1768.

OGILVIE v. SKENE, &c.

[M. 8792.]

DAVID OGILVIE, Esq. - - *Appellant;*
SKENE and HUNTER, - - *Respondents.*

House of Lords, *4th March* 1768.

INFEFTMENT—DISPENSATION CLAUSE.—Held, reversing the judgment of the Court of Session, that where parts of lands are conveyed by a party, whose charter contains a dispensation clause authorizing infeftment to be taken on a part for the whole, that the benefit of this dispensation clause is not lost to the parts alienated, when the conveyance is merely for life, to revert then to the granter, and that the infeftment taken on part was good for the whole.

DAVID OGILVIE was enrolled at the Michaelmas head court 1767, as a freeholder in the county of Forfar, upon the following titles: 1*st*, A charter under the Great Seal to William, Earl Panmure, of the lands, amongst others, of Auchnevis, otherwise Auchmull, and others, dated 6th August 1765; 2*d*, A conveyance of these lands, 3d September following, from the earl to Mr. Ogilvie for life, reserving the fee to himself, and also of the above charter and precept of sasine therein contained; 3*d*, Instrument of sasine following upon the conveyance and charter to Mr. Ogilvie, dated 19th September, and registered 4th October 1765.

Messrs. George Skene and Robert Hunter, two of the freeholders, petitioned the Court of Session against the enrolment of Mr. Ogilvie, alleging that the lands lay discontiguous, and his sasine was void and null, as he had not taken infeftment upon the several different tenements included in his conveyance, but had only taken it at one part for the whole, by the symbols of earth and stone. The appellant in answer, denied that the lands lay discontiguous; and insisted, that even though they did, yet by the dispensing clause in Earl Panmure's charter, this mode of infeftment was expressly authorized.

The dispensing clause was in the following words: "Quod unica sasina per dictum Gulielmum comitem Pan-
" mure ejusque prædict. *super aliqua parte* fund. dict. ter-
" rarum nunc et omni tempore futuro per deliberationem
" terræ et lapidis fundi earundem, absque ullo alio symbolo,
" sufficiens erit pro integris terris, baroniis, molendinis, deci-

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" mis, piscationibus, at usque supra script. cum pertinen. *vel* " *quavis earundem parte* non obstan. quod discontigue ja- " cent."

In reply, the respondents admitted that such dispensing clauses were established by usage, and were effectual so long as the *whole* lands granted by the charter continued united in the same person, but whenever the union was dissolved by alienation of part, the dispensation clause was at an end.

Jan. 19, 1768. The Court sustained the objections to the validity of the sasine.

Against this interlocutor the present appeal was brought.

Pleaded for the Appellant.—The appellant is assignee of the Earl of Panmure, whose charter contains the dispensation clause above quoted, which is conceived to the earl, his *heirs* and *assigns*. As his assignee, he is entitled by the charter to take infeftment upon any part of the lands, which shall be good for the whole, or for any part. The respondents' distinction between an assignment of the whole lands, and an assignment of part only, has no foundation in the charter, but is expressly contrary to the words of it. Besides, the argument assumes what is not the case here, namely, that Earl Panmure has conveyed from him the fee of part of the lands. Had he done so, then the argument might have applied, that having sold part, the union was thereby dissolved, and the privilege of the dispensing clause at an end, with reference to the parts so conveyed. But, unfortunately for this argument, the conveyance to the appellant is for life only, and the fee is expressly reserved to himself, and made to revert back to the Earl of Panmure at his death. Craig lays it down " per usus fructus constitu- " tionem licet de domino superiore tenendi, sasina etiam " subsecuta, unio tamen non dissolvitur." From which it is clear, in the present case, that where the conveyance is merely a life estate, though to be holden of the crown, the union is not thereby dissolved, and consequently the dispensing clause is left entire. Here the fee is reserved to Earl Panmure, and therefore the property cannot be said to be disjoined, or the union dissolved. But, moreover, this is not to be viewed as an erection of lands by crown charter into a union. It is only a charter granted by the crown, containing a clause of dispensation, authorizing sasine to be taken by one symbol on any part of the lands for the whole, which is a right the crown is entitled to grant; and, therefore, the respondents' argument, founded on a supposed

L. 2, Dieg. 7, § 19.

union, expressly created in a charter, does not apply, and falls to the ground.

Pleaded for the Respondents.—The proposition is indisputable, and the appellant must admit it, that every parcel of land lying discontiguous, requires a separate infeftment, unless, either by a charter of union, or by a clause of dispensation, this is rendered unnecessary. It is equally clear, that taking infeftment upon each separate tenement, can only be dispensed with, by the express grant of the sovreign, either by erecting separate tenements into a barony, by an express clause of union; or by a clause of dispensation. Here there seems to have been at one time a barony, but it is equally obvious, that subsequently the lands, of which this barony consisted, were broken up; and it is clear law, that the moment these were disjoined the union was dissolved, with respect to the part alienated. The respondents, therefore, contend, that the lands in question having been sold and disjoined, have lost the benefit of the union, or dispensation clause, contained in Lord Panmure's charter. And it makes no difference that the appellant, in this instance, holds only a right for his life, the estate, after his death, reverting to Earl Panmure, because the result is quite the same, where his right is absolute and irrevocable during his life.

After hearing counsel, it was

Ordered and adjudged that the interlocutor complained of be reversed.

For Appellant, *J. Montgomery, Al. Forrester.*
For Respondents, *C. Yorke, Al. Wedderburn.*

ARCHIBALD DOUGLAS - - - *Appellant;*
DUKE OF HAMILTON, &c. - - *Respondents.*

House of Lords, 27*th February* 1769.

FILIATION—PROOF—ONUS PROBANDI.—Circumstances in which held, that children born in France, of a certain marriage, were the lawful children begotten of that marriage—and that the appellant, having acquired his *status* as such—and having been served and retoured the lawful son and heir of the parties, that he was entitled to be protected in that *status* until the contrary was proved; Ques. Whether the *onus probandi* of proving the reverse, lay on those who impugned his birth.

The late Duke of Douglas, and Lady Jane Douglas, his