

dissatisfied with the evidence brought forward of the value, it was incumbent upon him to bring contrary evidence, if it was in his power.

After hearing counsel, it was

Ordered and adjudged, that the appeal be dismissed, and that the interlocutors therein complained of be affirmed. And it is further ordered the appellant do pay to the respondents £50 for their costs in respect of said appeal.

For Appellant, *Sir J. Scott, W. Grant, J. Anstruther.*
W. Adam.

For Respondents, *David Williamson, Wm. Dundas.*

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FERGUSON
v.
MOSSMAN, &c.

WILLIAM FERGUSON of Raith, Esq. - *Appellant* ;
HUGH MOSSMAN, ESQ., and J. ANDERSON, } *Respondents.*
W.S. - - - - -

House of Lords, 17th Feb. 1797.

JUDICIAL SALE—ERROR—MISREPRESENTATION—ADVERTISEMENT OF SALE.—The teinds were represented in the memorial and abstract of a ranking and sale, and in the advertisements of the sale of the estate, to be valued and to be exhausted, and subject to no further burden from stipend. Held, on discovery of an informality fatal to the sub-valuation, and which deprived the lands of exemption from such burdens, namely, that the sub-valuation and report of the sub-commissioners had not been approved of by the high commission of teinds;—that the purchaser was not entitled to abatement from the price, there being no *mala fides* on the part of the seller.

The appellant was purchaser of the lands of the Macfarlane estate, at a judicial sale, including the lands of Upper and Nether Arrochar, in the parish of Arrochar. The upset price was £19,756. They were knocked down to him at £28,000, and were bought under the representation that the teinds were valued, and the value of them exhausted by the stipend of the minister; and this was set forth in the advertisements of the sale, and was proved by the sub-valuation of

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the commissioners, in August 1629 ; and by a decree of the Court of Session in July 1784, which had refused an application by the minister for an augmentation of stipend, on the ground that it was proven that “ there is payable “ yearly of stipend to the minister of Arrochar, £28. 17s. “ 9 $\frac{6}{12}$ d.,” and “ that the teinds of the said lands are ex- “ hausted.” It turned out, however, that there was a mistake, namely, the sub-valuations or reports of the sub-commissioners were not legally approved of by the high commission of teinds by a proper decree of approbation, and the sub-valuations were liable to other intrinsic objections. Hence the appellant insisted in the present action, for an abatement from the price on this account, yet the Lord Ordinary found : “ That it must be presumed “ that Mr. Ferguson, prior to his purchase of the estate of “ Arrochar, made inquiry, not only into the circumstances “ and situation of that estate, but also into the rights and “ titles thereof; and as he had obtained all right, title, and “ interest, which Messrs. Macfarlanes and their creditors “ had in the estate, (which was all they were bound to do “ by the conditions of sale), therefore finds Mr. Ferguson is “ not entitled to any deduction from the retained price on “ account of the teinds in question, and dismisses his claim “ accordingly.” And on two representations, the Lord Ordinary adhered, and on reclaiming petition, the Court adhered.*

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Feb. 3 and 17,
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June 1, —

Against these interlocutors the present appeal was brought.

Pleaded for the Appellant.—In determining the question here raised, no difference can be made in point of principle between a judicial sale by creditors on a bankrupt estate, and a sale voluntarily made by the proprietor himself. The rules which apply in the latter case must, with equal force, bind and take effect in the former; and, assuming no distinction to exist between judicial and voluntary sales, at least in the completion of the sale, it is a fixed rule, recognized in the law of Scotland, that the purchaser is entitled to relief against the seller where he has been induced to the

* LORD PRESIDENT CAMPBELL said :—“ I think the interlocutors right. The whole facts were fairly stated, and offerers might judge for themselves. What if the teinds had been stated as not valued, and afterwards a valuation was discovered ?”

