

prisonment he had undergone was punishment sufficient; and I therefore move your Lordships to affirm the sentence, so far as it directed Carse to be imprisoned for a month; but to *reverse* so far as it directed him to be put on the pillory, &c.; and so far as it declares him infamous and incapable of bearing public trust."

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Accordingly, it was

Ordered and adjudged that the two interlocutors complained of, in so far as they ordain James Carse to be carried from the bar to the tolbooth of Edinburgh, therein to be imprisoned, be affirmed. And it is further ordered, that the said interlocutors, so far as they ordain him to be put upon the pillory for one hour, with a paper fixed on his breast, denoting his crime, and the Magistrates to see the sentence put in execution, and so far as they declare him infamous and incapable of bearing public trust, &c., be *reversed*.

For Appellants, *J. Erksine, J. Anstruther.*

WILLIAM BRUCE, Late Shipmaster, Dundee, *Appellant*;
ROBERT CLEGHORN & ALEXANDER CLEGHORN, Bakers in Leith, - - - } *Respondents.*

House of Lords, 2d March 1785.

SALE—TITLE—INCUMBRANCES—PRICE.—Circumstances held not sufficient to set aside and void the sale, although the missives on one side expressly declared, that unless the titles were found sufficient, the bargain then made was to be null and void. Also held, that the purchasers were not bound to pay the price until certain incumbrances were purged affecting the purchase.

Robert Johnston, proprietor of some houses in Leith, mortgaged them to William Petrie, and Helen Berrel, for two distinct and separate sums, amounting to £200. Johnston thereafter failed in business, and removed himself to London, whereupon two of his creditors adjudged the property, and entered into possession, by uplifting the rents of the same.

Some years thereafter, the appellant Bruce acquired, by purchase from Johnston, the right to this property, paying him at the time, £150 for the reversion, and the purchaser,

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on his part, undertaking to relieve the property of the adjudication affecting the same.

The appellant thereafter entered into possession, and let the principal part of the premises to the respondents, Messrs. Robert and Alexander Cleghorn. The latter gentleman proposed to purchase these premises, and the following writings were exchanged :—

Leith, 6th September, 1776.

“ Sir,

“ We hereby make offer of £350 Sterling, for
“ your whole subjects, back area, and office-houses belong-
“ ing thereto, lying in the Tolbooth Wynd here, £200 of
“ which we oblige ourselves to pay you at the term of Mar-
“ tinmas first, and £150 more at the term of Whitsunday
“ thereafter, being the full balance, your obliging yourself,
“ heirs and executors, to dispone and deliver up to us all
“ your rights and titles to said subjects, with full warrandice,
“ and clear :—And if, upon examining your rights to said
“ subjects, they be found insufficient, both parties shall be
“ free, and the bargain made void and null. And in case
“ any debts or incumbrances shall appear which have not
“ been heard of, the bargain shall be also void and null, and
“ both parties free.

(Signed) “ ROBT. & ALEX. CLEGHORN.

“ To Mr. WILLIAM BRUCE,
late Shipmaster, Dundee.”

Sept. 6, 1776. To this letter of offer, the following answer was returned :

Leith, 6th September, 1776.

Gentlemen,

“ I except of your offer for my wholl subgiks in the Tol-
“ both Wynd hear, with the bak area, and office houses be-
“ longing thereto, namely, thrie hundred and fifty pounds
“ Sterling, two hundred of which to be paid me on order at
“ term of *Mertinmas* first, and one hundred and fifty pounds
“ Sterling at the next term of *Whedsondy* inshouing, being
“ the full balance. And I oblig myself, my heirs and ex-
“ cutors, to give you up all my rights and titles to the said
“ subgiks, with full warrdice, clier at the term of *Mertinus*
“ first ; all the rent till *Mertinus* first to be payed to me.
“ As witness my hand.”

(Signed) “ WILLIAM BRUCE.”

“ To Messrs ROBT. & ALEX. CLEGHORN,
Bakers in Leith.”

It was stated by the respondents, that when the title deeds were sent him to be examined by his agent, instead of these proving to be a complete progress of title deeds, there was nothing but some *old memoranda* relating to the property, of no use or value. This was intimated to the appellant, who, in reply, demanded payment of the price, stating that they were bound to accept them, as sufficient title deeds, or give up the bargain.

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Hearing that the appellant was anxious to give up the bargain, in consequence of having been offered a higher price for the property, the respondents brought the present action for implement of the same.

The appellant contended that the respondents wished to keep both the property and the price, and that, having given them all the title deeds in his possession, he had implemented his bargain under the missives. He also offered to complete the sale, by granting a disposition to them along with the progress of writs already in their hand; and if they did not consent so to accept these writs, he required them, in terms of the agreement, to give up the bargain, and send back the papers.

