

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.