

1776. *December 17.*

JAMES RIGG against WILLIAM DURWARD and DR. WILLIAM THOM.

No. 2.

Allegation of fraud in a bargain, found barred by acquiescence.

DURWARD was proprietor of the lands of Cults, in the neighbourhood of Aberdeen.

Rigg having been in London, entered into an agreement with the undertakers for paying the streets of that city to furnish them with stones fit for that purpose, for which there was at that time a considerable demand from the port of Aberdeen, in which city he resided. Upon his return, Mr. Rigg, upon a communing with Mr. Durward, took a tack from him of certain grounds on which there were quarries for stones.

Instead, however, of finding any stones of the requisite size, nothing could be obtained from these quarries fit to answer the purpose for which he had taken the lease, and which, from the account given by Durward, he was led to expect; and Durward having become bankrupt, and disposed his whole effects, with the tack in question, to Dr. Thom, Rigg brought an action for reducing the same on the head of fraud.

In this action, he pleaded, that Durward had importuned almost every undertaker in the stone trade at Aberdeen to take a lease of these quarries, which upon inspection they had all refused; while at the same time, under pretence of friendship for the pursuer, he told him at the time when he offered him the lease, that several people had applied to him with great earnestness for the lease of these quarries, and in particular Mr. Littlejohn, the agent for the Messrs. Adam, but that he wished to prefer the pursuer, and would therefore let them to him: That Durward did this, although he well knew at the time, that the quarries contained no such stones as those which the pursuer had occasion for, and were furnished by others employed in the trade to the London market, and that he was led to impose in this manner upon the pursuer, who being a Brewer by profession, was not capable of judging so accurately concerning the value of the quarries: That the pursuer, after laying out an expense of no less than £50. Sterling, was obliged to abandon the working of the quarries altogether, and that having offered to subset them to several people, the uniform answer he had received was, that they were not worth the working: That Durward himself was so sensible of this, that he had often promised the pursuer to give up the bargain, although, notwithstanding these promises, he afterward thought proper to do diligence upon the tack for arrears of rent, and in this manner forced payment from the pursuer. In these circumstances, there was no doubt, that there was an evident fraud on the part of the defender, and the pursuer craved to be allowed a proof of them.

Answered for the defender: The allegations of fraud are not well founded. But without going into the facts of the case, such allegations are wholly irrelevant. The most dangerous consequences would follow if general allegations

of fraud were sufficient to set aside leases of lands ; especially, where the lessee has homologated the transaction by payment of rent. In this case, the pursuer has homologated the tack by payment of rent for three years ; and upon this ground the proof which he now offers cannot be received.

No. 2.

The Lord Ordinary had pronounced an interlocutor, “repelling the reasons of reduction,” and to this interlocutor the Court adhered.

Although there might have been fraud in the conduct of Durward, the pursuer had homologated the tack by paying rent ; and it was observed from the Bench, that supposing a man to have been *concussed* into a bargain, yet, if he afterward homologated it, when at freedom, he could have no relief,—and the same principle applied to the case of fraud.

Lord Ordinary, *Covington.*Act. *Chas. Hay.*Alt. *Elphinstone.**J. W.*

* * The case Shepperd against Campbell Robertson and Co. mentioned p. 4948. and p. 4980. ought to have been dated 28th June 1795. It has not been reported. See APPENDIX, PART II.