After some discussion, Lord Gardenstone, Ordinary, Aug. 5, 1777. pronounced this interlocutor, 9th Oct. 1776, "The Lord Ordinary having considered the minute of debate, finds "there is no ground for setting aside or voiding the bargain "of sale; and finds that the pursuers are not obliged to "pay the price even in part, until the extent of the incumbrances by adjudications are ascertained; nor in whole, "until the said incumbrance is purged or discharged, or "sufficient caution is found to that effect. And as it appears to the Lord Ordinary that the litigation has been "occasioned by an indirect attempt on the part of the defender (appellant) to set aside the purchase, finds the defender liable in expenses, and allows an account to be "given in." On representation, this judgment was adhered to by the Lord Ordinary.

Nov. 22, 1777.
 June 19, 1778.

On reclaiming petition to the whole Lords, praying an alteration of the above judgment, the Court, of this date, adhered, and refused the petition. A second petition met the same fate.

Feb. 2, 1779.
 Feb. 18, 1779.
 Nov. 14, 1781.

Against these judgments the present appeal is brought.

Pleaded by the Appellant.—1. That the letters above recited, expressing the terms of the bargain, are not sufficient in law to bind the parties. 2. That although they should

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be deemed sufficient in law, *locus penitentiæ* remains to either party, at any time before the bargain is completed, by disposition in proper form being executed. 3. That by the terms of the bargain the appellant was only bound to dispoise and deliver up to the respondents all such right and title to the said subjects as were then vested in him, and to guarantee such sale to be an absolute one, and a clear transfer of the property, subject to such demands as were already made on the estate, and specified in the proceedings at law, between the appellant as dispoisee, and the creditors of the said Robert Johnston. And, that the respondents cannot insist on the appellant purging such incumbrances as at the time of the sale affected the estate, and were so known to them; but, in case they are dissatisfied with either the appellant's title to the estate, or with the amount of the incumbrances, they may give up the bargain; the appellant being always ready and willing to allow them to embrace either alternative.

Pleaded for the Respondents.—1. The appellant has contended that the respondents are bound to pay the adjudication debts or incumbrances; but the price of £350 was all that the respondents undertook to pay, as the fair and full price of the subjects, and which sum was offered on condition of the latter being, “clear of every burden or incumbrance whatsoever.”—2. The appellant on his part, obliged himself and his heirs, to give up all *his* right and title to the property, with full warrandice and clear, at the term of Martinmas then first. Although, therefore, the respondents had paid up the whole price of three hundred and fifty pounds before the particulars of the debts came to their knowledge, they would have been entitled to the repetition of the amount of those debts upon the appellant's express warranty. Bruce the appellant, stands personally liable at this moment to account to the creditors adjudgers for the £230 he received as factor for them, under the order of the Sheriff of Edinburgh. The respondents are not liable to replace that money to Bruce, with whose factory intromissions they had no concern. If they be not liable to replace that money to the appellant, they cannot be liable in the payment of it to his creditors, and consequently the property which they have purchased for an adequate price, ought to be cleared of the incumbrance. And they are now willing, as they have all along been, to pay the balance coming to the appellant after paying those debts.

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After hearing counsel, it was
 Ordered and adjudged that the interlocutors complained
 of be, and the same are hereby affirmed.

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For Appellant, *Arthur Onslow*.
 For Respondents, *Ilay Campbell*.

[Mor. p. 120.]

SIR JAMES NASMYTH, Bart. *Appellant* ;
 JOHN SAMSON, Heir-at-Law of DAVID SAM- } *Respondents*.
 SON deceased, and JOHN AITKEN,

House of Lords, 4th April 1785.

ADJUDICATIONS—PENALTIES—*PLURIS PETITIO*.—Circumstances in
 which held, where the termly penalties due by a bond were in-
 cluded in the accumulated sum of an adjudication, that these
 formed a *pluris petitio*; and the adjudication so far objectionable
 as to reduce it to a security for payment of principal and interest
 in the bond.

Certain property, which originally belonged to John Por-
 teous, having been adjudged by Sir James Nasmyth, and he
 having entered into possession in virtue of his adjudication,
 a judicial sale and ranking of the creditors was then brought.
 The estate was bought by Sir James Nasmyth, the principal
 creditor. Sixty years after the date of the adjudication, the
 heir of Porteous brought a challenge of the title in Samson's
 name. His chief grounds of challenge consisted in objections
 to the adjudications which grounded the judicial sale.

It was objected to the adjudication for the accumulated
 sum of £11,346. 13s. 4d. Scots led upon the debt *originally*
due to Bertram of Nisbet, and assigned to Sir James Nas-
 myth, that the termly penalty of 100 merks for failure in
 payment of each half-year's interest contained in the bond,
 and adjudged for, being equal to one-third of the interest,
 was exorbitant, and therefore the adjudication ought not to be
 sustained; and that the other adjudication upon the same debt
 for £1480 Scots of interest was unnecessary; that interest
 being included in the first adjudication.

The Court pronounced this interlocutor:—“ The Lords Nov. 20, 1763.
 “ sustain the objections to the first article in the state of
 “ the interests produced in the ranking, being an adjudica-
 “ tion at the instance of Sir James Nasmyth against the
 “ common debtor, for the accumulated sum of £11,346. 13s.