No 14.

Answered for Sir Alexander and the Creditors arresters, to the 1*st*, That the adjudications having been led 44 years ago, and the reversion having not only been renounced by the apparent heir of the debtor, against whom the apprisings had been led, but he having also granted a bond of warrandice upon which he was inhibited, the right was unquestionably secure in the person of Sir Alexander's author.

To the 2*d*, That the pursuer behoved either to condescend on the deeds of Sir Alexander, from which he apprehended eviction, or behoved to depend on the warrandice which his creditors, who were called in the multiplepoinding, ought to give the pursuer upon receiving the money from him.

To the 3*d*, Though the adjudgers from Sir Alexander had carried his right, yet they also carried a right to the minute of sale; and though they might pretend to be preferred to the arresters on the price, yet that was *perinde* to the pursuer, as to the subsisting of the minute.

THE LORDS found the minute of sale a binding contract on the pursuer, Mr Haldane, Sir Alexander Anstruther producing his author's infeftment and sufficient progress, unless Mr Haldane condescend upon incumbrances that would exclude his right; but before payment of the price, found, that all the creditors, particularly the adjudgers, ought to be brought into the multiplepoinding now depending, in order to be discussed, reserving to the Lords to consider what security or warrandice should be given by the receivers of the price.

Act. *Alex. Garden.* Alt. *Ja. Graham*, sen. Clerk, *Hall.*

Edgar, *p.* 139.

1738. *November* 14.

EARL MORTON *against* CREDITORS of CUNINGHAM of Boquhan.

No 15.

A PURCHASER at a public roup sought a defalcation, upon account of the teinds purchased by him along with the stock, to which he *alleged* the bankrupt had no good right. It was *answered*, That he purchasing with his eyes open, knowing the nature of the rights to the subject, and having also the creditors bound in absolute warrandice for the sums they receive, there ought to be no defalcation. THE LORDS found the pursuer was not entitled to a deduction of the price, but that, if he would, he might give up the bargain. It was taken notice of, that the case was not of a total want of right. Here was a right *ex facie* good, the purchaser only starting objections, which were never sustained to infer a defalcation of the price.

Fol. Dic. v. 2. *p.* 358.

*** Kilkerran reports this case:

No 15.

The estate of Boquhan having been brought to a sale before the Lords by Mrs Helen Cuningham, as apparent heir, and the Earl of Morton having become purchaser of a part of the lands, with the teinds thereof, the Earl did thereafter insist for a defalcation of the price, on account of an objection discovered to the seller's right to the teinds; or that he might be allowed to retain the price corresponding to the teinds, for his security in case of an eviction, paying the annualrent thereof in the mean time.

But the Lords "refused to allow him either;" the right being *ex facie* good, and he having the creditors' warrandice, to the extent of the debts whereof they received payment; but in respect of the discovery made of a possibility of eviction, found that the Earl might give up the bargain if he pleased.

Kilkerran, (Sale.) *No* 1. *p.* 498.

1742. *July* 13. Lockhart *against* Johnston.

No 16.

The purchaser of lands tailzied under prohibitions and irritancies, against selling, &c. but without a resolutive clause, found not obliged to adhere to the bargain, as the seller's powers were doubtful.

Allan Lockhart of Cleghorn having entered into a minute of sale with Johnston of Eastfield, for the purchase of a part of his estate; and doubting Eastfield's powers; in order to have the judgment of the Lords, suspended the minute on this ground, That Eastfield's title was a disposition from his father to him, and the heirs-male of his body, whom failing, to the father's grandchildren by a daughter; and containing a proviso, "that it should not be lawful to him, the institute, to sell or dispone the lands, contract debts, or grant securities thereon, whereby any part thereof might be evicted, burdened, or adjudged, and declaring all such dispositions, debts, or deeds, to be *ipso facto* void and null, and the lands to be nowise subject thereto;" all which prohibitions and irritancies were ingrossed in the sasine following thereon.

And it being *alleged* for the charger, That the tailzie was ineffectual against purchasers, 1*mo*, as not recorded; 2*do*, as containing no irritancy of the contravener's right;—the Lords, without further entering into the question, than to observe that the case was doubtful, and that the proper contradictors, the heirs of entail, were not in the field, "found the suspender not bound to accept of the bargain, and stand the chance of an after-challenge on so doubtful grounds."

Fol. Dic. v. 4. *p.* 248. *Kilkerran*, (Tailzie.) *No* 2. *p.* 539.

*** C. Home's report of this case is No 70. p. 8474. *voce* Locus Poenitentiæ.