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" interlocutors with regard to the lands of M'Gowanston, Mill of " Drumgairlock, Dennymuck, Whitestone, Pennyglen, barony of " Greenan, and lands of Balvaird, and that the Court of Session " were not authorised to review their interlocutors with relation " thereto, by the said order of this House, and that such parts, " therefore, of the said interlocutors of the Court of Session of the " 10th of February and 24th November 1807, as have relation " thereto, being unauthorised by the remit of this House, are null " and void (being the parts of the interlocutors which are unfa- " vourable to the appellant Blane) (Cathcart's trustee), and as " such complained of in his appeal, and with this declaration, It " is ordered and adjudged that the appeal be dismissed."—*Vide* case *infra*.

[M. 15459.]

SIR KENNETH MACKENZIE, Bart., - *Appellant.*
JOHN STEWART, Esq., and OTHERS, *Respondents.*

House of Lords, 14*th March* 1754.

ENTAIL—ACT OF PARLIAMENT—FRAUD.—An entailed estate was sold for payment of debts by Act of Parliament applied for and obtained with the concurrence of the appellant and others, substitute heirs of entail. Held (reversing the judgment of the Court of Session), that the appellant was not barred by such concurrence and agreement, nor by the Act of Parliament, from opening up the whole proceedings, and showing that the debts fraudulently represented as due, were fictitious and not chargeable against the estate.

No. 106.

November 28, 1688.

THE Earl of Cromartie, then Viscount of Tarbat, of this date executed an entail of the lands and barony of Roystoun, in favour of himself and his lady for life; whom failing, to his third son, Sir James Mackenzie, and the heirs male of his body; whom failing, to his second son, Sir Kenneth Mackenzie, and the heirs male of his body, with several other substitutions over.

The entail contained the usual prohibitory, irritant, and resolutive clauses. Infeftment was passed upon it, and it was recorded in the register of tailzies. The maker did not reserve any power either over the estate or the succession; but the heirs of entail in possession had power to jointure their wives to a limited amount, and to charge the estate with portions for younger children, not exceeding four free years' rent, and Sir James and the other heirs succeeding to the estate were taken bound to pay to the Earl's eldest daughter, Lady Anne Mackenzie, the sum of 20,000 merks, with 2000 merks of penalty, and interest from their death, conform to bond of provision granted her. This debt, which was the only encumbrance on the estate, was afterwards paid and extinguished by the father.

Yet these extinguished claims of debt were, along with other fictitious claims, made the foundation of a scheme, formed by the Earl and his son, Sir James, to break this entail of Roystoun.

The Earl having only then a liferent interest in the estate, with no power to burden for debt, he, in conjunction with his son, granted an heritable bond upon the estate for 8250 merks. And on the 9th April following, conceiving that he had the full fee of the subject still in him, he granted a new disposition of the said estate to his son Sir James, in fee-simple, without any limitation, and without taking any notice of the entail. A bond was also granted at same time, but antedated, to his daughter Lady Anne, for her 20,000 merks, made payable at Whitsunday 1689, with interest from that date, instead of making it payable and interest to run from the Earl and Countess' death. This fictitious bond Lady Anne was made to assign to her uncle, Lord Prestonhall. And on

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the same day Lord Prestonhall granted a declarator of trust to Sir James Mackenzie, obliging himself to assign the same bond to Sir James, that he might use diligence against the estate of Roystoun.

After the Earl's death, Sir James succeeded, and

1739. possessed until 1739, when the Duke of Argyle offered a very inviting price for the purchase of the estate. The question was how they were to sell so as to give an unexceptionable title? The plan adopted was by going to Parliament, and on the representation that the entailed estate was exhausted with debt, obtaining an Act of Parliament to sell for payment thereof. To this Sir James Mackenzie obtained the concurrence of his only son, Sir George, and of Sir George Mackenzie, the eldest son of Sir Kenneth, the two first substitutes.

An act was obtained accordingly, but it was carefully concealed that these claims were fictitious, and that Sir James Mackenzie had an interest in the said two debts, he representing them all along to belong to *bona fide* creditors.

The next substitute, Sir George Mackenzie, son to Sir Kenneth, having afterwards discovered the fraud perpetrated by his uncle, brought an action jointly with his brother Gerard against the respondent, as representing his grandfather, and against the trustees on the Act of Parliament so obtained, for an application of the residue of the purchase-money after payment of just, true, and lawful debts really affecting the entailed estate of Royston. In defence, the respondent objected that he was barred from raising this question by the agreement he entered into with reference to the sale of the estate under the Act of Parliament, and his concurrence therein.

