SCOTLAND.

APPEAL FROM THE COURT OF SESSION.

SCOTLAND—*Appellant.*

MERCER—*Respondent.*

June 21, 1813.

CASE OF SALE OF ESTATE HELD FEU, WITH CLAUSE OF PRE-EMPTION IN FAVOUR OF SUPERIOR, UNDER PENALTY OF NULLITY OF SALE, AND IRRITATION OF FEUAR'S RIGHT.

MERCER purchases an estate held in *feu*, with clause of pre-emption in favour of the superior, under penalty of nullity of the sale and irritation of the feuar's right. The purchaser in open Court consents to take the estate without the usual warranty. The sale sustained.

THOMAS SCOTLAND, the Appellant's father was owner of a small estate called Craiglaw, in Perthshire, held in *feu* of the family of Aldie, of which Miss Mercer, Lord Keith's daughter, is the representative. This property, the Respondent, the factor on the Aldie estate, agreed to purchase as trustee for Lord Keith, and a minute of sale at the price of 1100*l.* was accordingly drawn up on unstamped paper, signed by Thomas Scotland, and attested by Mr. James Keay, a respectable Solicitor, and another witness, and kept by the purchaser. This contract was executed in August 1795, the Respondent paying down 100*l.* of the price.

August 1795. The Respondent, as trustee for Lord Keith, purchases the estate of Craiglaw, from the Appellant's father.

The Appellant having heard of his father's intention to sell inhibited him, and raised an action in the Court of Session, for declaring his own right as having the fee vested in him; his father being, as he alleged, merely a tenant for life. This action was depending at the time of the contract, and was finally dismissed only in 1798. During the whole

The Appellant inhibits his father, and raises action of reduction of sale on ground, that fee in himself, dismissed 1798.

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process nothing was said respecting any *mental* incapacity of his father.

On examining Scotland's title deeds another difficulty occurred: it was discovered that by the original grant or feu charter of the lands of Craiglaw to Scotland's ancestor, which was dated in 1711, it was declared "not to be lawful to the feuar to sell "or convey the lands so feued to any person, without first making an offer to the granters of the "feu, or their successors; and upon their paying "the value thereof, which had been paid by them "(that is 600 merks, or 33*l.* 6*s.* 8*d.* sterling) the "feuar should be obliged to denude (divest himself) "in their favour. Or if the feuar should sell and "convey without making such offer, then the feu "right, or any deed granted by the feuar, should be "void and null." And this proviso was repeated in the instrument of sasine following on the feu charter, and in the subsequent investitures.

Clause of pre-emption in feu; charter in favour of superior.

Farquharson v. Keay. Fac. Coll. 1800.

A question on a similar case was depending in the Court of Session—whether such a proviso was available against a purchaser from the feuar, and it was deemed advisable to postpone the enforcing of the contract, 1st, Till the termination of the Appellant's above-mentioned action, and 2dly, Till the decision of the case in question, as this might be of material consequence in fixing upon the proper method of conveyance.

Conveyance postponed, and why?

Death of old Scotland in 1801, before conveyance, and action of reduction of sale by Appellant.

In August 1801, old Scotland died, upon which the Appellant, as heir-at-law, brought an action in the Court of Session, calling for the production of the minute of sale, and concluding that it should be reduced on these grounds: 1st, That there was but

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one copy of the minute or contract, which was all along retained by the Respondent, who having it thus in his power to cancel or destroy it, might consequently put an end to the bargain, when he thought fit, without the knowledge or consent of Thomas Scotland, whereas, by law, one party cannot be bound in a mutual contract, while the other is free. 2dly, That the minute was elicited and impetrated by the Respondent, through circumvention on his part, and facility on the part of the grantor, without any onerous or just cause, and to his great hurt and enormous lesion, the sum pretended to be stipulated as the price of the lands being totally inadequate to the value, and Thomas Scotland being at the time of the pretended sale, and long before, so weak in mind and intellect, as to be incapable of knowing, entering into, or concluding a transaction of that importance; and 3dly, That it was the understanding of the Respondent himself, that there was no bargain concluded, and the pretended minute of sale was good for nothing, as was evident from the Respondent's conduct, in letting Scotland continue in receipt of the rents, and in his, the Respondent's, character of factor for the superior, taking payment from Scotland of the feu duties.

