

1738. July 20. & 1739. January.

GARDNER of Northtary *against* BROWN and COLVIL.

No 69.

A DECRET-ARBITRAL on a verbal submission, concerning an heritable subject, found not effectual, in respect of the *locus poenitentiae*.

But afterwards, upon advising petition and answers, found effectual, in respect. the impugner of the decree was present thereat, and adducing witnesses.

Fol. Dic. v. 3. p. 396. Kilkerran, (ARBITRATION.) No 2. p. 33.

* * Clerk Home's report of this case is No 42. p. 5659. *voce* HOMOLOGATION.

1742. July 13.

RICHARD JOHNSTON of Eastfield *against* ALLAN LOCKHART of Cleghorn.

No 70.

A person who had purchased lands, contended he was at liberty to resile, because the lands being entailed, the seller could not grant a valid disposition. Answered, the entail contains no irritant clause, and was never recorded. Found sufficient to entitle the defender to resile, that the right was disputable.

THE deceased Richard Johnston disposed his lands of Eastfield to the charger his son, &c. under certain reservations, provisions, and restrictions; and the disposition further contained this proviso, "That it should not be lawful to the said Richard Johnston the disponee, to sell or dispoise the said lands, to grant heritable or irredeemable securities thereof, to contract debt thereupon, to grant obligations, or do any other deed civil or criminal, for which the said lands, or any part thereof, may be burdened or affected, evicted, forfeited, or adjudged; which hail dispositions, securities, debts, deeds, and crimes, and every one of them, are hereby declared, *ipso facto*, void and null, and the said lands nowise subject thereto, &c." The disposition contained procuratory and precept, in virtue whereof the charger was infeft under the foresaid prohibitions and irritant clauses, specially ingrossed in his infeftment. But the tailzie was not recorded in the register of tailzies, neither did it contain any clause irritating the contravener's right.

These lands being encumbered with debts mostly of the father's contracting, the charger entered into a minute of sale with the suspender, who, upon looking into the title deeds, refused to implement the bargain; and being charged on the minute, he suspended on this ground, That he was not safe to purchase, as the same was liable to be declared void and null, in consequence of the prohibitory and irritant clause contained *in gremio* of the dispoiser's right.

Answered for the charger, That this tailzie was never recorded in the proper register, as directed by the statute 1685, cap. 22.; therefore it could have no force or effect of annulling any disposition granted to third parties; *2do*, It contained no clause irritating the right of the contravener.

Replied, It was implied in the nature of all sales, that the seller must make good his title and power to dispoise before he could grant a valid disposition to the purchaser, upon which he could rely as a security; that however