

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

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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.

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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.

No 41.

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