No 173. entail; yet these alienations are good against every person, till reduced by the heir of entail, and may be secured even against him by the positive prescription.

THE LORDS repelled the objection.

For Mr Houston, *Lord Advocate, Niel Ferguson.* Alt. *Fay Campbell.*

Fol. Dic. v. 3. *p.* 424. *Fac. Col. No* 20. *p.* 30.

1790. *February* 23. CHARLES GREY *against* CHARLES HOPE.

No 174.
In transcribing a sasine into the record, certain lands were omitted in the clause where the notary attests that delivery was given. This mistake was signified to the keeper, and he was required to insert the omitted lands, but did not think himself warranted to do so. An objection on this ground, to the enrolment of the proprietor, was sustained by the Court.

THE estate in virtue of which Mr Grey claimed to be enrolled as a freeholder in the county of Linlithgow, was partly composed of the lands of Drumbowie, which were rated in the cess-books of the county at L. 166: 13: 4.

Mr Grey had been duly infeft in these lands on 18th September 1788; and on 22d September, he received from the depute-keeper of the register the instrument of sasine, with the usual attestation on the back of it, bearing, that it had been duly recorded.

But in transcribing the instrument of sasine into the record, the lands of Drumbowie, though specified in the precept of sasine inserted in the introdictory part of the instrument, were omitted in the clause where the notary attests that delivery was given. This was not observed till 24th September 1789, and it was immediately intimated to Mr Grey's agent, who insisted, that the keeper of the record should insert the omitted lands in a marginal note, which should be authenticated by his subscription. This, however, the keeper did not think himself warranted to do. The record-book in the particular register where Mr Grey's sasine was ingrossed, is not kept by a deputy of the Lord Clerk Register, as is directed by the statute of 1617, but by a clerk appointed by the Crown. At the time when this oversight was observed, it had not been signed by the keeper.

At the Michaelmas meeting held on 1st October 1789, when Mr Grey's claim was exhibited, an objection, arising from the circumstances already mentioned, was stated by Mr Hope, one of the freeholders. And this objection having been sustained, Mr Grey complained to the Court of Session, and

Pleaded: For the purpose of intimating to the public the alienation or burdening of lands, our law has required the registration of sasines, and other writings of the same kind, and that within forty eight hours after they are presented to the keeper of the record. Nor has the interest of the private party been less the object of attention; it being provided, that within the same short space, the sasine or other writing shall be returned to him by whom it was presented, with an attestation, bearing the day, month, and year of the registration, and in what part of the record the particular writing is to be found. Act, 1617, cap. 16.

In process of time, however, when, from the multiplicity of commercial transactions, the actual booking of the whole writing within so short a period as forty-eight hours became impracticable, the keeper of the register was required to have a minute book, in which the date of presenting the deed, a general description of the lands, with the names of those who were parties to the business, should be immediately inserted, leaving the registration itself to be afterwards performed as soon as it could be done, in the same order in which the different writings appeared in the minute-book. In this way, this short marking in the minute-book has come to be considered as the commencement of the registration; and until the whole has been completed in the fullest manner, it is to the instrument of sasine itself, attested by the proper officer, especially where this is confirmed by the marking in the minute-book, that attention is to be paid. Act, 1672, cap. 16.; 1693, cap. 14. No 174.

Thus, if no part of the sasine in this case had appeared in the record, the claim of enrolment founded on it would have been nevertheless unexceptionable. And surely the omission as to a part, which it was in the power of the keeper of the register to remedy, cannot be more fatal to it. Indeed, in this case it may be justly doubted, how far any part of the sasine has been recorded as the statute requires. On these principles it was decided, where a sasine had been attested and marked in the minute-book, that the circumstance of its not having been transcribed into the record till within a year of the enrolment, did not affect the freeholder's right. To give a different determination, would be to invest the keeper of the record with a power of rendering ineffectual at pleasure the most important rights which can be exercised by the landholders of this country. Wight on Elections, p. 206. 9th February 1763, Sir Alexander M'Kenzie and others, *contra* M'Leod of Cadboll. See APPENDIX

Answered; The statute of 16th Geo. II. cap. 11. requires the registration of the freeholder's infeftment twelve months before he is enrolled. By this must be meant, a registration with regard to all the lands on which his claim is founded. The purpose of the law, which was to give an opportunity of examining into the real situation of those feudal rights, which are to be productive of so important a privilege, most evidently requires, that it shall appear during the whole of the statutory period, what the lands are in virtue of which an enrolment is to be demanded; and thus the claim which was here rejected, seems no less irreconcileable to the words than to the meaning of the law.

The determination, finding that a delay in transcribing a sasine into the record, was not fatal to a claim for enrolment, the sasine having been duly entered in the minute-book, and thereafter exactly engrossed in the record, though not within forty-eight hours from the date of the presentation, and perhaps not within sixty days from the date of the infeftment itself, is inapplicable to the present case. There, the question was not with regard to the registration, which was, to all appearance, regular and complete, but with regard to the date of it; and as, in many cases, the transcribing of the writing into the register cannot be

No 174. performed within the time above-mentioned, while, from the sasine itself being retained by the keeper of the record till this actually takes place, no injury can arise to third parties, the decision may be considered as a proper one.

But where, as in the present instance, the record, as it is made out, does not mention a part of the lands contained in the infeftment, it is evident, that without overthrowing at once the whole system of the public registers, no regard can be paid to it, so far as relates to the omitted lands. If there can be said to be any record at all, it is an imperfect and vitiated one, and therefore useless. If again the writing is to be considered as unrecorded, the requisites of the statute of his late Majesty, have not been observed. The proposed insertion of the omitted lands into the margin of the record, after the lapse of much more than sixty days after the date of infeftment, could give no validity to it which it had not before; nor could this be done by the keeper of the record, who is entrusted with the filling up of the register, but who has no power to correct or alter it.

The consequences of this doctrine are evidently most just. It is the fault of him who presents a sasine to the keeper of the record, that it is not published in the most regular manner; because it is in his power, by examining the register as soon as it is filled up, to see whether the necessary accuracy has been observed. But were any imperfection in the records to be remedied in the way here proposed, the loss would fall on those who are altogether free from blame, as having been authorised by law to rely on the fidelity of the registers.

THE COURT were unanimously of opinion, that the judgment of the freeholders was well founded. Where it appears from the record that a sasine has been engrossed of the same date with the attestation on the back, and the marking in the minute-book, this, it was observed, could not be redargued by parole testimony, without giving more credit to the keepers of the register than to the record itself. The case here was very different; the claimant wishing to set up the presumptive evidence, arising from the indorsation of the sasine, and the marking in the minute-book, against the record.

After advising the petition and complaint, which was followed with answers, replies, and duplies.

"THE LORDS dismissed the complaint."

A reclaiming petition was preferred, to which answers were given in; but the LORDS adhered to their former judgment.

Act. *Wight, W. Robertson,* et alii. Alt. *Blair, Honyman, Hope,* et alii. Clerk, *Menzies.*

C. *Fol. Dic. v.* 3. *p.* 423. *Fac. Col.* No 119. *p.* 229.

A separate complaint was, at the same time, preferred against the keeper of the register, insisting that he should be ordained to amend the record, and for damages and a fine. THE LORDS found damages due, and imposed a fine of L. 5, but they would not in this case authorise any alteration to be made in the record.