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underrtood as sold by a rental, the proved rental is the rule; to fortify which, the decision of the Creditors of Hallgreen was cited, 13th January 1725, No 25. p. 13328, where the LORDS found, in general, that the purchaser can have no deduction from the proved rental by the rents falling lower, after the probation, and before the sale. To the *first* it was *answered*, That public sales are plainly by a rental. The first step taken is to fix the rent, the next, to fix the number of years purchase the lands may be worth. To the *second*, The proved rental is indeed the rule, but still upon supposition that it is the true rental at the date of the purchase; and truly selling by a rental implies as much; for what has the purchaser ado with any but the present rental? This is plainly the case of private sales, and no good reason can be given to difference public sales. THE LORDS found, that the purchaser is not entitled to any abatement of the price on account of any diminution of the rental betwixt the time of the judicial proof of the rental and the purchase. See APPENDIX.

Fol. Dic. v. 2. p. 312.

1764. *November* 14.

WILLIAM WILSON, &c. *against* The CREDITORS of Sir JAMES CAMPBELL of Auchinbreck.

No 27.

In a judicial sale, the Court refused to the purchaser any deduction from the price, on account of certain diminutions in the rental, which had happened between the date of the proof, and the time of the purchase; but allowed deduction for some teinds, the right of which was proved never to have been in the person of the debtor.

MR JOHN M'LEOD of Muiravenside being creditor to Sir James Campbell, commenced a process of ranking and sale of his estate of Auchinbreck before the Court of Session. A proof of the rental was led in the month of April 1739; but the lands were not sold till the 24th of February 1761, when William Wilson, writer in Edinburgh, and two other gentlemen, became purchasers. Mr Wilson, after having particularly examined the subjects, discovered that some houses, which had been added to the judicial rental, as yielding a considerable sum when the proof was led, had, since that period, become entirely ruinous, and of no value; that some of the lands had been over-rated, and yielded a rent considerably inferior to what they were stated at in the judicial rental; and that one-fourth of the teinds, the whole of which he had bought and paid for along with the lands, did never belong to the bankrupt, but were the property of the Crown, as coming in place of the bishop of Argyle. On account of the houses becoming ruinous, and the diminution of the rent of the lands, Mr Wilson in particular claimed a deduction, and the other two purchasers, in conjunction with him, demanded that allowance should be granted on account of the teinds.

It was *argued* for Mr Wilson, That he was justly entitled to restitution, upon the principles of common sense, natural equity, and positive law. Common sense dictates, that, in a purchase, the seller must deliver all he sold, for a very obvious reason, viz. because the delivery and the payment make part of the same contract, and wherever there is a stop in the one, there must be a propor-

tionable stop in the other. It would appear extremely repugnant to natural justice, if a person, in a voluntary sale, by giving in a false rental, should be permitted to enrich himself by his own fraudulency and collusion; and, in the present case, though neither of these appears, yet it is equally detrimental to the purchaser, whether the money is taken out of his pocket by mistake, by unforeseen accidents, or by deliberate imposition. The rule in equity is the same. No man is to pay for more than he receives; and the Roman law, the best guide in matters of this kind, always allowed the *actio redhibitoria* to void, or the *actio quanti minoris* to rescind, the sale, according to the different degrees of lesion. No 27.

This seems to be a rule, founded so much in equity, that it must apply to the law of every country. In a voluntary sale there could be no difficulty; and the difference betwixt that and a judicial one is not so perceptible.

By the act 1681, which introduced judicial sales, the Court could not dispose of a bankrupt-estate without the consent of the debtor, when a legal reversion was competent to him.

Now, if upon this statute the debtor had concurred with the Commissioner, would not the purchaser have been entitled to a deduction, in proportion to the imposition of the rental? Without doubt he would; and it requires extraordinary acuteness to perceive the alteration introduced by the act 1690, which impowers the Court to sell, without appointing a commissioner, and without consent of the bankrupt.

