an irredeemable right. The contract and charter bear reference to each other; and the object of the charter appearing in the absolute terms it does, was to give the wadsetter a right to be infeft in the lands, to protect himself against third parties. The bond of reversion is doubtless not forthcoming, but this is easily accounted for from the misfortunes of the family, and the distance of time. The original right, therefore, being merely a redeemable right, no length of possession and prescription, can convert it into one absolute in its nature, because this title being defective, cannot prescribe a right of property. And it is no answer to this to say, that if the right was one limited in its nature, the reversion would, (although the original bond was lost), be registered in the register of reversions, in terms of the act 1617, without which it could not be effectual, because the answer to this is, that such rights may be used against the heir of the party, whether registered or not, though ineffectual against third parties; besides, the several legal interruptions in 1704, 1711, 1716, and 1735, bar the plea of prescription.

After hearing counsel, it was

Ordered and adjudged that the interlocutors complained of be, and the same are hereby *reversed.**

For Appellant, *Dav, Rae, Ar. Macdonald.*
For Respondents, *Henry Dundas, Al. Wedderburn.*

Unreported in Court of Session.

[M. App. Tailzie, Part I. p. 1.]

ALEXANDER IRVINE of Drum, - *Appellant.*

GEORGE, EARL of ABERDEEN, MRS. MARGARET DUFF or CULTER, and Others, } *Respondents.*

House of Lords, 16*th April*, 1777.

DECREE OF SALE—ENTAIL—GENERAL AND SPECIAL CHARGE.—Entail executed in shape of a procuratory of resignation, upon which charter was obtained, and this charter, but not the procuratory, produced judicially before the Court, and recorded in the Register of Tailzies. Held, that this was not perfect registration of the entail, and that the charter was not the original entail, but

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* Lord Mansfield reversed on the ground of the positive prescription pleaded by the appellant; as is noted on the papers of the London Solicitor, which the compiler has seen.

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the procuratory. Held, circumstances not sufficient to set aside a decree of sale impugned on fraud. Held that a general and special charge, as the warrants of an adjudication cannot be called on after 20 years.

This is the sequel of the case reported *ante* p. 249, which was a reduction of decree of sale, &c. of the estate of Drum, brought by the appellant, to whom it ought to have descended as heir of entail, but was now possessed by the respondents, as purchasers at the sale. In this reduction, the respondents produced the decree of sale, and insisted that this being a sufficient title to exclude, the action was barred. The House of Lords reversed the judgment of the Court of Session, finding the decree of sale a bar to the challenge, ordained the respondents to produce the writs called for, and remitted to the Court below to proceed with the cause.

The cause having come back to the Court of Session, it was debated, 1st, whether the respondents were bound to produce the writings respecting the estate of Auchtercoull, in regard to which little discussion had occurred in the previous part of the case, these lands being situated under different circumstances from that of Drum; 2d, Whether they were obliged to produce the general and special charges, and other warrants of the decrees in dispute? 3d, Whether the entail of Drum was completely recorded?

The Lord Ordinary held, that the previous discussions and
Jan. 21, 1771. judgment only related to Drum, and that the respondents were not barred from pleading the special defence, now maintained relative to the Baronies of Federate and Auchtercoull, and found as to these that they had produced sufficient rights and titles to exclude the pursuer's action of reduction; but found that they were bound to produce the general and special charges, and other warrants of the decrees brought under challenge, and all other writs and deeds specified.

Both parties having reclaimed to the Court, the Lords, of
Feb. 28, ____ this date, found, " In respect the general and special " charges called for, are not the grounds, but the warrants " of the decrees of adjudication, which the defenders are " not obliged to produce after 20 years; Finds, that the de- " fendants are not bound either to produce the said general " or special charges, or any other warrants of the decrees." The appellant reclaimed, and, in the meantime, objection having been stated to the entail of Drum, as defective for want of registration, in consequence of the original entail of

Drum, executed by Alexander Irvine in 1683, (meaning the procuratory of resignation), never having been judicially produced before the Lords, for the purpose of registration, but only a charter and relative nomination. It was answered, that as the entail of Drum was the first that was recorded under the act 1685, the Court had been careful in following its directions, as appeared from the record, which stated that the charter and relative nomination were produced, and that they were read and compared with the record in presence of the Lords, who interposed their authority thereto agreeably to the statute, and this having been done, the production of the procuratory, which the respondents were pleased to call the principal entail, was not necessary—as the *charter* was the *entail* itself, just as certainly as it was a deed and disposition—that so the Court and the law viewed it at that time. The procuratory of resignation was merely the act and will of the vassal, containing his instructions to the superior, that he might accept resignation for the purpose of granting a new charter or disposition, containing the strict limitations of an entail.