The Appellant, having by appointment of the Lord Ordinary, given in a condescendance offering to prove the facts alleged in his reasons of reduction, and a proof being allowed, several witnesses were examined as to the state of old Scotland's mind, and the value of the land at the time of the bargain. The evidence was contradictory, but the

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Court appeared to be of opinion, that the imbecility and lesion were not sufficiently made out, and that if the Respondent would, at the bar, agree to discharge his claim of repetition, in the event of the superior's evicting the lands, it would render the bargain sufficiently equal, and defeat the Appellant's plea upon that head. To this the Respondent consented, and the following minute was given in: "George Joseph Bell, for the Defender, stated, "that the Defender all along considered himself "bound by the minute of sale, under reduction, to "implement the bargain in the terms of that deed, "and that he did not, nor does he now consider "himself entitled to any claim whatever against "Thomas Scotland or his heirs, upon the warran- "dice in the minute, in consequence of any effect "which might have been, or which may at any "time hereafter be given to the clause of pre-emp- "tion, in favour of the superior of the lands in "question contained in the charters thereof."—The

Dec. 6, 1806. Court of Session decides in favour of the Respondent.

Court then pronounced the following interlocutor: "The Lords having resumed consideration of this "process, and advised the state thereof, testimonies "of the witnesses adduced, writs produced, and "a minute now given in by the Defendant, and "heard counsel further, repel the reasons of re- "duction, assoilzie the Defender, &c." From this decision the Appellant appealed to the House of Lords.

Appeal to the Lords.

Sir S. Romilly and *Mr. Brougham* (for the Appellant.) They submitted, 1st, That the preponderance of evidence, as to the imbecility and in-

adequacy of price, was in favour of the Appellant. 2dly, That the lesion under the clause of pre-emption was enormous, amounting to a forfeiture of the whole of Scotland's real property; and the Court of Session must have been convinced of this, when they prevented the purchaser from having recourse to Scotland or his heirs for compensation, in the event of the superior claiming the forfeiture. It was no sufficient reply to this, to say that the contract was rendered more equal by the release of the warranty. The question was, Whether at the time it was entered into the contract was not, to use the words of Lord Thurlow in a less clear case, *such as would make any man in his senses stare to hear it mentioned?* 3dly, That the contract was never completed, or was abandoned by both parties in Scotland's lifetime, no possession having ever followed upon it, though Martinmas, 1795, was the term of entry declared in the minute, and Scotland having from the time of the execution of the minute of sale, up to the time of his death, six years afterwards, acted as the owner, and the Respondent having levied the feu duties in the usual manner. It was also stated, as evidence of inequality or circumvention, that there was only one copy of the minute of sale which remained with the Respondent, and gave him an opportunity of enforcing the contract or not as he thought fit; and also that, on the death of old Scotland, his widow had broken open his desk, and given the Respondent what papers he chose.

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Messrs. Adams sen. and jun. (for the Respondent.) 1st, The Appellant had totally failed in the

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attempt, to prove the mental incapacity of his father or the inadequacy of the price. The direct contrary had been proved in both particulars, and even if the latter had been proved, inadequacy of price was no reason for setting aside the contract, supposing Scotland to have been in full possession of his mental faculties. 2dly, The clause of pre-emption induced no forfeiture, and in proof of this they cited the act, 20 Geo. 2, cap. 50, and the case of *Farqhuarson v. Keay*. But suppose it had, the loss would have fallen not on Scotland but on the purchaser, who must have had notice, and *caveat emptor*. 3dly, There was no abandonment; but merely a delay, the reasons for which were sufficiently explained. With respect to the fact that there was only one copy of the minute of sale, nothing was more common than to rest on one such copy where the parties had confidence in each other; and in the present case it was the only evidence of the Respondent having paid down 100*l.* of the price. As to the breaking open the desk, the Appellant's own witnesses proved that the Respondent took nothing except a lease and plan of the estate.

June 25, 1813. Ordered and adjudged that the appeal be dismissed, and the interlocutors complained of affirmed.

Agent for Appellant, CAMPBELL.
Agent for Respondent, CHALMER.