

although one of the Judges does suggest that the judgment might have been rested on that ground, it is manifest that the Court proceeded on the ground that Jackson could not recover because the agreement between him and Duchair was a fraud on Welsh. That decision appears to be closely applicable to the present case. The import of it is thus summed up in Chitty on Contracts (12th ed.), p. 700—'When one person advances money to another to buy goods from a third, and the person to whom the money is advanced agrees with the third to pay a higher price than the money advanced, this agreement is void as a fraud upon the person advancing the money, and the third person cannot sue for the higher price.' The case is quoted in Pollock on Contracts (5th ed.), p. 266, as involving that doctrine, and it appears to me that the statement of the case is fully supported by the reported opinions.

"If the principle given effect to in that case be sound—and I think that it is sound and in accordance with recognised principles in our law—it appears to establish the defence in this case. I think it plainly implied that Messrs Aitchison were induced to make advances on account of the misstatement of the price, to which the pursuer was confessedly a party, and in any view I do not think it would make a difference whether the fraud intended was carried out successfully or not. It is enough that the contract now alleged and sought to be enforced involved the intention and attempt to defraud.

"No case in our own books was referred to which comes so close to the present as the case of *Jackson v. Duchair*, but the principle affirmed, I think, is undoubtedly recognised in our law, and is thus stated by Professor Bell—'The general rule of law is that no right of action can spring out of an illegal contract, and no Court will lend its aid . . . to a claim founded on an immoral or illegal act'—Bell's Comm. ii. 317.

"A similar principle is familiar in cases of illegal preferences, which are not enforceable against a bankrupt on the ground that they involve a fraud on his creditors—*Riddell v. Chisholm*, November 20, 1821, 15 D. (N.S.) 160; *Arrrol & Cook v. Montgomery*, February 24, 1826, 48 D. 499. It appears to me that this defence sufficiently arises on the pursuer's statement, and may be sustained without inquiry.

"Had I not sustained the above defence as excluding the action I would have sustained the second plea to the effect that the pursuer's averments being contradictory of the written contract could be proved only by the defender's writ or oath. But it seems to me that I could not properly allow a reference to the defender's oath without by implication sustaining the relevancy of the averments. The pursuer referred to the case of *Smith v. Kerr's Trustees*, June 5, 1869, 3 Macph. 863, in support of his motion for a proof at large, but I do not think it applies. In particular, it does not appear in that case that any fraud or deception was practised or attempted."

Counsel for the Pursuer—Ure. Agent—A. C. D. Vert, S.S.C.

Counsel for the Defender—Asher, Q.C.—Crole. Agent—Edward Nish, Solicitor.

Tuesday, July 15,

OUTER HOUSE.

[Lord Wellwood.

ROBERTSON v. MEIKLE AND ANOTHER.

*Process—Expenses—Caution for Expenses—Poor's Roll—Where Action brought after Unfavourable Report by Reporters on Probabilis Causa Litigandi.*

A pursuer having raised an action of reduction in ordinary form afterwards applied for admission to the poor's roll. The reporters reported that there was not a *probabilis causa*. He then proposed to proceed in ordinary form. Held that he must find caution for expenses.

On 29th August 1889 William Robertson, cab-driver, Edinburgh, raised an action of reduction against Robert Meikle, dairyman, Corstorphine, and another.

Issues for trial by jury were approved of on 22nd November 1889, and the trial ordered to proceed on 25th February 1890.

A few days before the date fixed for trial the pursuer's agent, Mr Thomas M'Naught, S.S.C., intimated that he no longer acted for the pursuer in the action, and on 19th February 1890 the Lord Ordinary discharged the order for trial, the pursuer having intimated his intention of seeking the benefit of the poor's roll.

Nothing having been done by the pursuer, the defenders on 5th March 1890 gave notice for trial at the close of the Winter Session, and on 13th March 1890 their Lordships of the Second Division discharged the notice of trial in respect of a statement on behalf of the pursuer that he was in course of making application for the benefit of the poor's roll. In June 1890 their Lordships remitted the pursuer's application to the *probabilis causa* reporters, and on 4th July 1890 they reported that there was no probable cause. Their Lordships remitted the case to Lord Wellwood for further procedure.

On the case coming before Lord Wellwood, the agent for the pursuer intimated through counsel that he again appeared for his client, and asked for a day to be fixed for jury trial.

Counsel for the defenders asked his Lordship to ordain the pursuer to find caution for expenses with certification. Authorities—*Hunter v. Clark*, 1 R. 1154; *Thom v. Andreu*, 15 R. 782 (per Lord Young); *Ritchie v. Young*, 8 R. 748; *Clarke v. Muller*, 11 R. 418.

The pursuer relied on the judgment of Lord Lee in the reported case of *Thomson v. North British Railway Company*, July 14, 1882, 9 R. 1102.

The Lord Ordinary ordained the pursuer to find caution for expenses with certification.

