1738. *July* 20. & 1739. *January.*

GAIRDNER of Northtary *against* BROWN and COLVIL.

No 69.

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

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 disponed 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 dispone 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 therof, 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 disponer'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; 2*do*, 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 dispone before he could grant a valid disposition to the purchaser, upon which he could rely as a security; that however

a *bona fide* purchaser might be secure, who had purchased upon the faith of the public law, seeing that his author was not bound up by any entail duly recorded, nor by any clause in the infeftment itself, and in that view had completed his titles, and paid the money, ere any discovery was made of the defect of powers; yet whereas, in the present case, the discovery was made of this objection before the right was completed, or price paid, he could not now be obliged to implement under the feasable right of an after challenge from the heirs of entail, especially as that question could not be tried in the present process of suspension, the heirs of entail not being parties to this suit. No 70.

Answered to the *second*, That the statute has no where enacted, that the contravener's right must be annulled in order to make good the prohibitory clauses; the contravener's right may be annulled, and the right of creditors secured, and so *vice versa*: It is the will of the donor, of which the creditor is duly certiorated, that has the legal effect of vacating his security. But whatever may be in this, were the question here with an heir of entail, yet where it is only with the disponer himself, it is believed a purchaser ought not to be obliged to stand the chance of any after challenge, where the discovery has been timeously made.

THE LORDS found the suspender was not bound to accept of the bargain, and therefore suspended the letters *simpliciter*.

Fol. Dic. v. 3. *p.* 396. *C. Home, No* 202. *p.* 336.

1746. *December* 19. A. *against* B.

No 71.

VERBAL submissions and decrees arbitral *inter rusticos* for matters of small importance, are probable by witnesses. See APPENDIX.

Fol. Dic. v. 3. *p.* 396.

1766. *June* 13.

WALLACE, GARDYNE, and Co. *against* PATRICK MILLER, and Others.

No 72.
When it is a part of the agreement, that the bargain shall be reduced into writing, there is *locus poenitentiae* till that be done.

MESSRS Gibson and Balfour, and Patrick Miller, were engaged with John Weir in a co-partnery for selling and bleaching linen, under the designation of John Weir and Co.

In May 1766, Wallace, Gardyne, and Co. of Arbroath, sent a parcel of linens to be bleached by John Weir and Co.; and, upon the 7th of that month, made offer to sell them the cloth at certain prices, upon two months credit.

By this time, the co-partnery of John Weir and Co. was dissolved, which John Weir mentioned in his answer of 16th May; and, at the same time, offered to take the linens upon his own account, on condition that the credit should be enlarged to 4 months.