## SECT. II.

### Rental.

1735. *February* 13. Captain CHALMERS *against* Sir JAMES CUNINGHAM.

No 5.

SEVERAL friends of a bankrupt family agreed among themselves to transact the debts, and to take off parcels of the estate for payment. In a count and reckoning betwixt the heir, who acceded *ex post facto* to this treaty, and one of the friends who had agreed to take one barony at sixteen years purchase; a dispute arose about the rental in order to fix the charge.—The LORDS found, That the kain ought to be stated in the rental, in case that at the time of making the bargain, a price was exigible for the same when not paid in kind; and also, that the services ought to be stated, if, at the same period, a certain value was exigible when not performed. See APPENDIX.

*Fol. Dic. v. 2. p.* 356.

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1773. *July* 1.
Mr THOMAS MITCHELL *against* CHARLES ANDERSON of Candiecraig.

No 6.
In a voluntary sale of lands, concluded by mutual missives, for a price to be paid at the rate of a certain number of years purchase; found, that neither the cess paid by the tenants, nor the poultry and services, where there was no conversion, were to be included in the rental for fixing the amount of the price.

IN consequence of a proposal by Mr Mitchell to purchase certain lands belonging to Mr Anderson, the latter gave him the following signed holograph missive: "*Aberdeen, December* 21. 1770. Sir, I just now acknowledge to have sold you my lands on the south side of Don, at the rate of forty years purchase, conform to the tenants' tacks and missives they have of me; which you, by your acceptation hereof, are bound to pay me against Whitsunday next, which is hereby agreed to be your entry to the said lands."

Mr Mitchell, on the other hand, gave Mr Anderson the following holograph missive, of same date; "Sir, I hereby acknowledge, that I have bought from you, at the rate of forty years purchase, your lands on the south side of the water of Don, and oblige myself to pay you in terms of your letter to me of this date."

Some differences having arisen between the parties respecting the rental of the lands sold, and the mode of ascertaining the same, Mr Mitchell brought a process before the Court of Session against Mr Anderson, concluding, that the value of the lands should be ascertained, the price fixed, and the defender decerned to grant a disposition. After some procedure before the Lord Ordinary, a proof was allowed to both parties; and, upon advising thereof, the LORD ORDINARY pronounced an interlocutor, ascertaining a variety of particulars to-

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wards fixing a rental, and, *inter alia*, the following; "1. That the purchaser is liable to the land-tax, and can claim no deduction from the price on that account; and that, if the land-tax is paid by the tenants, as in this case, the same ought to be considered as part of the rent, in so far as it relieves the master of what he behoved necessarily to pay; 2. That the butter payable by the tenants ought to be stated as part of the rent, according to the common conversion of the country; 3. With regard to the services of the tenants for leading and casting peats, harvest-work, long carriages, and horses for harrowing, in regard that few of these services are ascertained in such a manner as to be binding in law upon the tenants, and none of them are converted; therefore finds, that they cannot be converted into money, so as to make any part of the rental; 4. And, in respect of the uncertainty of the measure of the leet-peats, that they were very seldom exacted, and never any conversion paid for the same; therefore finds, that they ought not to be added to the rental; 5. And, in respect there is no conversion of the kain-fowls, finds, that these cannot be added to the rental."

Against the Lord Ordinary's judgment, comprehending the above particulars, both parties reclaimed; Mr Mitchell, particularly with respect to article 1st and 2d, and Candiecraig with respect to articles 3d, 4th, and 5th.

Upon the *first* point respecting the land-tax, *pleaded* for the pursuer; From the proof, it appears, that the tenants of these lands pay the cess; and the pursuer can discover no good reason for adding the cess to the rental, so as to make it a charge against him in this case.

The only argument that has been insisted upon on the part of Candiecraig to support his plea is, that, in judicial sales, the practice is to state no deduction on account of the land-tax, when payable by the proprietor. Whether it is the practice in judicial sales to add the cess to the rental, when payable by the tenants, the pursuer cannot, with certainty, say, although he is informed it is not the practice in that case to make any addition to the rental; but, be that as it will, the pursuer cannot discover any analogy between the present case, and where lands are exposed judicially. In judicial sales, the purchaser has full opportunity of informing himself of every advantage and disadvantage relative to the intended purchase; and, though there may be no deduction allowed on account of the land-tax in the scheme of the sale, yet a purchaser will consider it as a deduction in making his offer, and regulate his conduct accordingly.

Neither does there appear now to be the same reason for not allowing deduction on account of the land-tax, as there was the time judicial sales were first introduced. At that period, the land-tax was by no means a permanent burden; it was only laid on when the exigencies of government absolutely required it; and even then, was very uncertain, and variable as to the sum; and, for these reasons, no deduction could be ascertained in the case of a bankruptcy; but the land-tax cannot now be considered as an accidental or uncertain

burden, but, in every respect, as permanent and fixed as ministers stipends, feu-duties, or any other public burden whatever: It may indeed vary a mere trifle in the *quantum* annually laid on; but still the burden remains, the difference being inconsiderable.

