1814.

AGNEW v. DUNLOP. March 11, 1785.

" is no clause or provision in the entail by which the heir of " entail is empowered to sell the whole or any part of the said " estate of Barnbarrow for payment of debt, and in regard the " Court has no jurisdiction to authorise any such sale, assoilzie " the defenders,—leaving to the pursuer and the other parties " concerned to take such steps for their relief in the premises " as they shall be advised."

Against the interlocutors pronounced in this cause, with the exception of part of the last interlocutor, which is above quoted, the present appeal was brought.

After hearing counsel,

It was ordered, That the cause be remitted back to the Court of Session to review the interlocutors complained of generally, allowing the appellant to call all necessary parties before them, and to do therein as to them shall seem just.

For the Appellant, *John Clerk, J. Greenshields, Alexander Maconochie, J. A. Murray.*

For the Respondent, *Sir Samuel Romilly, Geo. Cranstoun.*

(Sheuchan Case.)

JOHN VANS AGNEW, Esq. of Sheuchan, *Appellant.*

MrS FRANCES DUNLOP, otherwise AGNEW, Widow, and universal Disponee and Executrix of Robert Vans Agnew, Esq., last of Sheuchan, as representing her said Husband; the Right Honourable JOHN, EARL of STAIR, JOHN MAITLAND, Esq. of Freugh, as representing the deceased Captain the Honourable PATRICK MAITLAND of Freugh; Sir DAVID HUNTER BLAIR, Bart., and JAMES HUNTER BLAIR, Esq., both or one of them representing the deceased Sir John Hunter Blair of Dunskey, Bart.; RAMSAY HANNAY, Esq. of Kirkdale, ALEXANDER M'LEAN, Esq. of Mark, and CHARLES STEWART, W.S., as Trustees of William Hannay of Bargally; and JOHNSTON HANNAY of Torrs, Esq., and DAVID BALFOUR, Esq., W.S., — *Respondents.*

(*Third Appeal.*)

House of Lords, 29th July 1814.

APPEAL.—Circumstances in which an appeal was dismissed as incompetent.

Having been disappointed in obtaining authority from the Court of Session to sell the estate of Barnbarrow, to pay John Vans' debts, as is shown by the preceding appeal, Robert Agnew, the son, went to Parliament, and obtained an Act authorizing the sale of such parts of Barnbarrow and Sheuchan estates as might be necessary to pay off these debts.

He obtained this Act, which gave him power to sell such detached parts of Barnbarrow for the purpose of paying off these debts, and if that was insufficient, also to sell such disconnected parts of the estate of Sheuchan as should be necessary for the payment of said debts.

Under this Act, certain lots were fixed on, and sold by judicial sale to the respondents.

The appellant did not raise a reduction of these proceedings in the Court below; but it seems having certain objections to the regularity of the proceedings in the sale, such as that these proceedings were in absence while he was a minor, and that no curator *ad litem* had been appointed to him, and that the whole proceedings were collusive, and that the Act of Parliament obtained for the sales of the estates was obtained upon untrue statements in regard to the estate, and without any just grounds for the sale, he brought the present appeal against the whole interlocutors in the cause, the last being dated 30th June 1808.

In hearing the cause in the House of Lords, it was objected to by the respondents, 1st, That the appeal was incompetent as not having been brought in due time, under the standing orders of the House, 24th March 1725; 2d, That the appellant had not cited as respondents to his appeal the creditors of his late grandfather, who were necessary parties thereto; 3d, That the present respondents were not parties to the action in the Court below, and it is not competent to bring the rights of purchasers at judicial sales under challenge in the way of appeal,—that can be done only by proper action of reduction, brought in a competent Court, and cannot be brought in question in the first instance by way of an appeal.

1814.

AGNEW v. DUNLOP, &c.

LORD CHANCELLOR ELDON (as to these three appeals) said*—

"My Lords,

"There are three appeals in the matter of Agnew *v.* Stewart, Agnew *v.* Agnew, and Agnew *v.* Agnew, the Earl of Stair, and Others. These appeals affect a great variety of proceedings in the Court of Session. The latter case respects the execution of a decree following on an Act of Parliament. My Lords, with respect to that, it appears to me, upon consideration of the case, that it is quite clear the appeal to this House is quite incompetent. Our jurisdiction here is to decide on questions of law on which judgment has been originally given in the Court below; it is perfectly impossible to say that there is a case here on which a judgment has been given in the Court below; and if, when the appeal was first presented, the respondents had applied by petition, stating that it was a case in which an appeal was incompetent, and praying the appeal might be dismissed, I think, the House would on such a petition being brought before it, have had no difficulty in informing them that they were not bound to answer such an appeal, and would have dismissed it. The respondents, however, have taken another course, and have put the case in the state in which it now is, which makes it reasonable there should be no costs; but it appears to me that the proper way of disposing of that will be—(declaring that it is not competent, in the circumstances of this case, to affect the purchaser by the proceeding of the appeal)—to dismiss this appeal, reserving to the appellant such relief (if any); not meaning to say that he has any, but reserving to him such relief, if he has any, in any other mode of proceeding."

Ordered accordingly.

LORD CHANCELLOR.

"My Lords,

"With respect to the two other cases, they involve very material, and to me very nice, points of Scotch law, which, in consequence of this gentleman being very long abroad, have been brought before your Lordships at a very late period. These points of Scotch law occurring so long ago as the year 1784, nobody has been able to give us the least information at the bar of the reasons upon which the Court of Session proceeded; and therefore I am of opinion that it might be right in these cases to remit them to the Court of Session, to review the interlocutors complained of generally, allowing the appellant to call all necessary parties before them, and to do therein as to them shall seem just. I feel that it would be impossible to decide these cases with any certainty that we were possessed of the merits or the principles upon which they

* From Mr Gurney's Short-hand Notes.

ought to be decided; and your Lordships know, with respect to entails and the mode of effecting them, there have been very important decisions within the last few years, reference to which must be had in the determination of this case. I therefore feel, that, as it respects all parties, it will be exceedingly desirable that these interlocutors should be remitted to the Court of Session."

Ordered accordingly.

Whereupon the Lord Chancellor pronounced the following judgment in the last of these appeals:—

It is declared, That it is not competent in the circumstances of this case to affect the purchasers by the proceeding of appeal; it is therefore ordered that the said appeal be, and the same is hereby dismissed this House, reserving to the appellant such relief (if any) as he may be entitled to in any other mode of proceeding.

For Appellant, *John Clerk, John Greenshields, Alexander Maconochie, J. Murray.*

For Respondents, *Sir Saml. Romilly, Math. Ross.*

NOTE.— *Vide* Shaw's Appeal Cases for what was done under this remit, vol. i., p. 333.

(Scarr Case.)

[Fac. Coll., Vol. xiv. p. 209; et Napier on Prescription.]

Mrs JEAN WELSH MAXWELL, of Steelston, and Lieut.-Colonel WILLIAM NEWALL, her Husband, - - - - *Appellants.*

ALEXANDER WELSH, Esq., of Scarr, - - *Respondent.*

House of Lords, 29th July 1814.

ENTAIL—NEGATIVE PRESCRIPTION—POSSESSION ON TWO TITLES —NON VALENTES AGERE.—An entail was made of the estate of Scarr, which, after being recorded, remained personal, without any title being made up under it. The institute, who was also the entailer's heir of line, possessed on apparency for twenty years. The entailer having left some debt, the son of William Welsh, a substitute under the entail, attempted to carry off the estate as a fee simple estate, by obtaining an assignation to these debts, and adjudging upon these, charter was obtained upon this adjudication,