1757. *January* 4. SIR WILLIAM STIRLING *against* THOMAS JOHNSTON.

No 70.
A clause of pre-emption without an irritancy, in a vassal's charter, found to be ineffectual against a purchaser.

LINTON feued to Miller a small tenement of L. 40 Scots of yearly rent. The charter contains a clause, 'declaring, That it shall not be lawful to Miller to sell 'or dispone the said lands, without first making an offer of them to Linton at 'the price originally paid for them, and the value of improvements, &c.; and 'if he do in the contrary, such conveyances are declared to be null.'

Linton conveyed his right of superiority to Sir William Stirling; and Miller afterwards disponed the property to Johnston. This disposition was sought to be reduced by Sir William, as having been executed without any offer made to him, in terms of the clause of pre-emption.

Pleaded for Johnston, The clause in this feu-charter contains no irritancy of the vassal's right. The right of the feu must still remain with Miller the vassal; and it is inconsistent with the law of Scotland, and the nature of property, that while he remains proprietor of the lands, they should not be affectable by his debts or alienable by his deeds. The essence of property consists in the power of alienation, which cannot be taken from the proprietor but by divesting him of the property, and vesting it in the party to whose prejudice the alienation is made. This was the chief difficulty that occurred in the introduction of tailzies into this country; and the only remedy that could be devised to take it off was, to insert clauses forfeiting the heir's right in favour of the next substitute; and consequently nothing could be carried by his deeds, when he is divested of the property by the condition of his right: but if such irritating clause is omitted, debts and deeds are effectual, notwithstanding the strongest prohibitions. *See* March 11. 1707, Lady Redheugh, *voce* TAILZIE; 13th June 1712, Creditors of Riccartoun, IBIDEM.

Answered, Bargains may be made under any conditions. Where it is expressly stipulated, that the superior shall have a right of pre-emption, there can be no reason why such condition should not be effectual. The superior may reduce the sale, to make his own right of pre-emption effectual, though the vassal's feu was not forfeited. In the case of tacks secluding the assignees, the assignation is void; but it will not irritate the right of the cedent. And no argument can be drawn from tailzies, which derive their being from a statute, and can have no effect if the statute is not literally complied with, and unless the provision of the statute be strictly obeyed.

Replied, Tacks are merely personal, founded on an *electio personæ*, and exclude assignees, without any clause for that purpose; there needs therefore no forfeiture of the tack, in order to bar the power of assigning; because it is excluded from the nature of a tack: But, in a right of property, the principles are entirely different. The power of alienation is essentially inherent in it, and cannot be barred any other way than by divesting the disponer of his property.

'THE LORDS found, That the disposition by John Miller to Thomas Johnston was a valid and sufficient right, notwithstanding the prohibitory clause in the feu-contract and charter.' No 70.

Act. *G. Brown.* Alt. *Johnstone, Ferguson,* Clerk, *Kirkpatrick.*
Fol. Dic. v. 3. *p.* 131. *Fac. Col. No* 4. *p.* 6.

1767. *March* 6.

ROBERT IRVING, ARCHIBALD MALCOLM, and GEORGE WALLACE, *against* MARQUIS of ANNANDALE, and the EARL of HOPETON his Curator.

No 71.
A clause in a feu right, requiring the vassal, if he should propose to sell, to offer the subject to the superior, for a certain sum, before a notary and witness, found not to fall under the statute 20th Geo. II. abolishing clauses in charters *de non alienando sine consensu superiorum.*

IN 1661, the Earl of Annandale granted to Francis Scot a feu of the lands of Balgray. The charter bore to be granted in implement of a former disposition, and contained the following clause: 'Et similiter, si contigerit Francisco Scot, 'suisque prædict. vel vendere, alienare, aut disponere hæreditarie et irredima-'biliter, terras aliaque supra nominat. aut aliquam partem earundem, personæ 'vel personis quibuscunque; quod tunc Franciscus Scot, suique prædicti, tene-'buntur legalem et realem oblationem earundem facere in præsentia notarii et 'testium, ut congruit, nobis, nostrisque præscriptis, pro summa 2500 mercarum 'monetæ prædictæ, et hoc tanquam pro pretio et valore earundem per nos nos-'trosque antedictos, pro iisdem, dicto Francisco Scot suisque predictis solvend. 'per spatium 8 dierum ante quemlibet terminum Penticostes, aut festi Martini 'præcedent. qualibet haereditaria seu irredimabili alienatione per dictum Fran-'ciscum Scot suosque prædict. terrarum aliorumque supra mentionat. vel aliqua-'rum partium earund. faciend. Et si contigerit nos, nostrosque prædict. non 'accipere dict. oblationem, tunc licebit dicto Francisco Scot, suisque præscript. 'vendere, alienare, aut disponere hæreditarie et irredimabiliter, cuique alio per-'sonae vel personis, ille aut illi videbuntur expediens, easdem totas terras alia-'que suprascript. aut aliquam partem earund. et hoc sine consensu nostro nos-'trisque praedict. ad hoc impetrand.; ac etiam si contigerit dict. Francisco Scot 'suisque prædict. aliquo tempore futuro, vendere, alienare, aut disponere hære-'ditarie et irredimabiliter cuique personæ aut personis, terras aliaque supra-'script. aut aliquam partem earund. sine avisamento et consensu nostro nostris-'que præscript. ad eandem in scripto obtento aut ante aliquam oblationem, sic 'nobis nostrisque prædict. ut supra faciend. ad recipiendum et emendum eadem 'super pretium supra specificat. tunc omnes tales hæreditariæ et irredimabiles 'alienationes, dispositiones, et jura, infeofamenta, et securitates per dict. Fran-'ciscum Scot ejusque prædict. in et ad favorem dict. aliis personæ seu personis 'earund. terrarum aliorumque supra nominat. sic concedend, una cum hac prae-'senti charta nostra et infeofamento desuper sequend. postea nullius erunt ro-'boris aut effectus, ac si eadem et hæc charta nostra nunquam data nec concessa 'fuissent, et nullitas ejusdem admitten. et recipiend. per modum exceptionis