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In these circumstances, the pursuer must consider it singularly hard, if he should be obliged to give forty years purchase of a sum which he is never to receive; and which, though not particularly mentioned in the present case, was certainly understood by the parties to be a deduction from the rental, at least, not to be charged against the purchaser, more than the minister's stipend and feu-duties, which Candiecraig admits the pursuer is entitled to have allowance for.

In all contracts, but more particularly in that of sale, the governing rule is *bona fides;* and, therefore, the understanding of the parties at the time of entering into the transaction, must regulate the after proceedings; and that it was not the sense and meaning of the parties in the present case, that the land-tax should be charged against the purchaser, is proved by Candiecraig's own letter of sale, by which he sells to the pursuer his lands, "at the rate of forty years purchase, conform to the tenants' tacks and missives they have of me;" the plain meaning of which evidently is, that the purchaser was to pay forty years purchase of the rent the tenants were bound to pay the landlord; but clearly excludes the idea of any sum not payable to the landlord being chargeable against the purchaser.

And this interpretation of the letters of sale is supported by every principle of justice and equity; besides, a very strong presumption in this case, which arises from the greatness of the price; for it cannot be presumed, that any person would give forty years purchase of a rental, but in the view and belief of having that rental fixed at the sum actually payable to the proprietor, clear of all deductions: And over all the north of Scotland, particularly in the Highland parts of the country, where the tenants pay the cess, it is not the practice in a sale to make any addition to the rental on that account.

But this very question has been determined by the Court in a sale of teinds. The decision is observed by Falconer, Clerk *contra* Duke of Queensberry, 14th July 1747, *voce* TEINDS.

*Answered;* The pursuer seems entirely to misapprehend the nature of this article. The cess is properly a tax upon the heritor himself, though laid on in proportion to his land-property; and there is no more reason for deducting this from the rent, than any other tax which he is obliged to pay. Hence it is, that, in judicial sales, no deduction is made on account of the land-tax when paid by the heritor himself; and, for the same reason, it is always added to the rent when it is payable by the tenants.

In judicial sales, lands are sold at a certain number of years purchase, and so were the lands in question. It neither is, nor can be said, that the pursuer had not as full opportunity of informing himself of every thing respecting these

No 6. lands, previous to his bargain with the defender, as if they had been sold by authority of the Court. The pursuer's reason, therefore, for not paying regard to the practice in judicial sales in this particular, will not hold.

The same is the practice in judicial sales to this hour; and there can be no doubt it would have been altered, if there had been any good reason for it. But the fact is, there was more reason for considering the cess as a permanent burden in 1681, when the act introducing judicial sales was enacted, than now. At present, the cess is only granted from one year to another; whereas then, it was granted for a term of years together. Thus, in 1672, it was granted for five years; in 1678, it was granted for five years more; and, when these were expired, it was granted for the whole lifetime of King James VII.

The terms of the bargain were, that the defender was to sell his lands "at the rate of forty years purchase, conform to the tenants' tacks and missives they had of him." And, as the tenants were bound to pay the cess without allowance, which consequently is part of their rents, it follows, past all dispute, that, by the very terms of the bargain, the cess falls to be added to the rental.

And, as to the decision Clerk *contra* the Duke of Queensberry, where it was found, in a valuation of tithes, that the land-tax being paid by the tenants, was not to be added to the rents, so as to increase the rental; this case, which is observed by Mr Falconer, is but very shortly collected, and what were the grounds of the interlocutor do not appear. But it is enough to observe, that, in valuation of tithes, very different rules are observed from what are followed in other cases. Thus, deductions are allowed for inclosing, improving, &c. but it would sound a little odd, if deduction on account of these was sought in a sale of lands.

The Lords, upon this point, "find, that the cess paid by the tenants ought not to be added to the rental for which the petitioner is to pay;" and adhered to the Ordinary's interlocutor as to the other points reclaimed against by Mitchell.

On the other hand, Candiecraig having complained of that part of the Ordinary's interlocutor above recited, respecting the services of the tenants, the prestation of the leet-peats, and the kain-fowls, the judgment was adhered to, except as to the last article; as to which, the Lords found, that the value of the kain-fowls ought to be added to the rental. Mr Mitchell having reclaimed, the Court returned to the Lord Ordinary's interlocutor:

"And, in respect there is no conversion of the kain-fowls, find, that these cannot be added to the rental."

This point respecting the kain-fowls being still open, Candiecraig reclaimed with respect to it, and another article decided against him; but, when the reclaiming petition and answers came to be advised, on the 25th of January 1774, an offer was made at the bar to dissolve the bargain, which was accepted.

Act. *Dean of Faculty, Elphinston.* Alt. *Sol. General, J. Boswell, Rolland.* Clerk, *Kirkpatrick.*

*Fol. Dic. v.* 4. *p.* 254. *Fac. Col. No* 80. *p.* 201.