

S E C T. VI.

Whether the sale understood a lump bargain or by rental. When subjects turn out disconform to the rental. When part of the subject has been evicted. Relief to a purchaser for an incumbrance not known at the time of sale.

No 24. 1697. July 20. WILLIAM HAY of Drummelzier *against* SIR JAMES COCKBURN.

WILLIAM HAY of Drummelzier and Sir Patrick Aikenhead having bought the lands of Dunse, a part of Cockburn's estate, by roup, and afterwards discovering several material errors in stating the rental and price, they craved rectification of the same, and allowance or deduction conform. *Alleged* for Sir James Cockburn and the creditors, That *esto* there were some lesion and over-valuation in the rental, the same ought to have been examined before the roup, and the offerers knowing all the public conditions of the sale, cannot now reclaim, seeing the next bidder will take it off their hand; and if this were allowed, all sales may be branled and subverted, which was become one of the surest ways of purchasing. *Answered*, This were a strange iniquity, if undeniable errors be made out, and yet the Lords shall not have liberty to reform the same; and this is no new thing, for the like was done in the roup of Carloury, Cockburn's path, Leswade and Others. THE LORDS would not review any errors in the testimonies of the witnesses, or the probation; but if there was any material error *in calculo*, or in the misapplication of the probation, the plurality inclined to reconsider the same; as where a house in Dunse is given up to belong to Sir James in superiority, and it is proved to hold of the Town of Edinburgh and the like; though this latitude may be of a very bad preparative.

Fol. Dic. v. 2. p. 311. Fountainhall, v. 2. p. 788.

1725. January 13. JAMES COUTS, Purchaser of Halgreen, *against* The CREDITORS of Halgreen.

No 25.
No deduction allowed where the rental decreased after probation, but before the sale.

THE estate of Halgreen having been long in the hands of creditors, was at last brought to a public judicial roup; and one for Mr Cout's behoof was preferred, as the highest offerer, and Mr Cout's gave bond for the price. The purchaser finding that there were considerable inlacks and deficiencies of the ren-

tal contained in the letters of publication, insisted against the Creditors for a deduction from the rental, and of L. 23 Scots of the schoolmaster's salary, which had not been allowed, *alleging*, That by the fraud of the Creditors he was led in to make so disadvantageous a purchase; for, though the rental in the letters of publication was agreeable to the proved rental, yet the proof having been taken seven-and-twenty years before the sale, the rents in that time had fallen considerably; and of this the creditors were in the knowledge, as appeared from their inserting an unusual clause in the articles of roup, viz. that the purchaser was to take his hazard of the deficiencies of the rental, and of any superplus burdens thereon, which might have happened since leading of the probation; which article, though it was struck out by authority of the Lord Ordinary before the roup proceeded, yet it was a sufficient evidence, that they knew what disadvantage would attend the purchaser.

No 25.

It was *answered* for the Creditors, That there was no ground for any abatement, since the sale had proceeded after all the solemnities required in law; that the rental in the letters of publication was agreeable to the proved rental; and that being the only rule that creditors have to walk by, in exposing of bankrupt estates to sale, the purchaser must take his hazard of any deficiencies happening betwixt the proof and sale. As to the schoolmaster's salary, it was abundantly compensated by other advantages.

THE LORDS found, that the purchaser could have no deduction from the proved rental, by falling lower after the probation, and before the sale; but found, that there must be a deduction given of any burden not formerly allowed before the sale.

Reporter, *Lord Pancaitland.* Act. *Graham, sen.* Alt. *Horn.* Clerk, *Gibson.*
Edgar, p. 148.

1732. December 22. COCKPEN against CREDITORS of COCKPEN.

AFTER the proof of the rental was fixed, a tenant having quitted his possession, and the Lord's factor having let the same, at a public roup, L. 100 less than the proved rental, after intimating the same in the gazettes, and at the adjacent parish churches, but without applying to the Lords for a warrant, which regularly ought to have been done; whereby it happened that the lands were exposed to sale at the proved rental; and having been bought at 27 years purchase, the purchaser, when he came to understand that the judicial rental was erroneous, insisted for a proportional abatement of the price; and here it was not alleged but that the factor had let the room at the true worth; and L. 100 yearly was a considerable article in an estate of 2000 merks a-year. The Creditors, who were his parties, *pleaded, imo*, That sales before the Lords are of the nature of lump bargains, where the rule is, *ut caveat emptor*; *2do*, If they are

No 26.