purchase either by fraud, by misrepresentation, or by error. In the present case, by misrepresentation and by error, the appellant was induced to purchase an estate, a part of which has been evicted as not belonging to the seller, although such was represented to belong to him, and a price paid, upon the distinct understanding that it formed a part of the subject sold, and warranted as such by the seller. In such a case, the Court has always given relief. Vide *Mrs. Blair v. Murray*, 16th June 1790; *Loyds v. Creditors of Paterson*, 13th Feb. 1782, F. C.; *M'Lean v. M'Neill*, 23d June 1753, M. 14164. Such representation appeared in the whole proceedings of the judicial sale. In the memorial and abstract stating the rent, burdens, value of the estate, &c., and likewise in the advertisements, and the assertions of the agent on the sale, it was expressly set forth that the teinds were valued and exhausted, and that no further burden could in that shape be brought upon the property; and it would be an extraordinary proposition indeed, to say that the appellant was not bound to rely on all these representations, just as it would be equally unjust to hold that when all these representations turned out erroneous, there was to be no remedy; a result that would be neither consonant with law nor justice. Even in the most favourable view of the case for the creditors, there has been an error common to both parties, in which case, every principle declares that the sellers ought not to receive a price for a subject they had not to give. There is thus an error in the first essential of a sale, namely, the subject. And at the very least, in terms of the decisions, in such cases an abatement ought to be allowed.

Pleaded for the Respondents.—The appellant does not allege that the teinds of the lands of Upper Arrochar were comprehended in the sale. All he says is, that it was held out to purchasers that the lands could not be subjected to a further payment as for teinds, because the minister's stipend exhausted the valued teind, which he says implied a warranty of exemption. But it by no means follows that he was bound to rely on the memorial and abstracts and advertisements. The former are merely framed for the information of the judges, and the latter always refers to the evidence lying in Court, for any fact which may be therein stated. With the evidence of these facts, a purchaser at a judicial sale must be presumed satisfied. And these representations were mere matter of opinion, formed and given from documents pointed out. No disguise or fraud was practised, and as it was admitted that the appellant's man

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of business examined those writings, and in particular the subvaluation in 1629, he and they are to blame if they did not discover the informality which afterwards proved fatal. Vide *Earl of Morton v. Creditors of Cunningham*, 14th Nov. 1738, M. 14175; *Dempster v. Creditors of Skibo*, 27th June 1788, M. 13335; *Hannay v. Creditors of Bargaly*, 26th Jan. 1785, M. 13334.

After hearing counsel, it was

Ordered and adjudged that the interlocutors be affirmed.

For Appellant, *Sir J. Scott, Wm. Adam.*

For Respondents, *W. Grant, J. Anstruther.*

NOTE.—Unreported in Court of Session.

[M. 15768.]

WM. FERGUSON of Raith, - - - *Appellant* ;
 Rev. JOHN GILLESPIE, Minister of Arrochar, *Respondent.*

Et e contra.

House of Lords, 17th February 1797.

APPROBATION OF OLD SUB-VALUATION OF TEINDS—DERELICTION—
 AUGMENTATION OF STIPEND—EXHAUSTED TEINDS.—A report of the sub-commissioners as to the valuation of the teind, was not approved of, nor had the sub-commissioners, on valuing the teinds, taken any proof of the value of the lands. (1.) Held, in action of approbation brought to have these old valuations approved of at the distance of 160 years, that approbation fell to be pronounced as to the lands of Nether Arrochar; but (2.) as to Upper Arrochar, it being objected that the minister was neither present, nor cited to appear before the sub-commissioners in the valuation, and the record did not bear either that he was present, or cited to appear; Held this a good objection to the approbation as regards those lands; and therefore, that there was no bar to the minister's augmentation. (3.) Also held, that it is not a dereliction of a former valuation, where the stipend is payable part in money and part in grain, that the whole has been paid in money for more than forty years.

The informality in the sub-valuations of the lands of Upper and Nether Arrochar, purchased by the appellant, having been discovered, as stated in the preceding case, this induced the minister of the parish to bring a process of augmentation before the Court of Session, as Lords Commissioners for the Plantation of Kirks and Valuation of Teinds.