

Dunmore, his brothers-in-law; they, in 1742, to Cameron; and Cameron to Rowand in 1760. The conveyance from Mackie to Messrs Crawford and Dunmore was wanting; though it appeared, from the books of these gentlemen, that they had stated the price of the subject to Mackie's credit; and that Mackie and his heir, from the year 1743 downwards, had acquiesced in the sale made by them to Cameron.

It appeared that Rowand himself had purchased the tenement upon the same progress which he now offered to Cochrane; that he had possessed it five years, and his authors twenty years, without challenge; that at the roup the articles and inventory had been publicly read over, and the writings themselves produced and looked at by several of the offerers before the sale began.

THE LORD ORDINARY pronounced the following interlocutor: "Having specially considered the conditions of the roup, by which the buyer was to accept of the progress contained in the inventory, and debarred from any objections to the payment of the price on that account; and that though the progress is defective, no fraud appears on the part of the seller, by which the suspender can be reponed; finds the letters orderly proceeded." Having afterwards taken the cause to report, the LORDS unanimously adopted the Lord Ordinary's interlocutor, pronounced it of new, and gave the expense of extract.

Lord Ordinary, *Aythinleck*.
Clerk, ———

For Rowand, *Ilay Campbell*.
For Cochrane, *Cullen*.

Fac. Col. No 4. p. 10.

1772. December 10.

GEORGE AIKMAN, Merchant in Glasgow, against JOHN HEPBURN, Surgeon in Edinburgh, and WILLIAM CHEAP, Manufacturer there, his assignee.

A small house in this city, belonging to Aikman, having been advertised for sale, William Cheap, who then occupied it as a ware-room, at the rent of L. 13 Sterling, first offered himself as a purchaser; but as Cheap refused to give more than L. 100 Sterling, his offer was rejected.

Shortly thereafter, John Hepburn wrote the following missive, dated September 28. 1770, to Aikman's doer, George Jeffrey: "Sir, as I see the ware-room, presently possessed by William Cheap, linen draper, advertised to be sold by you, I hereby offer for that subject the sum of L. 150 Sterling, my entry to be at the term of Whitsunday next to come, and the price to be payable at that term; and for which, if this offer is accepted, I shall grant bond, with security to your satisfaction."

P. S. "The above offer I oblige myself to stand by under the penalty of L. 30 Sterling over and above performance."

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Case where the purchaser of an heritable subject was found bound, either to accept of the disposition and progress offered, or to depart from the bargain.

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On the same day, Mr Jeffrey wrote to Mr Hepburn an answer, as follows : " Sir, I have yours, of this date, offering me the sum of L. 150 Sterling for the ware room presently possessed by William Cheap, linen draper, which I am empowered by George Aikman, merchant in Glasgow, the proprietor, to dispose of. And I hereby, on the part of Mr Aikman, accept of your offer, and shall execute the deeds necessary with the first conveniency. Your entry to be at Whitsunday 1771, and you to grant bond, with security to my satisfaction, payable at that term ; the disposition to bear absolute warrandice ; and I oblige Mr Aikman to stand by this bargain, under the penalty of L. 30 Sterling attour performance."

In pursuance of this bargain, the title-deeds which Aikman had to this house having been transmitted from the country, were delivered to Hepburn's doer to make out the conveyance ; but some exceptions being taken to the sufficiency of the title, it was agreed that the import of the objection, and what further should be done for the purchaser's security, should be referred to a person conversant in those matters. Meanwhile Cheap, then apprised of the objection, made a bargain with Hepburn to take the purchase off his hand, and to give him five guineas above what was contracted to be paid to Aikman. Cheap, however, would not abide by the agreement made with Hepburn, for referring the flaw started to the title, and refused to pay rent or price.

Aikman, thereafter, brought an action against Hepburn, concluding, that he should be ordained to make payment of L. 150 Sterling, the stipulated price, with interest from Whitsunday 1771, upon receiving a disposition with absolute warrandice, in terms of the missive ; or otherwise, in case it should be found that Hepburn was not obliged to accept of the progress of writs in the pursuer's person, that he, Hepburn, should be ordained to deliver up the missive granted to him by the pursuer's doer ; and the bargain thereby constituted to be declared void and null, and the pursuer at liberty to dispose of the said subjects at pleasure, &c.

