

1737. June 24.

JAMES BROWN of Carseluth *against* ISABEL MUIR and her Husband.

No 15.

A bond for borrowed money, in which the debtor bound himself, that, in case he at any time sold his lands, he should dispone the same at an agreed price to the creditor and to no other, was found, in so far as concerned the sale *contra bonos mores*, and therefore not binding.

THE deceased Robert Brown of Carseluth, with consent of the said James his son, granted an obligation to the also deceased John Muir of Craig, bearing, in the narrative, That he having advanced the sum of 16,000 merks for relieving them of certain debts, upon the express condition, That, in case they should at any time thereafter have occasion to sell the lands of Kirkmabrecks, &c. then they should dispone the same to him and to no other; after which follows the obligatory clause, 'Whereby they bind and oblige themselves, their heirs, &c. That, in case at any time they had occasion to sell the said lands, they should dispone the same to him and his heirs (secluding assignees) and to no other person whatsoever, he always paying 17,000 merks, as the agreed price thereof, whereof the said 16,000 merks to be in part, in case it was not paid before the time of such sale.'

Of this deed James raised a reduction after his father's death, as being an usurious and unlawful bargain adjected to a loan of money; in which this separate question occurred, How far the obligation to sell, being indefinite as to time, can have a perpetual endurance?

For the pursuer it was *argued*; That by the express tenor of the clause, the obligation was perpetual; seeing the obligants had bound themselves, &c. That, if they had occasion to sell the lands, they should dispose of them to the said John Muir; which was surely an unlawful paction, as it resolved in an interdiction not authorised or known in law. Besides, it is contrary to the common liberty of mankind, that one should astrict himself with respect to selling his estate to a particular person or family; for, while one remains proprietor, it would seem inconsistent with the nature of the property, that he should lie under such an embargo. It is true, there are instances in law where such pactions are sustained; thus, in *L. 75. D. De contrahen. empt.* a paction adjected to a sale, That, if the purchaser shall have occasion to sell the thing again, he shall dispose of it to no other than the first seller, is valid. Such is the case likewise where any person has the privilege of pre-emption, as the superior in emphetutical rights; but in these, and many others that might be mentioned, the party who is preferable, behoved to give the current or market price for it, and not pretend to take it for a sum covenanted at the time of the bargain; seeing, from the nature of such a paction, the subject may not be disposed of for many years; so that a remote heir, when he comes to sell it, may not draw the tenth part of the value; as the prices of things vary every day, which is really the present case; as the value of these lands is now far greater than the sum agreed on.

For the defenders it was *observed*; That the narrative of the obligation seems to point as if it had not been intended to be perpetual; seeing it sets forth,

That in case 'we, or either of us, have occasion to sell the lands,' &c. which are words that can only apply to the two obligants. Nor is it any objection to this construction, That, in the obligatory part, they not only bind themselves, but their heirs; for, although a man oblige himself to do any thing in his own life, yet, notwithstanding thereof, he usually binds himself and his heirs that he shall do so; the consequence thereof is, That, if he contravene, the heir will be liable in damages, and obliged to procure to be undone what his predecessor did. Now, to apply this to the case in hand, if the obligants here had sold the land to another, and then died, the heir would be bound to make good the damage, and to procure the same to be undone; but, granting that it was perpetual, there is no force in the objection; seeing there is nothing inconsistent with the liberty of mankind, that one should lie under a perpetual obligation not to sell but in favour of one family, such being the import of every clause of redemption; and, if a man can lawfully bind himself, Why cannot he, in the same way, bind his heirs? Nay, there does not seem any thing to stand in the way of a man's obliging himself and his heirs not to sell at all, which is truly the case of entails; as it is the natural consequence of property, that every person may subject it to what conditions and limitations he pleases.

As to the distinction, That such bargains are not valid if the price is fixed at the beginning, it is without any foundation or authority whatever; if indeed the right of pre-emption arises from law and not by paction, then no price can be fixed; and, of consequence, the current price, at the time of sale, must be the rule. But it would prove a strange restraint upon property, if a person who intended to secure himself a certain price in the event of an eventual sale, should not have it in his power to do it. Nor is it to the purpose to mention the chance of lands rising in value; as the hazard of its falling lies on the side of the buyer.

THE LORDS found the obligation was no longer binding than during the life of Carseluth and his son, the obligants.

But, upon petition and answers, founded on the objection, That the contract of sale was unlawful, by being adjected to a loan of money,

THE LORDS found the contract, in so far as concerned the sale, *contra bonos mores*; and therefore not binding.

C. Home, No 29. p. 54.

1752. June 3.

ARCHIBALD STEWART, Clerk to the Signet, *against* ALEXANDER, Earl of GALLOWAY.

SIR JAMES STEWART of Burray, being pursued criminally before the Court of Justiciary, for the murder of Captain James Moodie of Melsetter, and not dar.

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No 16.

A party granted bond for a sum to an officer of