

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 allenary; 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

Dunmore, his brothers-in-law; they, in 1742, to Cameron; and Cameron to Rowand in 1760. The conveyance from Mackie to Messrs Crawford and Dunmore was wanting; though it appeared, from the books of these gentlemen, that they had stated the price of the subject to Mackie's credit; and that Mackie and his heir, from the year 1743 downwards, had acquiesced in the sale made by them to Cameron.

It appeared that Rowand himself had purchased the tenement upon the same progress which he now offered to Cochrane; that he had possessed it five years, and his authors twenty years, without challenge; that at the roup the articles and inventory had been publicly read over, and the writings themselves produced and looked at by several of the offerers before the sale began.

THE LORD ORDINARY pronounced the following interlocutor: "Having specially considered the conditions of the roup, by which the buyer was to accept of the progress contained in the inventory, and debarred from any objections to the payment of the price on that account; and that though the progress is defective, no fraud appears on the part of the seller, by which the suspender can be reponed; finds the letters orderly proceeded." Having afterwards taken the cause to report, the LORDS unanimously adopted the Lord Ordinary's interlocutor, pronounced it of new, and gave the expense of extract.

Lord Ordinary, *Aythinleck*.
Clerk, ———

For Rowand, *Ilay Campbell*.
For Cochrane, *Cullen*.

Fac. Col. No 4. p. 10.

1772. December 10.

GEORGE AIKMAN, Merchant in Glasgow, against JOHN HEPBURN, Surgeon in Edinburgh, and WILLIAM CHEAP, Manufacturer there, his assignee.

A small house in this city, belonging to Aikman, having been advertised for sale, William Cheap, who then occupied it as a ware-room, at the rent of L. 13 Sterling, first offered himself as a purchaser; but as Cheap refused to give more than L. 100 Sterling, his offer was rejected.

Shortly thereafter, John Hepburn wrote the following missive, dated September 28. 1770, to Aikman's doer, George Jeffrey: "Sir, as I see the ware-room, presently possessed by William Cheap, linen draper, advertised to be sold by you, I hereby offer for that subject the sum of L. 150 Sterling, my entry to be at the term of Whitsunday next to come, and the price to be payable at that term; and for which, if this offer is accepted, I shall grant bond, with security to your satisfaction."

P. S. "The above offer I oblige myself to stand by under the penalty of L. 30 Sterling over and above performance."

No 20.

Case where the purchaser of an heritable subject was found bound, either to accept of the disposition and progress offered, or to depart from the bargain.