

No 27.

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^cQueen.**A. G.**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 decret 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-

ment lies in supposing these to be separate and unconnected, whereas they are co-relatives, the one being the condition of the other; and, upon a general view, the insurance must be considered as an equal bargain between the insurers and the insured. Hence, had the Lords known the subjects were insured, and the premium not paid, when they set a price on them, that circumstance would have made no variation. Or, suppose the premium had been paid up, for the same reason it would have been added to the price; and, for the same reason, Mr Jamieson, had he known of the insurance, would have offered as much as he did, though the bond was not paid; or, had it been paid, would have given just so much more purchase-money.

Replied for Mr Jamieson, The benefit of insurance, and payment of the premium are not inseparably connected. The moment a house is insured, the benefit of insurance follows the subject, and transmits to singular successors; but it is not till the bond is recorded in terms of the statute, that a real lien is created on the subject. Should, therefore, the insurance-company neglect to register such bond properly, the subject would be insured, but not encumbered; so that a singular successor would have the benefit of the insurance, but the company would have nothing but a personal action for the premium against the granter of the bond. Suppose the proprietor of an estate has acquired a right of casting peats on a neighbouring moss, or the like, for a sum of money, for which he had granted heritable security on his estate, the purchaser, at a judicial sale of his estate, would be undoubtedly entitled to the servitude, and yet to have the estate disburdened of the heritable security. Mr Jamieson is precisely in the same situation. Purchasers must satisfy themselves as to the rental and apparent state of the subjects; but they are not obliged to search for incumbrances, against which the decret of sale is held to be a sufficient security.

THE LORD ORDINARY found Mr Jamieson "entitled to the benefit of the insurance from and after his entry; but that the creditors are entitled to any dividends due preceding that term, and must free and relieve the purchaser of any annualrents due on the premium of insurance preceding his entry."

Mr Jamieson having preferred a representation against this interlocutor, which virtually over-ruled his plea, the Lord Ordinary took the cause to report; and "the LORDS adhered."

For Jamieson, *Rae, Maclaurin.*
Reporter, *Lord Justice Clerk.*

Alt. Jo. Swinton, jun.
Clerk, ———.

J. M.

Fol. Dic. v. 4. p. 211. Fac. Col. No 1. p. 1.