No 11.
plete. The buyer is not obliged to accept of absolute warrandice to supply a defective title.

fective, in so far as the lands did hold of the bishop, and the original right was not produced, but only a charter of confirmation *in anno* 1611; and the charter confirmed was not produced; and the progress, since the charter of confirmation, was but late, and some of the charters had no sasine following upon the same, and some sasines wanted the warrants of charters and precepts; and albeit it was *alleged*, That the charters would be found registered in the bishop's register, that defect was not supplied thereby, seeing the bishop's register was not authentic, and ought to have no other respect than a register of any other lord or baron, of the writs granted by them;

The Lords found, That, though much may be said upon the progress foresaid, to defend against any person that will pretend right to the lands, and to found prescription upon them; a buyer nevertheless was not obliged to accept and acquiesce to the same as a sufficient progress, seeing the buyer ought to have a right; and prescription, with 40 years possession, doth not amount to a right, and there may be replies upon interruption; and, at the best, prescription is not a right, but *exceptio temporis*.

But the Lords did allow to the charger, a time for making out a better progress; and found, That the suspender could not be forced to acquiesce in absolute warrandice, which was offered in supplement of the progress, in respect the same is only the ground of a personal action, and may become ineffectual, if the person, obliged to warrant, should become insolvent. *In præsentia.*

Act. *Falconer.* Alt. *Stewart, &c.* Clerk, *Gibson.*

Fol. Dic. v. 2. *p.* 358. *Dirleton, No* 356. *p.* 170.

1682. *March.* Paton *against* Gordon.

No 12.
Found that a purchaser could not retain any part of the price upon alleged defects in the progress, in respect the lands had been disponed with warrandice, and a 40 years progress was delivered, where no incumbrances appeared.

George Paton having bought the lands of Grandhome, Dansie, and others, from Sir Robert Gordon of Gordonstoun, and having given bond for 1800 merks as the remainder of the price, whereupon Paton being charged, he suspended upon this reason, That Gordonstoun having disponed to him the lands, with absolute warrandice, yet, notwithstanding, the heritors, and possessors of Barnfield, having a servitude and moss-live upon the moss of Danstoun, from Gordonstoun's author, which will in a short time exhaust the moss, is a prejudice to the suspender's tenants of these lands, a moss being of great value in that country, without which the tenants cannot labour the land; and the moss is liable to serve both the suspender's tenants, and the heritor's, who has that servitude upon the moss; and therefore the suspender ought to have retention of this sum, with the damage and prejudice that he sustained by that moss-live: As also the charger has not delivered to him a sufficient progress of the rights of the lands, which at least ought to have been for the space of 40 years. *Answered*, That albeit the charger did dispone the lands with the muir and

moss belonging thereto, which absolute warrandice, that can import no more but to warrant the property of the lands, and the mosses, and muirs, as they had been possessed by the charger for 40 years before; so that this tollerance and moss-live being granted many years before, it must be understood that the suspender bought the lands with the burden of that servitude; as in the case of servitude of acqueduct, highways, and passages through the ground, which albeit they will be oft-times of great prejudice to the heritor, yet, when a man sells the lands, he is not obliged to warrant against these servitudes, especially where the parties having right to the same are in possession the time of the selling of the lands; seeing it cannot be understood that he sold the lands upon any other condition but as he possessed the same himself; and the suspender cannot retain the sum upon that account, of the want of a sufficient progress, seeing he is not distressed, nor any part of the lands evicted for want of a progress; and he having relied upon the absolute warrandice, which sufficiently secures him, he cannot retain the sum; but when he shall be distressed, or any part of the lands evicted, the charger shall then secure him. THE LORDS found the servitude did not import a contravention of the warrandice, and that the superior had no interest to retain the price upon any alleged defect in the progress, in respect the lands were disponed with warrandice; and that the 40 years progress, given to the suspender, was sufficient till the contrary appear, seeing there was no eviction nor distress.

No 12.

Fol. Dic. v. 2. p. 358. P. Home, v. 1. No 196.

1720. *June* 21.

JOHN COUPER, *alias* CHALMERS, *against* Sir ANDREW MIRETON of Gogar.

No 13.
The purchaser at a judicial sale found to be secure against all exceptions to the title of the bankrupt, even although it turned out that he had not been the real proprietor, but only liferenter.

MR THOMAS CHALMERS having contracted many debts, the estate of Gogar, whereof he had only the liferent, was, by an alleged collusion betwixt him and his creditors, brought to a judicial sale before the Lords, at which Sir Andrew Mireton became purchaser. His son John Couper, *alias* Chalmers, then an infant, in whose person the fee truly was at the time of the judicial sale, intented a process of reduction and improbation against Sir Andrew Mireton the purchaser, for having his titles set aside by which he possessed the estate. The purchaser produced his decreet of sale, and *contended*, That his right by that decreet was unqurrellable in virtue of the act 1695, anent the sale of bankrupt estates.

The pursuer *pleaded*, That it was neither in the words nor the spirit of the act, to render the sale of any other lands unquarrellable, but only of those which truly belonged to the bankrupt. The words are expressly concerning the sale of bankrupts' estates, and the provision is, That the lands shall be disburdened of all debts and deeds of the bankrupt, or his predecessors from whom he had right; implying plainly, that no security was intended to be granted