

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.

No 41.

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;

No 42.

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.

No 42.

“ THE LORDS having considered the wadset, by which the wadsetter bore the public burden, found the said clause of the act not extended to make the defender countable since the date of the wadset, but only since the date of the offer to secure the wadsetter conform to the act of Parliament, by virtue of any other clauses of the said act, ordaining all wadsetters to count for the superplus, and to possess the granter of the wadset, he finding caution for the annualrents, or to restrict to his annualrent.

Fol. Dic. v. 1. p. 487. Stair, v. 1. p. 145.

1667. February 1.

EARL OF TULLIBARDINE *against* MURRAY OF OCHTERTYRE.

No 43.
Clauses irritant in wadsets purgeable before declarator.

THE Earl of Tullibardine having wadset the lands of Logie-Almond, to Murray of Ochertyre, he did thereafter discharge the reversion, and at that same time, got a back-bond, bearing, That for payment of 56,000 merks, with all other sums that should happen to be due to him by Tullibardine, and all expenses, that he should dispoise the lands back to Tullibardine, or the heirs or assignees of his own body; but with this provision, that if he were not paid before Martinmas 1662, the bond should be null without declarator. Tullibardine premonishes, and after premonition, dispoises the lands to Sir John Drummond, and they both jointly consign, and now pursue declarator. It was *alleged* for the defender, Ochertyre, *imo*, No declarator upon this order, because the back-bond is personal to my Lord, and to the heirs or assignees, being of his body; so that Sir John Drummond, nor any stranger, can have right thereby to redeem. *2do*, The back-bond is extinct, and null, by committing of the clause irritant, in so far as payment has not been made before 1662. The pursuer *answered* to the first, that albeit the reversion had been personal to my Lord, only excluding his heirs and assignees; yet my Lord, in his own lifetime, might redeem, and being redeemed, the right would belong to any to whom my Lord had, or should dispoise. *2do*, This clause irritant is *pactum legis commissoriae in pignoribus*, which, by the civil law, and our custom, is void, at least may be still purged before declarator obtained, as being rigorous and penal, and so abiding the Lords' modification, as well as penalties in bonds modified of consent of parties, especially in this case, where the performance is not of a single liquid sum, but comprehends a general clause of all debts that were, or should be after due. The defender *answered*, that clauses irritant in wadsets are not rejected by our law, but are valid; only where declarators are requisite the Lords may reduce them to the just interest of parties before declarator; but here there needs no declarator, because the defender is in possession, and may except upon the clause irritant committed, and the clause bears to be effectual without declarator; and albeit this clause could now be reduced to the just interest, it is only this, that