If a deduction would have been competent before these improvements upon the act 1681, it must be so still; for it cannot be presumed, that this later statute was intended to introduce such a material alteration, unless it had been particularly expressed. The Court is empowered to put a value upon, and to fix the rent of the estate, of which rental the buyer is to pay so many years purchase. If the rental is false, he is entitled to restitution, and if no redress is granted him, he is cheated by the authority of law.

It was *pleaded*, on the other hand, for the Creditors, That a purchaser, in a judicial sale, always makes a slump bargain, and buys the whole subjects exposed *in cumulo*, without a minute examination of particulars; and, if it was otherwise, it would be impossible to imagine that any man of ordinary attention or economy would be so negligent as not previously to enquire into the circumstances of the subjects he was about to purchase; and, in the present case, such a supposition was altogether unnatural, as no less than 23 years had intervened between the date of the proof and the time of the sale. Agreeably to this doctrine, it was determined, on the 22d of December 1732, Cockburn of Cockpen against Creditors of Cockpen, No 26. p. 13329, that the purchaser was not entitled to any abatement of the price on account of diminutions happening in the rental betwixt the time of the judicial proof and the sale.

With respect to the deduction on account of the teinds, the plea seems equally unfavourable. The purchaser is presumed to enquire into the validity

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of the bankrupt's titles, as well as the condition of the subject. If this is omitted, he has himself only to blame, and therefore should be the only sufferer. In the case of a total eviction, the law orders the creditors to refund the price, in proportion to what they had received; but, in a partial eviction of the subject, the purchaser may give up his bargain if he pleases, but can demand no allowance upon that account; that the fourth of the tithes ought to be considered as a burden upon the subject in favour of the Crown, and ought to be viewed in the same light as stipends payable to a minister, an augmentation of which was never reckoned sufficient to found the purchaser in recourse against the seller.

As to the case of Cockpen, it was *replied* on the part of Mr Wilson, That the factor upon the estate had put up the farm, the rental of which fell, to a public roup, and intimated it in the gazettes; so that the situation of that farm was notorious, and the purchaser must have known what was so openly published.

"THE LORDS found, that the purchasers were entitled to deduction of a fourth part of the teinds, and repelled the hail other deductions claimed."

Act. *John Dalrymple.* Alt. *Rob. M'Queen.*

A. C. *Fol. Dic. v.* 4. *p.* 210. *Fac. Col. No* 148. *p.* 351.

1765. *January* 16.

JOHN BUCHANAN of London, Merchant, *against* ROBERT JAMIESON, Writer to the Signet.

No 28.

It being unknown, at the judicial sale of a house, that it had been insured with the Edinburgh Company, and a bond granted for the premium, the purchaser found not entitled to insist that the creditors should relieve him of that bond.

SOME houses in Wardrobe's Court were brought to a judicial sale by Mr Buchanan, and purchased by Mr Jamieson, without either party knowing that the houses had been insured with the Edinburgh Friendly Insurance Company, at L. 3200 Scots, for one-fifteenth of which, as the premium of insurance, a bond had been granted, which, with seven years interest on it, remained unpaid.

Mr Jamieson, upon discovering this bond, which, by registration, in terms of the 1st act Geo. II. cap. 22. had become a real incumbrance on the subjects, insisted that the creditors should relieve him, or that he should be allowed to relieve himself of it out of the price, as, by the decreet of sale, he is vested with every right which the bankrupt had in his person to the subject sold; and it is further declared, that the purchasers, and subjects purchased, on payment of the prices, "are freed, disburdened, and discharged, of all debts and deeds of the said deceased James Wardrop, and his author's and predecessors, from whom he derived right."

Answered for Mr Buchanan: Qui habet commodum, eundem sequi debet et incommodum; therefore Mr Jamieson ought not to have the benefit of the insurance, without being obliged to pay the premium. The fallacy of his argu-