Negro.

THIS case is reported in *Fac. Coll. (Mor.* 14,545.) Lord KILKERRAN has the following note upon the papers.

"The Lords generally inclined to find that the negro was not manumitted by his being brought to Scotland, but agreed to pass this bill, that the point might be in the most solemn manner determined; and on a further motion for the negro, a hearing in presence was appointed.

"*January* 4, 1757.—*Mors ultima linea rerum.* There the servant shall be free from his master.

"The poor young man is dead, and so has put an end to the question, what influence Christian charity or love to our neighbour, whatever his colour is, ought to have."