

*** Kilkerran reports this case :

No 15.

THE estate of Boquhan having been brought to a sale before the Lords by Mrs Helen Cuningbam, 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, *imo*, as not recorded; *2do*, 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."

Fòl. Dic. v. 4. p. 248. Kilkerran, (TAILZIE.) No 2. p. 539.

*** C. Home's report of this case is No 70. p. 3474. *voce* LOCUS POENITENTIÆ.