In this action, compareance was made both for Hepburn and Cheap. THE LORD ORDINARY, after hearing parties, gave this interlocutor : " Finds the defender cannot be liable for the price of the subjects libelled till a sufficient progress is produced." And upon a representation for Aikman, with answers, " Finds that the respondents are not bound, and cannot be compelled to give up the bargain which the respondent, John Hepburn, made with the represent-er ; and that they are not liable to pay the price of the subjects sold till a sufficient progress is produced ; and therefore refuses the desire of the representation, and adheres to his former interlocutor."

Pleaded by Aikman in a reclaiming petition, The separate conclusions of the libel rest upon the basis of a most equitable maxim, viz. that a party is not at liberty to approbate one, and reprobate another part of a mutual agreement. He does not insist upon implement of the bargain, if Mr Cheap chooses to resile from it ; but gives him a fair alternative of retaining the tenement, with the

best rights he is able to give, on payment of the price; or that he shall be set at liberty, the bargain itself, and every claim consequent on it, being discharged; while Mr Cheap, upon pretext of a defective title, at the same time that he holds fast the bargain, refuses to pay a farthing of the stipulated price.

The title, the defect of which is the foundation of this most ungracious plea, though, no doubt, liable to the single objection laid hold of by Mr Cheap, viz. that though the adjudications, and other rights, are now completed by infestment, yet he is insecure till the positive prescription is run, is, nevertheless, such as most purchasers of a small urban tenement would be satisfied with. There is a decree of adjudication as old as 1717 for L. 1713 Scots; a second decree of adjudication in 1721 for L. 2412 Scots; a third decree of adjudication in 1722 for L. 675 Scots; the amount whereof is far beyond the real value of the house. Add to this, that the pursuer, a young man, in very good circumstances, is bound to give absolute warrandice; and has, besides, offered the best corroborative personal security, or to refer what security he should give to the defender's own counsel. Mr Cheap well knows, that the pursuer has no real estate whereon to give real warrandice. He also knows, that the heirs at law of the person against whom the decrees of adjudication were obtained, cannot be discovered. And it is most unreasonable to insist, that the price should lie with him for 40 years, till the long prescription runs; or that the pursuer should invest the same in a real estate, whereon to give Mr Cheap security by real warrandice.

In the next place, if Mr Cheap will not abide by his bargain, and pay the price, upon receiving the best progress that the pursuer has to give, he cannot, with justice, object to its being annulled, and either party restored to their original situation; in a word, that Mr Cheap shall retain his money, and the pursuer his house. And a decision of this Court, November 14. 1738, Earl Morton *contra* Creditors of Cunningham of Boquhan, No 15. p. 14175., at the same time that it establishes the doctrine here maintained, appears to be perfectly applicable to the present case. "A purchaser at a public roup sought a defalcation upon account of the teinds purchased by him along with the stock, to which he alleged the bankrupt had no good right. It was answered, that he, purchasing with his eyes open, knowing the nature of the rights to the subject, and having also the creditors bound in absolute warrandice for the sums they receive, there ought to be no defalcation. The Lords found the pursuer was not entitled to a deduction of the price, but that, if he would, he might give up the bargain. It was taken notice of, that the case was not of a total want of right; here was a right *ex facie* good, the purchaser only starting objections, which were never sustained to infer a defalcation of the price." In terms of this decision, and the argument upon which it proceeded, the pursuer can truly subsume, that Mr Cheap purchased with his eyes open, and when thoroughly privy to the real state of the rights.

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Answered, In order to make good the bargain upon the part of the defenders, the price stipulated by the missive was, on the 15th May 1771, offered, in British gold, under form of instrument, to Mr Jeffrey, upon his delivering a formal disposition of the subjects, with a sufficient progress of writs, which was not complied with; and when the process came to be debated before the Lord Ordinary, the defenders declared they were willing to accept real warrandice; but as the pursuer declined to give that, they were assolizied from the action.

