

1782. February 13.

LLOYDS *against* The APPARENT HEIR and CREDITORS of PATERSON.

No 29.

Whether deduction be given on account of a partial eviction, when the subject has been valued and sold *in cumulo*?

Whether any distinction be made in this matter between a sale pursued by an apparent heir, and one at the suit of creditors?

At a judicial sale, at the instance of an apparent heir, there was sold to Messrs Lloyds, at the price of L. 600 Sterling, "all and hail the property of the splint-coal, and hail and other seams of coal, and machinery thereof, and the grievie's and colliers' houses belonging thereto, with the benefit of the tack of the lands of Wester Beath for the years thereof yet to run."

The grievie's house thus sold was a decent building, consisting of two stories, and covered with slate. Before the scheme of division of the price was finally adjusted, the proprietor of the lands, under lease, claimed the property of it; and the purchasers, on this account, insisted for a proportional deduction from the purchase-money. In support of this demand, they had recourse to the arguments used in the cases in the Dict. under this title. They farther urged, That, although in sales carried on by creditors, who had attached the subjects merely as they stood in the person of their debtor, and were not possessed of his title-deeds, a purchaser might, from the nature of the thing, be supposed to undertake the risk of a partial eviction; yet the case was different where the sale proceeded at the suit of an apparent heir, having access to his predecessor's rights and evidents, and who could no more be justified in exposing a subject not belonging to the ancestor, than an ordinary vender.

The Lords did not distinguish an action of sale pursued by an apparent heir from one at the suit of creditors. They seemed to think the purchasers in this case might renounce the bargain altogether; and likewise, that if a separate value had been affixed to each subject, they might have been allowed to renounce it, as to the subject evicted. But the purchasers declining to renounce, unless a considerable sum laid out by them in the improvement of the subject was to be repaid,

THE COURT refused to grant any abatement.

Lord Ordinary, *Alva.* For Mess. Lloyds, *Rae.*

For the Apparent Heir and Creditors, *Elphinston.* Clerk, *Home.*

C.

Fol. Dic. v. 4. p. 211. Fac. Col. No 31. p. 52.

No 30.

No deduction from the price allowed, on account of an error in a plan referred to in advertising the sale.

1785. January 26. WILLIAM HANNAY *against* The CREDITORS of BARGALY.

In the advertisements, publishing the judicial sale of the lands of Bargaly, this estate was said to consist of 1710 acres, 146 of which were covered with wood; and a reference was made to a plan and measurement in the hands of the agent employed in the sale, which was agreeable to that description.

Mr Hannay, the purchaser, offered to prove, that there was a deficiency of 96 acres, of which 46 were woodlands, the estate extending in all only to 1614 acres. He therefore claimed a proportional deduction from the price, and

No 30.

Pleaded, Although the action *quanti minoris* is not sustained in Scotland, where a purchaser has been disappointed in the value of the subject sold, a different rule justly prevails, where, from its being either erroneously or fraudulently described, he has been deceived with regard to its extent or quantity, Erskine, Book 2. Tit. 8. § 10.; 23d June 1757, Maclean against Macneil, *voce* SALE; Wilson against the Creditors of Auchinbreck, No 27. p. 13330: And this, though the bargain should still remain a beneficial one, the buyer being equally entitled to all the advantage he had reason to expect, as to be relieved from every loss to which he has been exposed, by receiving, in this manner, a false or inadequate notion of his purchase.

Answered, The value put on this estate, and the articles of roup, which alone formed the contract between the creditors and the purchaser, were here fixed, without regard to any measurement, this having been referred to merely as descriptive of the subject. An intention, therefore, cannot be presumed, of making the dimensions contained in it an essential condition of the bargain. Even in a voluntary sale, the circumstance above stated could not have justified an abatement of the price.

But in the case of lands sold judicially such a claim is inadmissible. It has been there wisely established, on account of the ignorance of creditors as to the nature and extent of their debtor's estate, that no deduction shall be given, unless where a separate value has been affixed to the right which is evicted, or found to be defective. In every other case, the purchaser's only remedy is by renouncing the bargain altogether, February 13. 1782, Lloyds against the Apparent heir of Paterson, *supra*.

Mr Hannay's petition, insisting for this deduction, was, with answers for the creditors, remitted to the Lord Ordinary in the action of sale, who found no abatement due. Mr Hannay reclaimed; but his petition was refused without answers.

Lord Ordinary, *Hales*.For the Petitioner, *H. Erskine*.For the Creditors, *Rolland*.Clerk, *Orme*.

C.

Fol. Dic. v. 4. p. 210. Fac. Col. No 195. p. 306.

1788. June 27. HUGH INGLIS, and others, against GEORGE DEMPSTER.

No 31.

BETWEEN the year 1780, when a judicial rental of the lands of Skibo was made up, and the subsequent sale in 1786, the rents had fallen about a sixth part.

No diminution of the judicial rental sufficient to annul a judicial sale.