

cipal, must be paid as the redemption-money for the land. The heir only can discharge. The case of *Oughterlony*, 1772, does not contradict the decision 1738: it went on a presumed declaration of will.

ESK GROVE. I considered this point as so well established that I did not much inquire into the grounds of it. I was lawyer in the case of *Oughterlony*. In the House of Peers we did not controvert the point of law, except a little for form's sake. The argument proceeded on the specialties of the fact and the declaration of will to create a division between principal and interest.

JUSTICE-CLERK. Had the decision 1772 altered the law, we should have had it mentioned daily at the bar, and it would have had a constant effect in settlements.

On the 23d December 1785, "The Lords repelled the grounds of compensation;" altering the interlocutor of Lord Gardenston.

Act. D. Smyth. *Alt.* W. Tait.

Lord Gardenston absent. [The opinion which he gave in the case of *Oughterlony*, 1772, was directly the reverse of his interlocutor in this case.]

1786. *February* 1. SARAH DALRYMPLE and HUSBAND *against* CHARLES SHAW.

PACTUM ILLICITUM.

It is *Pactum Illicitum* if a person stipulate a benefit to himself, or to another, for obtaining to a third an office from Government.

[*Fac. Coll.* IX. 386; *Dict.* 9531.]

PRESIDENT. In Britain some offices are saleable. Commissions in the army, particularly, are saleable; but *that* is by the will of the sovereign. But there is no example of offices bought without the knowledge of the sovereign, or even of his ministers. Such private bargains cannot be the subject of an action: *here* there is an office of *trust*: it never could have been the purpose of the Crown to allow a traffic to be made of such offices.

ESK GROVE. A man may agree to give a part of the emoluments of his office to whoever he pleases; but there is *here* an office, not in the gift of the party contracting, or of any great officer, but of the crown. I do not suppose that the crown knows any thing of sales and bargains. Besides, *here* there is no obligation granted by the officer, and this action is to compel him to ratify an obligation granted by his friends.

SWINTON. The *first* question is, Whether does action lie on what is called a *riding contract*? the *second* to what *extent*? I think that a *riding contract* is not actionable; that it is *contra bonos mores*, and inconsistent with the law of the land. When an office is established, a salary is given by the public; but when

that salary is transferred to another, the intention of the public is inverted: this is giving what one has no power to give.

BRAXFIELD. In order to judge of this issue, we must first see how the facts stand. If any thing be stipulated, either for the person who procures the office, or for some one else, I would not give action; but here Sir Adam Ferguson, who procured the office, had no concern in the matter less or more: if an office is obtained from the crown, I can see no reason why he who obtains it should not be at liberty to distribute its emoluments amongst his friends and relations.

MONBODDO. I wish that we had a law in this country like the old law of Richard II; (a very absurd law made to deceive the populace.) But the manners of the age will not admit of *that*. At the same time, I am of opinion that any bargain made for procuring an office is not the subject of action. But here I do not see that Mr Shaw, the defender, came under any obligation. He *now* agrees to communicate five-sixths of the profits to Mrs Sarah Dalrymple during her life.

ESK GROVE. Were I to judge by my own feelings as a man, I could not fail to express my dissatisfaction at the conduct of Mr Shaw, who endeavours to keep an office which was not intended for him. But I think that no action lies against an officer who has been previously engaged, by the procurer of the office, to accept it under burdens or conditions. It is no matter whether the person benefited by the conditions, be, to appearance, connected with the procurer or not; for it is impossible to trace the connexion of parties, or the causes of such stipulations. But still it is lawful for a party, once in an office, to agree to dispose of his salary as he chooses, either in whole or in part; and *this* Mr Shaw agrees to do.

HENDERLAND. I am not of opinion that the sale of offices is *malum in se*, or prohibited by express statute. Yet I should doubt of giving effect to a stipulation of this nature. This office is the creature of statute, introduced into the constitution for the benefit of the public: the emoluments are established as a salary: any bargain for communicating a share of the perquisites of office would be hurtful to the public. When a record is ill kept, the Court may interpose; but what should we answer to the plea of the clerk:—"The Court has taken five-sixths of the emoluments of the office from me, and I cannot keep the record properly on the remaining *sixth*." In the case of *Mr Dalrymple* there was a different *species facti*; for, *after* he had the office, he became bound to communicate the profits to a friend.

GARDENSTON. I differ as to the general point. It revolts against my feelings to say that, when a man agrees to give a share of the profits of an office to another, it is *contra bonos mores* to make him fulfil his obligation, but that it is not *contra bonos mores* to suffer a man to remain in possession contrary to his obligation.

On the 1st February 1786, "The Lords, having considered the whole circumstances of this case, found Charles Shaw liable for five-sixths of the profits to Sarah Dalrymple, during her life, and while he holds the office; but assailed *quoad ultra*."

Act. H. Erskine, Ilay Campbell. *Alt.* R. Corbett, R. Blair.
Reporter, Henderland.