

and which the heir-male will evict when he comes to be pursued by the creditors; seeing the executry is bound to relieve the heir *quoad* all moveable debts. And the truth is, the parties' principal view, and the substantial part of the transaction, was the lands. And it cannot be *emptio hæreditatis*; because *L. 7, Dict. tit.* requires that there be a *hæreditas*: but here there was none. And this intromission was abundantly purged by the posterior confirmation.

The Lords, by plurality, assoilyed him from this pursuit; and found him not liable. But, when they insist against the heir-male, he will recur upon the moveables for his relief *pro tanto*. *Vol. II. Page 740.*

1712. *June 21 and July 30.* CHARLES MENZIES *against* MENZIES, and JOHN MUIR.

*June 21.*—LORD Ormiston reported Menzies against Menzies. Charles Menzies, writer to the signet, having purchased the lands of Kinmundy at a roup, and being preferred to Gordon of Pitlurg, who competed with him for the bargain, and being pursued by his brother's daughter, to whom the price is payable, he craved two deductions: the first was of £1200 Scots, as a stock corresponding to £5 sterling, wherein the rental fell short of what it was given up to him; and he offered to prove it was that much less; and the possessors did not pay what it was given up for.

ALLEGED,—The only rental that can be the rule of the price, must be the rental proven at the time of the sale, which was done by the tenants' oaths confessing what each of them paid; and, whatever a stranger might pretend, Charles could never plead ignorance, for it was his brother's lands, he managed the sale, and led the probation itself. He caused Pitlurg count to him for his possession by that rental to the utmost denier, *et quod quisque juris in alium statuerit ipse eodem utatur*. If he took advantage of that rental to cause another count by it, with what face can he now object against it? His mouth is stopped *personali objectione doli mali*. And Pitlurg was willing to accept the bargain without any such deduction.

ANSWERED,—There is a great difference betwixt a judicial and a voluntary roup. In the first case, the rental is proven before the Lords with the utmost niceness and exactitude; but, in a voluntary sale, (as this was,) the rental depended much on the tutor's word; and, at most, it was but a *talis qualis probatio*, founded upon expediency for dispatch, but can never be the rule of the purchase; and the tutor is expressly obliged to warrant to him the rental to be no less than what it is stated in the decret of sale. So he has right to crave this deduction by express paction and stipulation; and, though he wanted that, it arises to him *ex natura rei*; for how unjust were it to cause him pay for a non-ens, a chalder of victual which he gets not? And, if Pitlurg omitted to seek this deduction, that can be no preparative for Charles Menzies; for he had other advantages to compensate the short rental.

REPLIED,—The distinction here, of judicial and voluntary, is chimerical and imaginary; for the rental is as much fixed in the one as the other, and are both alike led in the absence of the purchaser, who is not then known: and the buying conform to a rental implies such a homologation and acquiescence as excludes all quarrelling of it hereafter.

The second defalcation craved was of £2889 Scots, as the value of the teind; seeing they produced no heritable right thereto, but only some short tacks that would expire in a few years: and it is known teinds are subject to many hazardous accidents and diminutions which the stock is free of; and yet he is charged to pay twenty years' purchase for them as well as for the stock. And in a decision, marked by President Gilmor, *28th June 1664*, and by Stair *24th June, Black against Moffat*, the Lords found, in the price of goods the warrandice must be absolute, to make the right sufficient.

ANSWERED,—The offer at the roup was indefinite, without distinguishing the teind from the stock; otherwise they would have kept the price much higher. And the tacks are not so short; and he may get prorogations thereof. And with thir deductions he dwindles the price almost down to the half; whereas emption vendition is *contractus uberrimæ fidei*, to be regulated *secundum bonum et æquum*; and this were to pay the price by logic.

The Lords thought he behoved to have some allowance both for the short rental and the defect of the teinds; and granted a conjunct probation to either party for constituting the same.

The heirs made a farther offer, seeing he complained so grievously, they were willing to take the bargain off his hand, and refund him his expenses, *cum omni causa*, if he would put them in their own place; seeing they would get Pitlurg and others, who, without any vexatious pleas, would give them more than he had offered. And that this has sometimes been practised by the Lords, appears from the foresaid cases, cited by themselves; and again in *March 1684, Sutherland against Sutherland*.

ANSWERED,—These capitulations were very good in friendly communings, but were founded on no law, and much less here; they coveting to grasp at some meliorations he has made. And this was offered lately by *Major Chiesly to Bailie Brand*, for the lands of Dalry, and betwixt *Murdoch and John Allan*, and always refused.

The Lords did not think fit to interpose; but left the parties to move in these overtures as they pleased.

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*July 30.*—Charles Menzies of Kinmundy gave in a protest for remeid of law against Menzies his nieces, and John Muir; because the Lords had refused him a deduction from the price on account of the short tacks of the teinds.

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1712. *Feb. and June.* WILLIAM CLARK of TILLICORTHY against SIR SAMUEL FORBES of FOVERAN.

*February 14.* William Clark of Tillicorthy being a neighbour of Sir Samuel Forbes of Foveran, and under some debt; Sir Samuel designing a purchase of his lands, he transacts with some of his creditors, and takes a bond from him in December 1701, obliging him not to sell his lands, or grant bonds whereon they may be adjudged, without the said Sir Samuel's special consent, or making the first offer of these lands to him; and, if he be willing to buy them, Clark obliges himself to dispoise the same to him, he giving as good a