It was ordered and adjudged that the interlocutor complained of be *reversed*; And it is declared that the respondents are entitled to a return of the premium paid by them to the appellants, and it is therefore ordered and adjudged that the appellants do pay to the said respondents the said premium.

For Appellants, *J. Dunning*, *Ar. Macdonald*.
For Respondents, *E. Thurlow*, *Al. Wedderburn*.

LIEUT. ANDREW SUTHERLAND, - *Appellant*;
ELIZABETH COUNTESS of Sutherland, and her Guardians, for herself, and on behalf of the other Creditors of Skelbo, } *Respondents*.

House of Lords, 26*th March* 1777.

POSITIVE PRESCRIPTION—ABSOLUTE OR REDEEMABLE RIGHT—TESTING CLAUSE.—A conveyance by charter was made of certain parts of an estate *ex facie* absolute, and bearing to be for a price then paid. Eight days before its date, a wadset had been granted of the same lands, in favour of the same party, which obliged the party to grant a letter of reversion. No letter of reversion was adduced, and no appearance of it on the records. The positive prescription and possession followed. Held, in the Court of Session, that the wadset right and charter qualified each other, and were to be read as one deed, and that the right was redeemable. Reversed in the House of Lords, and held that prescriptive possession on the absolute right, fortified the appellant's title; and that the right was irredeemable. The contract of wadset having been executed by the aid of notaries; Held, that as one notary and two witnesses alone signed it, the wadset was bad.

The estate of Skelbo originally belonged to the Earl of Sutherland, but afterwards came to belong to Lord Duffus, who held the same of and under the Earl of Sutherland and his heirs, as lawful superiors thereof.

Lord Duffus was attainted for high treason in 1715; and, in virtue of the Clan act, the estate of Skelbo was then claimed by and reverted to the Earl of Sutherland, in virtue of the clause in the act, which provided, that in case of forfeiture, the lands of any such subject "shall recognosce and "return into the hands of the superior; and the property "shall be, and is hereby consolidated with the superiority, "in the same manner as if the same lands, or tenements, "had been by the vassal resigned into the hands of the superior *ad perpetuam remanentiam*."

The Earl, and afterwards the Countoss, made a claim to

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the estate under this act, but had, besides a distinct claim by virtue of an adjudication.

The Countess endeavoured to keep the estate at a valuation, but it being decided that she was not entitled to do so, and was bound to pay the whole debts due upon the estate, so far as constituted real burdens thereon, or allow the estate to be sold, she brought the present ranking and sale, and also reduction improbation of the several adjudications or wadsets affecting the lands, and concluding that the same might be reduced as already extinguished and paid, or if not, to ascertain the extent thereof, and concluding that the several wadsetters might be warned and cited to appear and bring their several wadsets, &c., and upon payment to discharge and renounce, so that the estate might be purged of the same.

Among the wadsetters on whom notice and citation was served, the appellant, Andrew Sutherland, was one, whose wadset extended over the lands of Cambusavil, being a part of Skelbo and Duffus estates, for 1000 merks Scots.

But it turned out that the appellant laid claim to the lands of Cambusavil upon a higher right than a mere right in redemption. He claimed these lands as absolute and irredeemable proprietor, founded on a charter granted to him in 1611 by William Sutherland of Duffus, long prior to his descendant's forfeiture, and insisted that these lands should not be included in the ranking and sale.

The narrative of this charter set forth, a price paid as the value or consideration for the lands. "Et præsertim pro "quadam magna pecuniæ summa, mihi per dictum Alexan- "drum Sutherland tempore confectionis præsentium gra- "tanter et integre persoluta, de qua quidem pecuniæ sum- "ma teneo me bene contentum placitum et satisfactum, "dictumque Alexandrum Sutherland suos hæredes, execu- "tores, et assignatos, pro me, meis hæredibus executoribus "et assignatis de eadem exonero," &c. The tenendas bears that the lands were to be held of the granter, "in feodo "hæreditate ac libere albæ firmæ in perpetuum," for payment of a penny yearly, "nomine albæ firmæ si petatur "tantum pro omni alio onere exactione," &c. Then followed a clause of absolute warrandice and precept of sasine. Upon this precept of sasine infeftment followed in favour of Alexander Sutherland and his wife, the grantees. And in virtue of this title, he had constant possession ever since 1611. This charter was afterwards renewed in 1642; and, in virtue of both, there was a complete title to the lands.

