

1663. January 8.

GORDON *against* LEES.

No 79.

A CREDITOR having transacted with his debtor, and accepted of a lesser sum for his claim, under this condition, that if the money should not be punctually paid at a certain term, the creditor was to recur to his former right; and the term being elapsed without offer of payment; the LORDS found the same yet purgeable.

Fol. Dic. v. 1. p. 490. Gilmour.

*** This case is No 23. p. 2965. *voce* CONDITION.

1672. December 10.

The LADY CULTQUHEY *against* The LAIRD of ABERCAIRNIE.

No 80.

THE Lady Cultquhey having granted a renunciation of her liferent-right in favour of her son, his heirs and assignees, upon certain conditions, for relieving of her debts betwixt and such a day; and by a posterior bond it is declared, that if the same were not performed at the day, the renunciation should be null, *ipso facto*, as if it had never been made: The Lady pursues a declarator of the nullity, her son to whom it was granted being dead without issue. Compareance is made for the donatar of her son's ward, who alleged that the renunciation being made to her son, his heirs and assignees, he as donatar to the ward of the lands renounced, was a legal assignee; and as the son in his own time, if he had been thus pursued, might have offered to purge the irritancy by present performance, so may and doth the donatar offer to purge, as is ordinary in all clauses irritant, especially where it bears not 'to be void without declarator.' It was *answered*, That clauses irritant *in commissoriis*, where they are penal, and give the party more than their just interest, may be purged; but when a party gratuitously grants any right without a cause onerous, upon conditions, and a clause irritant, in case of not performance, such clauses cannot be purged; albeit clauses irritant in reversions, or back tacks, which are penal, and whereby the wadsetter gets more than his just interest, may be purged.

A lady granted a renunciation of her liferent right in favour of her son, upon his becoming bound to relieve her of her debts betwixt and a certain day. By a posterior bond it was declared, that if the condition were not performed at the day, the renunciation should be null *ipso facto*.---The Lords found irritancies of this nature, not being penal, could not be purged.

THE LORDS repelled the defence, and found irritancies of this nature; not being penal, could not be purged.

Fol. Dic. v. 1. p. 489. Stair, v. 2. p. 130.

*** Gosford reports this case:

IN an action of declarator of the nullity of a contract passed and subscribed betwixt the Lady and her son, whereby she disposed to him her whole liferent lands, upon express condition, that he should pay the debt, and pay L. 2000 to

No 80.

her daughters, wherein there is a clause irritant, that in case of not performance, the disposition should be void and null; it was *alleged* for Abercairney, who was donatar to the ward of the fiar, who had succeeded to his deceased brother, who was party contractor, that he having now right to the lands disposed by the Lady, whereof she was denuded by the said contract, there could be no declarator upon the clause irritant, because he was willing to purge the same and perform all deeds to which her son was obliged, in whose place the donatar now succeeds. It was *replied*, That the irritant clause being committed during her son's lifetime, who never performed, and the disposition of her liferent being to her own son, flowing *ex pietate materna*, and out of affection to him, the donatar was not in the same case, and could not crave the benefit to be admitted to purge, as her son must have done.—THE LORDS did sustain the declarator, and found that the donatar could not be admitted to purge the clause irritant, which was long before committed, and thereby prejudice the Lady and her children of that which she only intended for their benefit, out of that affection that she carried to her own children.

Gosford, MS. No 534. p. 283.

1680. February 20.

JAMISON *against* WAUCH.

No 81.

A contract, containing an irritancy, upon non-performance, was found not purgeable, not being penal.

ELIZABETH MONIPENY being infeft in an annualrent out of the estate of Balmorie, disposes the same by her contract of marriage with umquhile Mr John Smith minister, her husband, who always uplifted upon his wife's right, yet was never infeft; but after his death there is a contract betwixt his son and his relict, and Mr Robert Lermont, whereby 'they dispoise to Mr Robert this annualrent, and he becomes obliged to pay a sum as the price to young Mr John, his heirs and assignees, at such terms,' with this provision, 'That the contract should be deposited till Mr Robert performed, and if he failed in whole or in part, he should be excluded *pro tanto*, and the disponer's right should continue with themselves.' Mr John Smith, younger, dies unentered heir to his father, and leaves a legacy to Wauch, who thereupon insists against Mr Robert Lermont for payment of this sum in the contract, as being moveable. Appearance is made for Dr Jamison, heir to Mr John Smith, elder and younger, and now infeft in the annualrent, who *alleged*, That the executor or legatar of Mr John Smith could have no right to this sum, because Mr John Smith, younger, was never served heir to his father; so that any disposition by him was ineffectual, and he, nor none representing him, could obtain Lermont infeft in the annualrent, and therefore could not demand the price; but the price behoved to belong to Dr Jamison, who is served heir to Mr John, elder, and infeft in the annualrent, and who could only dispoise the annualrent effectually; and albeit the price be conceived in the terms of a moveable obligation, yet the executor or legatar can have no right to the price, seeing he has no right to the infeftment of the