After hearing counsel, it was
Ordered and adjudged that the appeal be dismissed, and that the interlocutors complained of be affirmed, with £60 costs.

For Appellant, *Ja. Montgomery, Al. Wedderburn.*
For Respondents, *Al. Forrester, Thos. Lockhart.*

Note.—Unreported.

JAMES SIMSON, - - - *Appellant;*
ALEXANDER M'MILLAN, and WILLIAM M'DONALD, Writer, his Attorney, - } *Respondents.*

House of Lords, 16*th March*, 1770.

SALE—ABSOLUTE RIGHT OR RIGHT IN SECURITY.—Circumstances in which a sale of houses by auction was held to be unwarrantable, rigorous, and unfair, from the conduct of the seller, the conduct of the judge, and from the price at which it was sold. Also circumstances in which certain letters proved that an absolute disposition was a right merely in security.

The appellant, a merchant in Glasgow, was in the habit of making advances to the respondent, Alexander M'Millan, a herring and provision merchant in Campbelton. These advances amounted at one time to £1277. 9s. 2d.; and various and repeated letters having been sent to the respondent for payment, his brother thereupon became bound along with him by the following letter:—" 23 *September* 1757. " As you have on the 13 instant advanced £1277. 9s. 2d. " Sterling to my brother Alexander M'Millan and me, I " hereby bind and oblige me to pay the same, with interest, " and one half per cent. likewise, for such sums as you shall " advance for our joint account in time coming."

The appellant, notwithstanding this letter of security, did not receive payment of his advances as he wished; and he resorted once more to pressing letters. In some cases, answers came with small remittances, and promises of the balance when his houses in Campbelton and his ship were sold.

Again the appellant wrote, stating, " As you don't find " any person in your country disposed to purchase your " houses, &c. in Campbelton, rather than they should be " sold under the value, I believe I had better take a right " to them. They may probably become more valuable some

1770.

SIMSON
v.
MACMILLAN,
&c.

" time hence. You may, therefore, if you think proper, " give directions to Mr. Stewart, to make out the necessary " conveyances, and I shall account to you for the value that " shall be put upon them by indifferent people."

An absolute disposition and conveyance was granted to the appellant accordingly, but without any back bond, and no writing except the above letter, to shew the nature of the right so acquired. A vendition of the ship was granted, and thereafter sold, and the price, £200, put to the respondent's credit; after which, it appeared by a docqueted account signed between the parties, that the balance was thus reduced to £732. 4s. 1d. To this account there was the following docquet: " When I dispose of the houses " in Campbelton, disponed to me by Alexander M'Millan, " the money I receive for them is to be applied to the cre- " dit of his brother's account.—(Signed) James Simpson."

The appellant having failed to obtain payment in any other way, resolved to sell the property in Campbelton, and gave notice of this to Archibald M'Millan, the respondent's brother and surety.

The 15th of July was advertised as the day of sale, which was afterwards adjourned to the 15th August.

The respondent then, for the first time, hearing of the sale of his houses, wrote the appellant, stating his surprise, and adding: " If you must and will have your money, please " let me know of it, and I will find some friend to advance " the sum you have due, rather than to suffer my interest to " sell at an undervalue." " You have these houses as a se- " curity for the balance of accounts I owe you; as such, " *you ought to give timely notice when you must have your* " *money.*" To which the appellant replied, " the strain in " which you write surprises me much. *You know I have an* " *absolute right to these houses*, which I have kept rather " too long in my hands," and the sale must now proceed.

The sale proceeded, and the houses were knocked down to one MacCallum at £529.

Five months after the sale, the appellant offered the respondent, under form of protest, the balance of his debt, and required him instantly to convey his property, or pay its full value, £800.

Upon this being disregarded, the present action was brought before the Court of Session, on the ground of fraud, in as far as the sale had been unfairly hurried over; that it had taken place earlier in the day than the hour advertised,

and was finished before the expiry of the hour appointed on the day of sale. That the purchaser was a brother-in-law to MacKinlay, the judge of the sale; and, in order to serve him, he was allowed to be purchaser at an under value. A proof being allowed on the value of the subjects, and the manner in which the sale was conducted, one part of the witnesses, whose testimony, it was alleged, was subject to remark, stated that the houses were worth £800 or £1000; a different class stated that they were worth £500 or £600. On the hurry of the sale, it was proved that the sale was advertised to take place between twelve and two o'clock,—that the clerk of sale appeared, and read the articles of sale exactly at twelve o'clock,—that no person appeared to object. It was also urged that the sale did not then commence until all who had intended to be there were present; that after the last offer made by MacCallum, there was sand enough in the glass for several more offers, though none were made. And after the sand had run out, Bailie MacKinlay, the judge of the roup, offered to set up the glass again, if any person was disposed to offer more.

But one of the witnesses, MacKinlay, the judge of the roup, was heard, immediately after the sale, to have delivered himself thus to MacCallum: "You may thank Francis "and me for making you a laird in Campbelton; it cost us "no little trouble to bring it about."

Of this date, the Lords of Session pronounced this interlocutor: "Find the defender (appellant) liable to account "to the pursuer for the within mentioned sum of £800 as "at Whitsunday 1765, with annualrent from that term till "payment, and decern." On reclaiming petition the Court adhered; and, of this date, the Court decerned for £700 of expenses. Jan. 26, 1769. Feb. 8, 1769.

Against these interlocutors the present appeal was brought.

Pleaded for the Appellant.—The grounds of the interlocutor of the 24th Jan. 1769, at pronouncing of which the Court were divided in opinion, are, that the sale made of the respondent's estate was fraudulent and unfair; that the price it was sold for, was under value; and the sale itself a rigorous and unwarrantable proceeding in the circumstances. The appellant submits there was no evidence of fraudulent and unfair dealing, nor any foundation to support that supposition. When the testimony of all the witnesses is weighed with reference to its credibility, the price at which the property was sold at, was fair and reasonable. Nor was the

1770.

SIMSON
v.
MACMILLAN,
&c.

sale itself unwarrantable; on the contrary, from the nature of the disposition and other documents, it was clear the respondent had understood for sometime that this was inevitable. The sale was intimated to his brother, his cautioner for the debt; and he was present at the sale, and looked attentively after his brother's interests.

If there was fraud on the part of the judge and the purchaser, this is no proof that the appellant was participant in that fraud, or accessory thereto; and, consequently, no ground for making him answerable therefor. And that the value put upon the property by the respondent himself was entirely imaginary.

Pleaded for the Respondents.—Though the appellant, in his letter of 3d August 1764, maintained that "he had an "absolute right to the property," yet it was clear from his own admissions now, that "it was only a right in security." This right only gave him liberty to retain possession. There was no power of sale, no notice, no premonition or intimation whatever, and no consent from him. On the contrary, the moment he heard of it he disapproved, accompanied with proffers of immediate payment. Without charging fraud, therefore, against any particular person in the progress of the sale, it is sufficient to state, that the appellant has sold these subjects without the respondent's consent, and without any legal intimation given him. So that the act of sale itself, not the mode of conducting it, was sufficient wrong to entitle the respondent to make him responsible for its full value.

After hearing counsel, it was

Ordered and adjudged that the appeal be dismissed, and that the interlocutors therein complained of be affirmed.

For Appellant, *J. Montgomery, J. Madocks, John Dalrymple.*

For Respondents, *Al. Wedderburn, H. Dalrymple.*

Note.—Unreported in Court of Session Reports.