There is no point better established in the practice of this kingdom, than that a person purchasing heritable subjects for an adequate price, unless there were an express stipulation to the contrary, is not only entitled to a disposition with absolute warrandice, but is also entitled, before payment of that price, to receive a legal, complete progress; without which last, absolute warrandice, however apparently good at present, may, in a very short time, come to be of no avail; and this principle the pursuer seems not much disposed to contest; but urges, that the progress offered is forsooth more secure than most heritors in this city can boast of. The progress, however, if it may be so called, is such as no person would receive, were he even paying but half the value. The pretence, that it is impracticable for him to give a better one, is nugatory. It is in the power of the pursuer to fulfil his contract, and cure his title to the subject, either by suing a declaratory of expiry of the legal, or by buying in such interest as remains in the heirs at law of the real proprietor entitled to the redemption of the premises; or he may, as required by the defender Cheap, constitute (in trust) a real warrandice upon other subjects, a thing in itself perfectly reasonable, and which is generally done in cases of this nature.

The pursuer knew best the situation of his own tenement; and, if he had not a sufficient progress, he ought not to have exposed it. Mr Cheap cannot part with his purchase, which he made for his special accommodation; and, if the pursuer will not comply with what has been required of him, he has no title to demand the interposition of the Court in his favour, either as a Court of law or equity.

“THE LORDS find, that the defenders are bound either to accept of the disposition and progress offered, or to depart from the bargain, and repon the pursuer to the possession; and, in respect it appears that Mr Cheap knew the defect in the progress at the time when he made the bargain with Hepburn, therefore find him liable in the expenses of process, and remit to the Ordinary to proceed accordingly.”

A reclaiming petition was refused without answers.

N. B. In this case the progress offered did not appear to be sufficient; and though strictly the buyer is entitled to performance, yet it was considered, that, as here the seller could give no better progress, it came to be *factum impræstabile*, which resolves every *bona fide* contract, and then *damnum et interesse subit* to the other party; but to permit him to keep possession without either paying

the price or rent for the subject, was contrary to equity, more especially that Cheap purchased from Hepburn, conscious of the flaw in the title; and as there is no evil without a remedy, and that neither party could allege direct damage, dissolving the contract seemed an equitable relief within the power of the Court.

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Against this judgment, and a subsequent one of the Lord Ordinary, 'appointing the defenders to declare their option, whether they will accept of the disposition and progress offered, or depart from the bargain in terms of the interlocutor of the whole Lords,' an appeal having been taken by Cheap, the judgments were affirmed by the House of Lords, April 30. 1773, with L. 100 costs.

Act. R. Sinclair.

Alt. M. Laurin.

Clerk, Tait.

Fol. Dic. v. 4. p. 249. Fac. Col. No 39. p. 103.

1783. July 10. JOHN HAY *against* PATRICK PANTON.

MR HAY, as trustee for the creditors of a bankrupt, exposed to sale the subject possessed by the latter, and, among others, a ruinous tenement in the burgh of Kelso, which had been adjudged by his creditors.

By the articles of roup it was provided, that the creditors should assign to the purchasers their debts and rights, with warrandice to the extent of the price; and that the purchaser should accept such titles as were in the possession of the creditors, which were specified by an inventory.

Patrick Panton having become purchaser of the tenement above mentioned, and discovering that the inventory contained no right vesting the subject in the common debtor, brought a suspension, in which the LORD ORDINARY found, "that the suspender was not barred by the articles of roup from objecting, that no right whatever, in the person of the common debtor, is produced, or, though such title were produced, from objecting the nullity thereof, if such should appear."

Against this judgment the charger applied by reclaiming petition.

Observed on the Bench, A purchaser is not, in the common case, obliged to pay before the seller has delivered to him a sufficient title to the property of the subject sold. Here, however, it having been agreed that eviction alone should entitle the purchaser to recourse against the seller, no reason occurs why this paction should not be effectual.

Upon advising the reclaiming petition for the charger, with answers for the suspender,

THE LORDS found the letters orderly proceeded.

Lord Ordinary, Alva.

Act. Elphinston.

Alt. Tait.

Clerk, Menzies.

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Fol. Dic. v. 4. p. 249. Fac. Col. No 112. p. 175.

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Where it had been agreed that eviction alone should entitle the purchaser to recourse against the seller, the purchaser was found obliged to adhere to the sale without a sufficient progress.