In considering both petitions, the Court, of this date, adhered to their former interlocutors,* and remitted to the Lord Ordinary, and his Lordship having resumed consideration of the cause, allowed a proof of the facts on the merits, but the respondents reclaimed to the Court, who, of this date, pronounced this interlocutor, finding, "That the entail executed by Alexander Irvine of Drum in 1683, not "being duly recorded, is not valid against creditors and "other singular successors; but, before answer as to the "proof, ordain the pursuer to give in a condescendence of "what he offers to prove." They also determined, "That "the defenders (respondents) have produced sufficient to "exclude as to the lands of Auchtercoull, and remit to the "Lord Ordinary to proceed accordingly."† On reclaiming note the Court adhered. A proof was then taken and re-

July 24, 1771.

Mar. 5, 1772.

July 24, ——

July 31, ——

* "Adhered to, in respect of the reasons mentioned in the former interlocutor, and that general and special charges are not part of the pursuer's title, but produced as evidence of the passive title against the defender; and also in respect of the former decisions of the Court, and acquiescence of the nation therein." Brown's Suppl. Tait, p. 465.

† "At advising the principal cause, Lord Covington argued, that there was a material distinction betwixt this case and the case of Kinnaird, for in this case the charter contained, and proceeded on *a novodamus*, so that it was truly the tailzie. But none of the other judges seemed to regard this distinction." Brown, Suppl. Tait, p. 622.

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ported, and the cause debated on the whole points of dispute.

The argument pleaded by the respondents in defence to the reduction, was founded on the length of time, and the credit due to the judicial sale, and other proceedings by which the estate had been legally sold, and acquired by them as purchasers. Also, the bankruptcy of the proprietor, even when the entail was executed, the entail itself not having been recorded.

The appellant, on the other hand, contended, that the estate of Drum had been unfairly alienated, to his prejudice as heir of entail—that the bankruptcy was fictitious—the sale collusive, and the whole proceedings illegal and fraudulent. He also repeated his argument as to the recording of the entail, insisting that the charter was the entail, and that it was recorded in terms of the statute.

June 26, 1776. The Lords, of this date, pronounced this interlocutor,—

" Having advised the state of process, testimonies of the " witnesses, writs produced, memorials *hinc inde*, and whole " papers and proceedings in the cause, and having heard " parties' procurators thereon, sustain the defences, assoilzie " the defenders, and decern."

An appeal was brought against the interlocutors of 24th and 31st July 1772, and 26th June 1776, in so far as they determine that the entail executed by Alexander Irvine of Drum was not duly recorded, and also in so far as they sustain the respondents' defences.

Pleaded for the Appellant.—The estate of Drum was strictly entailed, and the entail duly recorded, according to the directions of the statute 1685 ; the charter of entail and relative nomination having been judicially produced, and properly entered in the register. The original entail spoken of in the act, must mean that which was understood at the time to be the entail, namely, the charter granted by the superior, and accepted of by the vassal, the consent of both being then necessary to give validity to an entail. So it was understood by the Court of Session, and every one, that the entail of Drum was just the charter of tailzie, and relative nomination of heirs. The estate was therefore good against alienations, and against creditors. But, notwithstanding this, a scheme was devised to break the entail by Irvine of Marthill, upon his succeeding as heir of entail, in conjunction with Sir Alexander Cuming of Coulter, who was his creditor, by raising up old extinguished debts of the en-

tailer, as if they were still due, in order to serve as a pretext for selling a part of the estate, which Sir Alexander meant to purchase. They found difficulties greater than they at first imagined, but ultimately made the £8000 Scots bond, which the entailer meant as a provision for his second son, Charles, the foundation of this proceeding. They adjudged for principal, interest, and penalty, and obtained decree, sustaining the bond as a charge against the estate, whereas they artfully concealed, that by a deed dated the very day after this bond, that deed was cancelled and a new one executed, making a provision to him of equal amount. If, therefore, the £8000 bond was not an existing debt, but, on the contrary, extinguished and cancelled, the adjudications upon it, and decree of judicial sale which followed those adjudications, by which the entailed estate was carried off, must be set aside. That, moreover, the agreement of 1773 with the appellant and his brother, had been violated, whereby it was agreed, that no more of the estate was to be sold but what was equal to the value of the debts then compounded for, which at that time did not amount to more than one-fourth of the value of the estate. The other debts of the entailer were all extinguished and paid, by partial sales, long prior to this scheme; such as the sales of Auchtercoull, Bruckly, and Ironside. And, therefore, although a judicial sale, and a decree of sale, was entitled to great weight, yet here, as the judicial sale was a piece of form resorted to, in order to give effect to a *private transaction*, that transaction being to transfer the estate *in fraudem* of the heirs of entail, no effect was due to it in this instance.

