

to say, that it should be void and null as to all effects betwixt Skirling and the contractors, and yet stand effectual as to the creditors not contracting.

*Replied* for the pursuer, That, by the clause irritant, the contract is not to be null, since it only says, (That then, and in that case, this present reversion shall expire and be void, &c.) but the effect of the irritancy is, that the reversion was to be null, and that the creditors were to have power to sell, and the contract to subsist as a discharge of the reversion in favours of the creditors contractors, and as an obligation upon them to apply the superplus of the price in favours of the other creditors.

THE LORDS, in consideration of the above clause in the contract 1662, subsequent to the clause irritant, found, that Brestmilo, by virtue thereof, hath right to affect the superplus price in the hands of Lieutenant-General Douglas his heirs, after the restricted sums in the contract are satisfied and paid, together with the annualrents of the same.

*Alt. Ro. Dundas.*      *Alt. Sir Ja. Nasmyth et Spottiswood.*      *Clerk, Dalrymple.*

*Fol. Dic. v. 1. p. 490. Bruce, v. 1. No 17. p. 22. & No 37. p. 46.*

1716. November 27.

WATSON of Saughton *against* HAMILTON of Monkland.

ROBERT HAMILTON, younger of Wishaw, (from whom Saughton has right by progress), having adjudged the estate of Monkland, against which adjudication there are important objections very obvious; several years thereafter, it was agreed betwixt them, that, upon Wishaw's disposing the adjudication to Monkland, he Monkland should pay a certain sum (to which by paction the adjudication was restricted) at four several terms therein mentioned. The defender did accordingly make some payments; but neither of the whole sums agreed, nor at the respective terms contained in the agreement, but posterior thereto, notwithstanding of an irritancy therein, declaring, that, in case punctual payment be not made at the terms stipulated, that then the said minute of agreement should be void and null, except as to allowance of what Wishaw should actually receive; and that the said minute was only a corroboration of Wishaw's diligence above-mentioned; but the defender contending, that the above clause was an irritancy, and therefore purgeable at any time before declarator, the question came to turn upon this, viz. whether the pursuer could lay hold on the minute of agreement as corroborating Wishaw's adjudication, and at the same time refuse to accept of the restricted sum in that minute, after deduction of payments made?

And here it was *contended* for the pursuer; That all irritancies are not of the same kind; that here there was a transaction betwixt a debtor and his creditor; here was *liquide remisum* to the debtor, but conditionally and provisionally, that

No 90.

No 91.

An adjudging creditor agreed to accept of a less sum than that in his adjudication, upon condition, that if it should not be paid at a certain day, he should be allowed to recur to the adjudication. Found, that the irritancy was purgeable after the term of payment.

No 91. he should pay at the times, and in the manner agreed, wherein he having failed, he must lose the benefit of the restriction. Now, by law, transactions are *stricti juris*, and to be performed *in forma specifica*; that this was not a penal irritance, inflicting any punishment, but the whole debt in the adjudication was just and lawful before the agreement; and the defender here only loses a favour which was indulged to him by the creditors upon a potestative condition in the defender himself; which not being performed, the defender could blame none but himself for this loss; and yet, after all, he comes but to pay his own just debt.

*Answered* for the defender; Supposing the minute could be of the sense the pursuer pleads, yet it is wholly penal, as excluding the defender from just defences; and such clauses irritant, which are penal, have no effect till declarator, which does not only take place, in such irritancies, *in pignoribus*, but in all other cases, as the Lord Stair observes, B. 4. T. 18. § 3. where his words are, "sometimes clauses irritant bear that the right shall thereby become null, *ipso facto*, without declarator. But, notwithstanding of this, clauses irritant are not effectual without they be declared, where they are exorbitantly penal; for the Lords, *ex officio*, have power to modify exorbitant penalties, albeit they bear to be liquidate of consent of parties; and, for the same cause, they have power to qualify those clauses irritant, and to allow time for purging the same"; which words of the author appear by the sequel to be meant of clauses irritant in any kind of rights, as well as wadsets.

THE LORDS found the irritancy in the said agreement was purgeable at the bar by payment of what was resting of the principal sum, at such a time as the Ordinary in the cause should appoint; with certification, that, if payment was not so made, the pursuer should have access to the whole sums contained in the adjudication, excluding all defences and objections except payment.

Act. Arch. Hamilton.

Alt. Boswell.

Clerk, Robertson.

*Fol. Dic. v. 1. p. 490. Bruce, v. 2. No 37. p. 48.*

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GRIERSON of Lagg *against* His Eldest SON and the OFFICERS of STATE,

No 92.

ONE having contracted some personal debt, tailzied his estate with this irritant clause, "that in case the tailzier should happen to be charged with horning, or other diligence, done against him, that the heirs of tailzie must relieve him thereof within six months after intimation thereof, otherwise to amit and lose their right." The irritancy being incurred, the public, by a forfeiture, coming in place of the heir of tailzie, it was *argued*, that the design of this clause was nothing else but to relieve the tailzier of his personal debt; and here the public was ready to purge the irritancy, and answer to the tailzier for all damage sustained. THE LORDS found the irritancy not purgeable. See APPENDIX.

*Fol. Dic. v. 1. p. 490.*