January 20, 1747. The Lord Ordinary, of this date, held Sir George

not barred by the agreement from proving that the debts were fictitious.

But the interlocutor was altered by the Court, who "Found that those debts that by the Act of July 1, 1752. "Parliament are appointed to be paid out of the "price of the estate of Royston, must be stated to "exhaust the said price; and that the price of the "estate being exhausted by these debts, there is no "ground for a further compt and reckoning. And "therefore assoilzie and decern."

Against this interlocutor the present appeal was brought to the House of Lords.

Pleaded for the Appellant:—The appellant is not barred by his agreement or concurrence to the sale by Act of Parliament, because that was given on the faith that debts, said to be debts against the estate, were real debts *bona fide* due to the creditors therein, and burdens on the estate, whereas they turn out to be fictitious; and having therefore been drawn into such consent by the misrepresentation of Sir James Mackenzie, and this Act of Parliament having been obtained upon such fraud and misrepresentation, he is not bound by the same, nor excluded as a substitute, from inquiring into the reality of these claims, because, if they are fictitious, the whole residue or price will then belong to him. Even supposing them real, it is clear, from the conception of the entail, that they could not be a burden on the estate of Roystown. Lundirie's heritable bond could not be so, because there was no power to burden the estate with debt; and in regard to the 20,000 merks of provision, it is equally evident that this claim was already extinguished, and only again fictitiously raised up with accumulations of interest, in order to effect their purpose. Neither the trustees under the act obtain-

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ed, nor Sir James, could retain more of the purchase money than was really and *bona fide* applied, in discharging the incumbrances supposed by the act to affect the estate. If, therefore, there was none such in existence; or if these creditors had compounded, or agreed, to take less, or agreed to take nothing at all, in either case, the appellant as substitute would be entitled to the benefit, and an eventual estate left free to descend to him. But assuming the debts to have been real debts, it was clear in law, that Sir James, during his possession, was bound to keep down the growing interest on these debts.

Pleaded by the Respondent:—The debts affecting the entailed estate specified in the Act of Parliament, must be taken as they are recited therein, especially in questions between those who were concurring parties to that act; for though there is a saving clause inserted to protect the rights of those who are not parties, yet it is a binding law to those who are, and consequently on the appellant. That act was obtained with the consent of the heirs of entail, and particularly the appellant, who had full opportunity to inform himself as to the reality of the debts now impugned. These heirs of entail received a valuable consideration for their concurrence; and are therefore now barred from opening up the question.

After hearing counsel, it was

Ordered and adjudged, that the interlocutors complained of be, and the same are hereby, reversed; *and that the interlocutor of the Lord Ordinary of the* 20*th January* 1747 *be, and the same is hereby, affirmed. And it is further ordered that the Court of Session do proceed thereupon according to justice, and the rules of that Court, without prejudice to any question that*

may hereafter arise concerning the relief to which the appellant may be entitled, against what persons or subjects such relief (if any) ought to be extended.

For the Appellant, *W. Murray, Alex. Forrester.*
For the Respondent, *A. Hume Campbell, C. Yorke.*

Note.—"The Lord Chancellor in delivering his opinion expressed a good deal of indignation at the fraudulent means of obtaining the act; and said that he never would have consented to such private acts, had he ever entertained a notion that they would be used to cover frauds."—*Kames' Dic.* p. 7445.

[M. 2439.]

JOHN STIRLING of Herbertshire, in the County of Stirling, Esq., - } *Appellant.*
ARCHIBALD CAMPBELL, younger of Succoth, Esq., - - - } *Respondent.*

House of Lords, 2*d April* 1754.

WADSET.—Proper and improper Wadset, difference between them in law, and also as a title for voting.

No. 107.

CAPTAIN CAMPBELL claimed to vote as one of the freeholders of the county of Stirling, under a title which was objected to as insufficient. This title was a wadset entered into by William Stirling and his ancestor whereby, in consideration of the sum of L.82, the former sold and disponed to the respondent's ancestor, the lands of Gunnershaw and others within the county of Stirling for twenty-one years, redeemable thereafter. Upon this he was infeft in the lands so disponed, consisting partly of property and partly superiority.