Pleaded for the Respondents.—The appellant had no right to call for production of writings or deeds, respecting the lands of Auchtercoull, because the respondent, the Earl of Aberdeen, has produced rights thereto, sufficient to exclude; for by the entail of the estate of Drum, the heirs of entail were allowed to sell lands, for payment of the entailer's debts, which were so considerable as to make him bankrupt, and so to necessitate a sale. Besides, the entail of Drum was not recorded, and therefore could not protect against creditors, and the sale of it to Sir Alexander Cuming was good. There is no law for holding that the charter was the original entail, and that production of it to the Lords, in place of the deed or procuratory of resignation for registration, was sufficient compliance of the act. A charter upon an entail is altogether different from the original entail itself. Nor is there

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any reason to believe, and no evidence to shew that, even supposing the bond of £8000 Scots was laid aside, as not a true debt, any advantage could accrue to the family, when it is admitted that a bond for an equal sum was next day granted, which might have been the means of vesting a fee, or of withdrawing a considerable part of the estate. The sales, therefore, to Sir Alexander Cuming of Drum, and the Earl of Aberdeen of Auchtercoull, were unexceptionable. No fraud is averred in regard to the sale of the latter. The Earl paid a full price to the creditors, and his purchase is secured by prescription, and a decree of sale. There was no concealment, and no fraud proved in the conduct of the sale, but, even if there were, it is not the business of a purchaser at a judicial sale to examine into this. The Court see to the judicial procedure before it, and a purchaser is entitled to rely that every step is fair and unexceptionable. And, in regard to the writing called for, by law no one is bound to preserve the warrants of apprisings, adjudications, decrees, and other diligences, beyond twenty years, and therefore the appellant was not entitled to production of the general and special charge, these being the warrants of the adjudication.

After hearing counsel,

LORD MANSFIELD stated:—

"During the last century, long and serious had been the investigation of the doctrine of entails, and the general opinion of all the judges was, that the practice was unfavourable to commerce, clogging and hampering to property, and in general hurtful to the public. However, in 1685, the legislature thought proper to give a kind of sanction to entails, under an express proviso that they should be registered in the courts of justice; that is, the original disposing deed; the procuratory of resignation to the Crown; the charter of *novodamus;* the precept of sasine and infeftment, and so forth; particularly some of the special clauses of each, to be inserted in the court books, and, in case of failure of any of these insertions, the entail to be void. This was not a question of right or equity, it was mere strict positive law. The act directed specifically what was to be done. Was that done here? No. The entail itself is an unfavourable plea, therefore a defect could not be amended by any consideration of equivalent transactions or agreements. He recollected an anecdote he had from the late Lord Advocate, (afterwards Lord President Dundas), that he had kept an exact account of all the entails he, as a lawyer, had helped to make, and also of all that he had helped to break, and that he found, upon the whole, he had helped to break just as many as he had helped to make, (a most excellent caution to

landed gentlemen not to strive against the stream, by entailing their estates, which their heirs take as much pains to break, and thus waste their estates among lawyers), and he did not doubt but posterity would find out means of breaking these restraints. He then moved the interlocutors complained of be affirmed.

LORD CHANCELLOR said :—

" That the mere point of law was against the appellant ; but he wished to pronounce such a decree as would enable him hereafter to bring the matter before the Court of Session in Scotland, so as that he might not be debarred from prosecuting his right on the ground of informality only."

LORD MARCHMONT seemed of the same opinion, and added, " that the point of positive law was so involved with informal proceedings of the appellant, that it required some consideration to form a decree, in which the positive law, as well as the equitable right of parties might be preserved. Case adjourned, 17th April 1777."

This case being resumed, the Lords agreed to affirm as below :—

It was ordered and adjudged that the interlocutor of the 21st and 31st July 1772 be affirmed. And it is further ordered and adjudged that the interlocutors of the 21st of January, 28th of February, and 26th of July 1771, and the interlocutor of the 26th of June 1776 be also affirmed, without prejudice to any satisfaction in money that the appellant may be entitled to in respect of any claim he may have in virtue of the agreement 1733.

For Appellants, *Al. Wedderburn, Alex. Murray, Dav. Rae, Alex. Wight, Ilay Campbell, S. Douglas.*

For Respondents, *E. Thurlow, Henry Dundas, Al. Forrester.*

LADY CRANSTOUN and MICHAEL LADE, Esq., *Appellants ;*
GEORGE LEWIS SCOTT and Others, - *Respondents.*

House of Lords, 21*st April* 1777.

RENUNCIATION—DONATION INTER VIRUM ET UXOREM—REVOCATION.—A husband procured a renunciation from his wife of her provision secured preferably over his estates, in order to allow these to be sold, and price paid to his creditors. Held, the wife not bound by the renunciation, although third parties were interested, and had agreed to abate claims on her granting it.

The late Lord Cranstoun, in contemplation of his marriage with the appellant, daughter of Jeremiah Brown of Apscourt, entered into two several marriage settlements