

solvency of the purchaser, is fixed by repeated decisions ; 4th December 1788, Allan and Stewart against Creditors of Stein, No. 45. p. 14218 ; 23d July 1789, Young against Stein, No. 46. p. 14218. although, in these cases the property of the goods be previously devolved on the purchaser ; and there is no room for distinction between these cases and the present. Accordingly Macredie acquiesced in Macartney's detaining the cattle, and, by the missive in question, entered into a new bargain with respect to them, by which a conditional sale only was constituted.

No. 1.

Nothing is more common than for parties to stipulate with regard to subjects delivered by one to the other, alternatively, that a fixed price shall be paid for it on a certain day, or that it shall be returned with an allowance for the interim use of it. In such cases, the sale is conditional, and the property is not transferred till the condition be purified ; Stair, B. 1 Tit. 14. § 4 ; 9th March 1785, Young against Dunn, No. 29. p. 14191. Such was meant to be the effect of the missive in question.

The creditors can qualify no prejudice from it, as, had it not been for it, the cattle would never have been on their debtor's farm ; and they were bound to inquire into the nature of his right to them.

The Lords, on the grounds stated by Macartney, by a great majority adhered.

Lord Ordinary, *Bannatyne*.
Clerk, *Pringle*.

For Macartney, *D. Cathcart*.

Alt, *Gillies*.

D. D.

Fac. Coll. No. 145. p. 324.

1801. *January 23.* JOHN GRAY *against* JAMES HAMILTON and Others.

THE grandfather of James Hamilton, in 1740, obtained a feu of the three farms of South Craigend, North Craigend, and Garthamlock. All these farms lay contiguous, and were thus described in the feu-charter : “ The lands of South Craigend, and whole houses thereon, consisting of sixty acres or there- by, with liberty and privilege to the tenants and possessors of the said lands of South Craigend, of casting and winning peats and turf in Craigend Muir moss, for the use of their families allenarly ; the lands of North Craigend or Comedie, consisting of ninety four acres or thereby, including the moss thereon, and the lands of Garthamlock, and housing thereon, consisting of one hundred and forty-one acres or thereby, burdened with the present highways, with the hail parts, pendicles, and pertinents of the said respective lands.”

In 1795, James Hamilton exposed two of these farms to public sale, viz. South Craigend and North Craigend. In the articles of roup, the description of the lands was taken *verbatim* from the original title-deeds. In particular,

No. 2.

A deduction from the price of a farm on account of its falling short of the measurement specified in the articles of roup, refused.

No. 2. the description of North Craigend was in the following words; "All and hail
 " the lands of North Craigend or Comedie, consisting of ninety-four acres of
 " land *or thereby*, including the moss therein, hail parts, pendicles, and perti-
 " nents of the said *respective* lands."

John Gray purchased North Craigend.

After being a considerable time in possession, he discovered that the farm contained only about seventy-seven acres.

In a multipointing raised for dividing the price among Mr. Hamilton's creditors, Gray claimed an abatement corresponding to the number of deficient acres.

Answered for Mr. Hamilton and his creditors: The specification of acres in the articles of roup is descriptive, not taxative; and as the purchaser has got the whole lands known by the name of North Craigend, an error as to the quantity of acres will not entitle him to any deduction from the price. At most it can only entitle him to void the sale, and to this the respondents have no objection; 26th January 1785, Hannay, No. 30. p. 1334.

Replied: Granting the respondents' doctrine to be well founded in the case of a total sale, it will not hold under the present circumstances, as the seller here retains a contiguous subject, and the insuperable presumption is, that he is still in possession of part of the lands which he actually sold.

The Lord Ordinary "repelled John Gray's claim."

On advising a reclaiming petition, with answers, the Court were a good deal divided. By one of the Judges, who was for altering the interlocutor, it was asked, If a shop-keeper sold ninety-four yards of cloth, and delivered only seventy-seven, would not the purchaser have a claim for the other seventeen, although the seller could shew that the quantity delivered was worth the price which had been paid?

But a considerable majority thought the interlocutor right. No fraud (it was observed) is here alleged, and therefore the purchaser must take his option, either to abandon the purchase altogether, or be contented with what he has got.

One Judge having expressed a suspicion, that part of the lands of North Craigend might, by an alteration of marches since the date of the original feu-contract, have been united to Garthamlock; the Court, while they adhered to the judgment of the Lord Ordinary on the question of law, remitted to his Lordship to inquire into that point.

The interlocutor of the Court was in these words: "Find, there is no
 " ground in this case for any deduction from the price, and in so far adhere
 " to the interlocutor of the Lord Ordinary reclaimed against; but remit to
 " his Lordship to hear parties, how far any circumstances occur in this case
 " that may afford any other ground for the petitioners' claim of relief, and to
 " determine therein as to his Lordship shall seem just."

Lord Ordinary, Cullen.
 Clerk, Sinclair.

Act. Archd. Campbell.

Alt. Grahame.

R. D.

Fac. Coll. 213. p. 484.