

No 36.

1729. *January 23.* DUKE OF ROXBURGH *against* KER.

IN an action for voidance of a tack upon this ground, that the woods which the tacksman had expressly bound himself to take care of, were neglected or destroyed; *answered*, This is not a statutory irritancy, nor made an irritancy by the tack, and therefore can only infer an action for damages; which the LORDS found relevant. *See* APPENDIX.

*Fol. Dic. v. i. p. 485.*

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S E C T. V.

*Pactum legis commissoriæ in pignoribus.*

No 37.

1611. *February 19.* BARSKEOCH *against* GARTHLAND.

BARSKEOCH's father having contracted with Garthland for the wadset of land under reversion, and upon provision, that if he should make requisition for his principal sum, the reversion should expire, if the requisition could not be obeyed by payment of the principal sum and byruns; Barskeoch's heir sought declarator of expiring of the reversion for a failzie committed by Garthland for not obeying a requisition. Garthland offered *purgare moram* by present payment of the principal and byruns. THE LORDS found *quod mora illa non erat purgabilis*, but that the reversion was expired.

*Fol. Dic. v. i. p. 486. Haddington, MS. No 2165.*

No 38.

A wadset had been declared irredeemable, if not redeemed upon a premonition of 90 days before the term. The clause irritant was sustained, and the Lords refused to assign a day to purge it; the party not offering instant-

1625. *July 19.*NAIRNE *against* NAPER.

IN an action of declarator at the instance of Nairn *contra* Naper, whereby the pursuer craved the right of the land, wadset to him upon a certain sum, under reversion, to be declared to pertain to the pursuer heritably and irredeemably, because of a clause irritant contained in the contract, that if that sum were not paid to the pursuer at any term whereat he should seek payment, after requisition made to the defender by him, upon ninestore days preceding the term, that then the lands, in case of failzie, to pay at the term, should pertain heritably and irredeemably to the pursuer; which action and clause irritant were sustained, albeit it was *alleged*, that *pactum legis commissoriæ* was re-

jected *in pignoribus*, and that this wadset of lands was *pignus* or *hypotheca*, which was repelled, and the clause irritant was allowed; neither would the Lords assign a day to the defender, as he craved, to purge the failzie and pay the sum, in respect of the requisition, preceding upon so many days, but decerned in the declarator, seeing the defender offered not instantly to consign the sum at the bar, to be delivered to the pursuer.

Clerk, *Hay*.

*Fol. Dic. v. I. p. 486. Durie, p. 178.*

No 38.

1628. February 7. PRINGLE against KER.

IN a declarator of a failzie betwixt Pringle and Ker of Linton, for not payment of the yearly annualrent, to hear the reversion of the lands given in wadset, be decerned to be extinct; the LORDS decerned, and would not admit the purgation thereof, by offering real payment, after dispute and calling of the process; but they thought that it was reasonable, that if the defender paid the principal sum, with the whole byrun annuals at the term of Whitsunday 1628, now ensuing, that he should be assoilzied; and so ordained some to deal with the pursuer to consent thereto, and the clerk of the process to stay the extracting of any decret to that term.

Clerk, *Hay*.

*Fol. Dic. v I. p. 486. Durie, p. 341.*

No 39.

1631. March 19. DR SCOT against DICKSON of Headrig.

A DECLARATOR being sought by the Doctor against the apparent heir of umquhile Robert Dickson of Headrig, who had borrowed 500 merks, to have been paid at Yule last, with provision in case of failzie of the reversion, which the said Doctor had granted him before, for redeeming of the lands of Headrig, wadset to him by the said umquhile Robert, by another anterior bargain, should expire; and for not payment, the declarator being sought, and a creditor of the defunct's compearing, and offering the money instantly to purge the failzie; the LORDS found, that seeing the debtor, who borrowed the money, died before the term of payment, and that there was so little a space, viz. only two months or thereby, which had run since the terms of payment, that the failzie was purgeable, and that the creditor of the defunct might as well be admitted to purge the same by present payment, as the defunct or his heir; for albeit the Lords by an old ordinance had enacted, that they would abide by failzies and clauses of penalties, convened and agreed on betwixt parties in their securities, and decern according thereto; yet that ought only to have

No 40.

It was provided in a bond for money, that the reversion in another security should expire, if the money were not paid at the time appointed. The borrower died before the term; and the money being offered two months after the time, the irritancy was found purgeable.