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place in provisions which depended upon securities, convened upon in that same writ, which bore the provision, and not where the provision had respect to make other securities to fall, which were not made by that writ, bearing such provision; as in this case, where the provision was set down in a bond of borrowed money, appointing a reversion, contained in another writ and security, made betwixt the parties before, to expire, if the money borrowed were not paid at the time appointed; whereas if the wadset had been granted, and the reversion given back again by this bond of borrowed money, and therein that the parties had agreed upon this clause now libelled, the same *eo casu* might have had place, if the failzie had been incurred. See PERSONAL AND TRANSMISSIBLE.

Act. Heriot.

Alt. Craig.

Clerk, Scot.

Fol. Dic. v. 1. p. 486. Durie, p. 584.

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1636. July 8.

CLEGHORN *against* FERGUSON.

A person having borrowed money granted a security to the creditor, by disposing lands in the form of an absolute disposition, but at the same time took a back-bond, declaring, that the lands should be redeemable within a limited space. Redemption was found competent at any time before declarator.

ONE Cleghorn in Cramond, having borrowed from Ferguson in Muirhouse 500 merks, he disposes to the creditor his lands in Cramond, which creditor, viz. Ferguson gives at that same time a back-bond to Cleghorn, that if, at the Whitsunday thereafter, which was in anno 1634, or within 15 days thereafter, he should repay his money, with the profit thereof to the term, then to repon him, otherwise the back-bond to become null; after which term Ferguson obtained decret of removing upon his said infetment; thereafter Cleghorn, and his assignee, Brown, charge upon the back-bond to repon the said Cleghorn, in and to his own right, and offer to repay the money; which being suspended upon the tenor of the back-bond, and clause thereof, appointing the back-bond to be null, if the sum were not precisely paid within 15 days after Whitsunday 1634, and so after so long a time, that day being expired, there was no place to offer the money and purge the failzie; especially whereas he had reformed the lands, and bestowed more expenses in repairing thereof than the land was worth; and the other party offering to pay the money *cum omni causa*, and all his charges, at the Lords' modification, he *alleged*, he ought to be reponed, seeing these clauses are not allowable in law, being *pacta legis commissoriae*, which in law are always reprobated *in pignoribus*, as this is, especially there being no declarator ever sought upon the failzie, which if the party had sought, he would ever have been suffered to purge the same, and would so have done; and the other *alleging*, That after so long time, no reason could permit him to purge the failzie, and the decret of removing is in place of a declarator;—the LORDS found, that notwithstanding of the intercourse of this time of two years, since the failzie was incurred, that the party might be heard to purge the failzie, the creditor being satisfied of his sum and annualrent, and all the charges

bestowed upon the beiting of the house ; for this being *pactum legis commissoriae in pignore*, they would not allow it; and being adjected as a penalty for failzie, to pay the principal sum at the time appointed, they thought it not reasonable to allow so great penalty so far transcending the ordinary annualrent; and therefore they ordained the parties to count upon the annualrents, and the charges debursed by the creditor upon beiting of the houses.

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Act. *Gilmour*.

Alt. ———.

Clerk, *Gibson*.*Fol. Dic. v. I, p. 486. Durie, p. 811.*

1662. November 25. SAWER against RUTHERFORD.

SAWER having wadset some tenements in Edinburgh to Rutherford, wherein there was a clause irritant, bearing, that if Sawyer did not put Rutherford in possession of the hail tenement, the reversion should expire, whereupon Rutherford obtained declarator of the expiring of the reversion, because Sawyer had detained a part of the tenement, Sawyer raised suspension and reduction of the decret of declarator upon these reasons: *First*, The clause irritant was *pactum legis commissariae in pignore* reprobate in law: *Secondly*, Because, by the act 62d Parliament 1661, betwixt debtor and creditor, it was declared, that clauses irritant for not payment of the sums in wadsets since 1649, should not be effectual. The defender *answered* to the *first* reason, That by act of sederunt of the Lords in anno 1642, clauses irritant and failzies were declared effectual; and albeit the Lords *ex gratia* are in use to suffer parties failing to purge the failzie, by satisfying damage and interest at the bar; yet it could not now be received after a decret *in foro contradictorio*. To the *second* reason, it was *answered*, That the said act of Parliament was special, in relation to clauses irritant, for not payment of the sum in the wadset, which was *stricti juris*, and could not be extended to this wilful failzie, in the pursuer's not removing and possessing him, and for the decret it was in absence, albeit a supplication was given in after the decret, desiring to be heard, whereupon he was not heard, but the answer to the supplication bore, that his desire was only competent by way of suspension and reduction.

THE LORDS found the decret not to be *in foro contradictorio*; and therefore reponed the pursuer to purge the failzie, by possessing the defender, and paying damage; but found that the clause in the act of Parliament reached not to this case; but whereas the pursuer craved count and reckoning of the profits of the wadset tenement, by the said act of Parliament, bearing that improper wadsets where the granter of the wadset is in the hazard of public burden, &c. being since 1649, the wadsetter should be countable for the profits more than the annualrents, since the date of the wadset;

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A wadset was granted, with a clause, bearing, that, if the reverser did not put the wadsetter in possession within a limited time, the reversion should *eo ipso* expire. After the space was expired, the Lords allowed the reverser to give up possession to the wadsetter, paying him damages for not possessing within the stipulated time.