On the other hand, it was objected by the respondents, that this charter proceeded upon a contract of wadset executed eight days before the date of the charter, wherein the lands of Cambusavil were merely wadsetted to Alexander Sutherland for the sum of 1000 merks Scots, and that the charter even bore reference to the contract. To this it was answered by the appellant, that although originally a mere wadset was intended, yet that this did not preclude a new transaction, different in its nature, and that there was sufficient interval of time to allow of such new transaction. No doubt the contract bore William Sutherland to have received 1000 merks, and, in consideration of this, he bound himself to infeft Alexander Sutherland and his spouse, "in "conjunct fee and liferent, and their heirs-male in fee, in "the lands of Cambusavil," they on their part binding themselves to deliver a sufficient "letter of reversion." But this letter was never granted. And there was nothing in this contract to preclude them making a new transaction, which was done accordingly by the feu-charter. The appellant further objected to the contract itself under the act 1579, c. 80, because, bearing two several dates of signing the same, it did not distinguish in the testing clause, which of the two contracting parties signed upon the 25th of February, and which upon the 15th March. It was further objected, that the notarial subscription for Isabella Ross was null, in so far as one notary and two witnesses only had subscribed, whereas two notaries and four witnesses were necessary, in terms of the act. And, finally, that his right was fortified by prescription. The Countess replied, as the charter 1611 was only a redeemable right, it would not be a good title to found prescription.

Feb. 25, and Mar. 15, 1611.

The Lord Ordinary, of this date, pronounced this interlocutor: "Finds and declares the lands of Cambusavil, and "others libelled, redeemable by the pursuers (respondents), "and they are duly and lawfully redeemed in terms of the "contract of wadset, from and after the term of Whitsunday "last, reserving to the parties to be further heard on the "other points of the cause, without prejudice to the decreet "of declarator of redemption being extracted in the mean-"time." On further representation the Lord Ordinary adhered; and on two petitions to the whole Court, the Lords adhered.

June 26, 1773.

Feb. 16, 1774. Dec. 12, 1775.

Against these interlocutors the present appeal was brought.

Pleaded for the Appellant.—Had there been a right of

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reversion granted, it would now be in existence; and produced to establish the redeemable right. The contract of wadset on which the Countess founds, only obliges the appellant's ancestor to grant a letter of reversion; and the question is, Was this letter of reversion ever granted, or was it not? The appellant contends that it was never granted; because a new transaction was entered into, by which an irredeemable right was conveyed of the lands of Cambusavil. In point of law, rights of reversion ought not to be reared up by mere implication, or by facts and circumstances, after the lapse of 150 years; nor ought deeds labouring under statutory nullities, as this contract does, be received in evidence of the existence of such reversion. They are *strictissimi juris*; and unless proved by the most unexceptionable written title, cannot be sustained. The *contract of wadset* is *not* the appellant's *title* to the lands. That *contract* is *prior* in *date* to the *irredeemable right* under which he possesses, and is, besides, null and void, in consequence of not being duly tested in terms of the act 1579, c. 80, as being only subscribed by one notary and two witnesses, in place of two notaries and four witnesses, and also because it does not particularize on which of the two dates the one or the other of the contracting parties signed it. Further, that this contract was clearly innovated by a subsequent agreement appears evident from the nonexistence and nonregistration of the bond of reversion, and no price being paid to Duffus "tempore confectionis præsentium." In virtue of this charter and sasine conveying the lands irredeemably, the appellant has possessed the lands ever since 1611, and the positive prescription has run upon his right. Independently of this right, and supposing it defective, he has also a prescriptive title under the later charter of 1642, supported by prescription for more than forty years.

Pleaded for the Respondents.—By the contract of wadset it clearly appears that the intention of the parties was simply to make a wadset of the lands of Cambusavil, redeemable by Lord Duffus and his heirs, on payment of 1000 merks, and the respondent, in his right, has it now in her power to redeem them. The contract is explicit, and the argument of the appellant, raised upon the charter dated eight days after it, is untenable, that a new bargain was gone into. There is not the least vestige of evidence of this, and the "*magna pecuniæ summa*" in that charter, cannot by any construction of words, be read so as to confer

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.