Counsel for the Pursuer—John Wilson.  
Agent—Thomas M'Naught, S.S.C.

Counsel for the Defenders—Vary Campbell—Cosens. Agents—Wylie, Robertson, & Rankin, W.S.

Tuesday, October 21.

## SECOND DIVISION.

[Lord Kinnear, Ordinary.]

### DUKE OF BUCCLEUCH v. BOYD.

*Superior and Vassal—Casualty—Prescription—Possession—Extrinsic Objection.*

The proprietor of M, which had formerly been held of a subject-superior, with a feu-duty of £3, 6s. 8d. Scots, obtained from the Crown a title which bore that the Crown had right to grant the same by virtue of the Acts of Annexation, and which reserved to the subject-superior, as Lord of Erection, the feu-duty of 6s. 8d. Scots. The said proprietor when informed by the factor of the subject-superior of the discrepancy between these sums, paid feu-duty to the subject-superior at the rate of £3, 6s. 8d. Scots. After the lapse of the prescriptive period since the date of the Crown charter, and also since the date of the factor's communication, the subject-superior sued for a casualty of composition from the lands.

*Held* (1) that the Crown title being *ex facie* valid, the pursuer's contention that the Acts of Annexation had been wrongly invoked was an extrinsic objection, and was therefore excluded; (2) that payment of feu-duty to the subject-superior being directed by the Crown title, was consistent with possession thereunder; and further, that possession was not interrupted by the excess of feu-duty paid over the sum demanded by the Crown title.

This was an action of declarator and for payment of a casualty of composition in respect of the five merk land of Maxpoffle. The pursuer claimed to be superior of the lands as representing the Lord of Erection of Melrose. He produced a charter dated 16th July 1627, granted by Thomas Earl of Melrose, afterwards Earl of Haddington, in favour of Nicolas Carncroce of, *inter alia*, the five merk land of Maxpoffle. The reddendo for the lands of Maxpoffle was in these terms—"Ac reddendo annuatim pro dictis quinque mercatis terrarum de Maxpoppill summam trium librarum sex solidorum et 8d. et trium solidorum et 4d. in augmentatione rentalis monetæ prescriptæ ad terminos antedictos per prefatas equales portiones." The pursuer alleged that at least since the date of the Erection in 1609, and particularly since 16th July 1627, the de-

fender's predecessors in the lands had until the beginning of the present century entered under various charters by progress with his predecessors as superiors. The last-entered vassal in the lands on whose entry a casualty was paid was James Newbigging, who entered with the then Duke of Buccleuch by charter of confirmation dated November 30, 1776. It was assumed that Newbigging died before 1861. The pursuer alleged—" (Cond. 3) The defender made up his title and is now infeft in the said lands and others in virtue of a decree of special and general service in his favour as nearest and lawful heir in special and heir-in-general of his father John Boyd of Maxpoffle, residing at No. 2 York Place, Edinburgh, dated the 14th and recorded in Chancery the 17th days of October, and in the new General Register of Sasines, &c., at Edinburgh, the 8th day of November, all in the year 1861. The defender is entered with the pursuer as superior of the said lands and others in virtue of the provisions of the Conveyancing (Scotland) Act 1874, and a composition exigible from a singular successor is payable by the defender to the pursuer."

The defender claimed to be a Crown vassal (1) in virtue of the Acts of Annexation, and (2) by prescription on certain Crown charters. The case was argued under both heads, but the judgments of the Lord Ordinary and the Inner House proceeded entirely on the ground of prescription.

It appeared from the titles that the Cairncross family had sub-feued the five merk land of Maxpoffle to several parties, including one Duncanson, the defender's predecessor in that part of the whole lands in respect of which the present claim was made. The representatives of Cairncross in 1771 sold the superiority of the whole lands to James Newbigging, who bought from the representatives of Duncanson the *dominium utile* of the lands in question. The subsequent transmissions of the lands were shown by the following titles—"(1) Disposition by James Newbigging, sometime writer in Edinburgh, to William Scott younger of Raeburn, dated 27th July 1807. (2) Instrument of sasine following thereon, in favour of the said William Scott, dated the 5th and recorded in the General Register of Sasines, &c., at Edinburgh, 12th days of September 1808. (3) Charter of confirmation under the Great Seal in favour of William Scott of Raeburn, of the above lands as being part of the old Lordship of Melrose held of the Crown by virtue of the Acts of Annexation, dated 21st, and written to the Seal, registered and sealed 30th December 1818. This charter confirms Nos. 1 and 2 before mentioned. (4) Charter of confirmation by the said William Scott in favour of himself, dated 15th November 1830. (5) Procuratory of resignation *ad remanentiam* by the said William Scott in favour of himself, dated said 15th November 1830. (6) Instrument of resignation *ad remanentiam* following thereon, in favour of the said William Scott, dated and recorded in the General Register of Sasines, &c., at Edinburgh, the 15th November 1830."