1770.

IRVINE
v.
EARL OF
ABERDEEN,
&c.

ALEX. IRVINE of Drum, Esq., and his Guardians, *Appellants;*

The Right Hon. GEORGE, EARL OF ABERDEEN, Mrs. MARGARET DUFF of Coulter, formerly Widow of Patrick Duff, Esq., now Wife of ALEXANDER UDNY, Esq., and him for his interest, - - - - - *Respondents.*

House of Lords, 2*d April* 1770.

DECRET OF SALE—EXCLUSIVE TITLE.—When a decree of sale is impugned, as having been fraudulently obtained, held that production of such decree is not a sufficient title to exclude exhibition of other writs specially called for, as the grounds and warrants on which it proceeded, nor a bar to the action raised for restoration of an entailed estate sold for the entailer's debts; reversing the judgment of the Court of Session.

Action of reduction and decree of sale to have certain entailed estates restored to the appellant, which were sold, under said ranking and decret of sale, on payment of the alleged debts of the entailer, on the ground that the proceedings in the ranking and sale by which he was deprived of the benefit of the estate, were fraudulently carried through, and that no more of the estates than was necessary to pay the entailer's debts, ought to have been sold, yet a sale took place, to the great hurt and prejudice of the appellant, the next heir.

The facts alleged in support of this were, That at the time the ranking and sale was raised, the estate of Drum was not bankrupt, and that, to create an appearance of bankruptcy, fraudulent means were alleged to have been resorted to: 1st. By rearing up fictitious debts; 2d. By overcharging other debts that had been paid in part; 3d. Charging penalties, accumulations, and expenses, not exigible; 4th. By lowering the yearly rent by at least £120 per annum; and, 5th. By concealing the value of part of the estate, upon pretence of its being mortgaged for £833. 6s. 8d., to certain bursars in the College of Aberdeen, though, in fact, the lands were not mortgaged, &c.,—that, though by a ratification executed by the appellant and his brother, of this date, 1733. it was understood 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, yet the whole estate was sold.

The appellant's guardians insisted for exhibition of a bond of provision of £5000 Scots, and adjudications whereby

1770.

IRVINE v. EARL OF ABERDEEN, &c.

the same was made to affect the estate. *Item*, the adjudications obtained by the Earl of Aberdeen and Patrick Duff; *Item*, The decree of ranking the creditors, and for the sale of the estate and decree of exoneration of the factor, who had received the rents thereof for thirteen years. In bar of the action, and of the exhibition sought, the decree of sale was produced, together with ratification under the hand of the appellant's predecessors, and the purchasers refused to produce any further writ, contending, that these were sufficient, and totally excluded the pursuers. In reply, it was contended, that as the decree of sale was impugned on the ground of fraud, it could not form any bar to the production of the grounds of warrants upon which it proceeded.

The whole Lords, after minutes of debate and informa-
Jan. 27, 1769. tions, found "that the defenders are not bound in *hoc statu* "to produce the writs and deeds called for, and remit to "the Lord Ordinary to proceed accordingly."

To this interlocutor, after reclaiming petition, the Court adhered.

It was against these interlocutors that the present appeal was brought.

Pleaded for the Appellants.—That here the decree of ranking and sale has been obtained by fraud, and where this is alleged against it, and where the purchasers, as has been condescended on, have been accessory to that fraud, the decree of sale cannot protect them. The estate being settled by strict entail, could not be sold but for payment of the entailer's debts, and no court whatever could authorize a sale of more of the estate than was sufficient for the payment of these debts. Here the whole estate was sold without the consent of the next heirs of entail. Even by the ratification and bond alluded to, it was expressly agreed, That *no more* of the estate should be sold *than was necessary for payment* of the *debts* of the *entailer*. But, in place of this, the whole was sold; and he was, therefore, entitled to be restored against that sale, on payment of the entailer's debts. When called in question, they must exhibit the whole writs particularly enumerated in the condescendence; and are not entitled to found on the decree of sale as excluding this exhibition, and thus cover their fraud by the very deed which is challenged as fraudulent. The allegations of fraud, if relevant in themselves, must be taken as true until disproved; and, as the averment is that the decret is fraudulent and voidable, it can afford no protection against the exhibition called for.

Pleaded by the Respondents.—The appellant is barred by personal exception from maintaining this suit, as well from his actually holding part of the lands of Drum by conveyance from the respondents, whose title, therefore, he cannot challenge, as well by his actual enjoying likewise a sum of money under the agreement, whereon his title is founded. Nor can this objection be removed but by giving up those lands, refunding all the rents, and repaying the 20,000 merks, with interest. Besides, the warranty in the disposition under which the appellant holds, renders the legal bar more conclusive. So does his special service to John Irvine, and to his grandfather and father, who were all barred from challenging the respondents' title by acts of agreement. By his positive ratification also, in 1733, of the disposition in favour of the purchaser, and his discharge of all claims. But more particularly, the decree of sale itself is a sufficient bar to this demand; and is a complete title to the respondents, necessarily precluding any further right of production, as long as the decree remains unreduced, the act 1695 making the title under a judicial sale the most perfect and absolute that can be had.

After hearing counsel, it was

Ordered and declared that the matter pleaded by the respondents is not a bar to this action, or to the appellants' insisting therein, saving the benefit thereof to the hearing of the cause; and it is therefore ordered and adjudged that the interlocutors appealed from, so far as they are complained of by the appellants, be reversed. And it is further ordered that the respondents do produce the writs specially called for."

For Appellants, *Al. Wedderburn, Dav. Rae.*

For Respondents, *Ja. Montgomery, Al. Forrester, Tho. Lockhart.*

(M. 14,209 et F. C.)

Messrs. HASTIE & JAMIESON, Merchants in Glasgow, - - - - } *Appellants;*

ROBERT ARTHUR, Merchant in Irvine, - *Respondent.*

House of Lords, 10th *April* 1770.

SALE—BILL OF LADING.—Its effect in transferring the property of the goods.

For a full report of this case, *vide* M. 14,209, along with the subsequent part of it, after its return from the House of Lords.