

1743. December 20. TAIT of Lochenkit against LORD MAXWELL.

WILLIAM TAIT of Lochenkit having purchased certain lands from the Lord Maxwell, in order to his paying securely, *suspended* the minute of sale on this ground, that the Lord Maxwell's right to the subject was by a tailzie made by the late Earl his father, whereby he was strictly tied up by prohibitory, irritant, and resolute clauses, from selling or contracting debt, whereby the lands might be evicted.

No 17.
The purchaser of lands in a tailzie, altho' not recorded, found at liberty to suspend the minute of sale.

Answered for Lord Maxwell, The tailzie has never been recorded, so that whatever might be his, the seller's, hazard of incurring the irritancy, the purchaser was safe, and therefore could not refuse payment of the price.

Replied for the suspender, That by the statute, only such purchasers were safe as could say, they had purchased *bona fide*, which he could not say, not only as he saw the prohibitory and irritant clauses in his author's right, but as he had brought the matter *sub judice*, before he paid the price; but whatever might be in this, he could not be tied to a bargain liable to challenge on such doubtful grounds, and where the proper contradictors were not in the field, as the Lords had found in a similar case, Lockhart *contra* Johnston, July 13. 1742, *supra*.

THE LORDS found, "that they could give no judgment till the heirs of entail were brought into the field."

And it was at the same time said, that when the heirs should be brought into the field, there would be no occasion to give judgment upon the import of the statute; for that as the tailzie imported at least an obligation, and that the sale yet consisted *in nudis finibus contractus*, without any money paid, the Court would never find, that the latter obligation, by the sale, should prevail over the prior one in the entail.

Fol. Dic. v. 4. p. 248. Kilkerran, (TAILZIE.) No 3. p. 539.

1749. February 14. LITTLE against DICKSON.

ATTENEMENT in Peebles being exposed to roup in the year 1747, by James Little, Thomas Dickson became purchaser, who, in a process brought against him by Adam Little, to whom the price was payable by the articles of roup, alleged the progress to be insufficient.

The progress was a decree of adjudication in the year 1694, taken in absence, against a minor, with a charter and sasine thereon, by the burgh of Peebles in 1696, recorded in the books of the burgh, and ever since clothed with possession. The adjudication without the grounds was nothing; but the charter and sasine, with 51 years possession, were, by the Ordinary, sustained to be a sufficient progress.

No 18.
Charter and sasine, with 51 years' possession, when the original right was defective, not found a sufficient progress.

No 18.

The defender having reclaimed, the Lords "found the progress not sufficient, and therefore found him not bound to the bargain."

Here the original right, the adjudication, was altogether defective; and supposing the charter and sasine to be formal, and the possession continued for 40 years after expiry of the legal, (within which time payment within the legal is competent) and after the majority of the debtor; yet as prescription is at best but *exceptio temporis*, liable to other interruptions, it doth not amount to a right which the purchaser is entitled to have given him; see June 13. 1676, Nairn *contra* Scrimsour, No 11. p. 14169.

Another exception was made to the progress, that the tenement appeared not to hold burgage, but feu of the burgh, and the sasine was therefore improperly recorded in the register of the burgh, instead of the register of sasines for the shire; but upon which the less weight could be laid, that the whole tenements in Peebles were said to bear in the *reddendo*, besides the burgage service, a small payment in money to the burgh, just as this does, and to be all recorded in the same manner. But as the defender prevailed upon the general ground, no inquiry into this was thought necessary.

Kilkerran, (SALE.) No 2. p. 498.

1769. November 24.

B. ROWAND, WIDOW, and ROBERT and JAMES ROWANDS, Nephews of the Deceased James Rowand, Chargers, *against* JAMES COCHRANE, in Paisley, Suspender.

No 19.

Lands being exposed to sale, and the articles bearing that the purchaser was to accept such progress as could be delivered, and to be debarred from objecting on that account, found to be an effectual sale, though the progress was defective.

JAMES ROWAND having exposed to sale a tenement in Paisley, by way of public roup, the articles of sale were drawn up, by which it was provided, "that the seller should be liable in warrandice from fact and deed allenarly; and to deliver such writs as he had in his custody, conform to inventory therewith produced, and shewn at the roup, consisting of seventeen in number, with the sufficiency of which progress the purchasers were to satisfy themselves before the roup; and, by their becoming offerers, were entirely debarred from making any objections against payment of the price on that account." An inventory of the progress was accordingly made out, and adjusted by the seller, as referred to in the articles.

At the roup, which was publicly advertised, and several times adjourned, the subject was purchased by James Cochrane, as the highest offerer. The price was reasonable; but he refused, when charged, to grant bond for the price; alleging, that the progress was manifestly insufficient, and such as shewed that the property was not in the seller. He also alleged fraud in inducing him, ignorant of business, to offer on a progress so clearly defective.

The progress stood thus: From the 1696 it was regular till the 1735, when the property vested in Mackie. Mackie conveyed it to Messrs Crawford and