No 17.

1665. *December* 5. CHEISLY *against* CUTHBERT.

CHEISLY charges Cuthbert for his prentice-fee, who suspends and *alleges*, That he was set prentice to him as apothecary, and that he deserted that employment and became a druggist, and thereupon the suspender left him.—It was *answered*, That the breeding him as a druggist was sufficient, and that he now practised as apothecary and chirurgeon.

THE LORDS found this answer not relevant, the suspender being set to him as apothecary, to make drugs, and not as a druggist that buys drugs, as to the time after he changed; but the charger having farther offered to prove, that he constantly in his chamber makes as well as sells drugs, the LORDS found it relevant.

*Stair, v. 1. p. 322.*

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No 18.

Debated, whether a clause irritant in, a mutual contract of sale was purgeable, but not decided.

1667. *December* 14. ROBERT HAMILTON Clerk *against* LORD BALHAVEN.

THE Lord Balhaven having disponed the barony of Beill to John Hamilton, son to Robert Hamilton Clerk, reserving Robert's liferent, with power to dispose of forty chalders of victual at his pleasure, and to set tacks, for what time and duty he pleases, and containing an express provision, that it shall be leisome to Robert to do any deed in favour of my Lord Balhaven, and that the fee shall be burdened therewith; and it is provided, that all rights Robert shall acquire, shall accresce to his son, who is to marry Balhaven's oye, and failing of the son's heirs, mentioned in the disposition, Robert and his heirs are in the last termination. Thereafter Robert enters in a minute with my Lord Balhaven, by which he is obliged to accept an hundred and twenty-nine thousand merks; and therefore obliges himself, and as taking burden for his son, and as tutor and administrator to him, validly, and sufficiently to denude himself and his son of their rights, to any that he should nominate; but here is a clause irritant, that if money or sufficient persons to grant bond to Robert, be not delivered to Robert at Lammas last, and payment made of the money at Martinmas last, that the right by the minute should expire *ipso facto*, without declarator. The minute was put in the Duke of Hamilton's hand, that if these terms were not performed, he should cancel it. Robert Hamilton pursues now a declarator against Balhaven, concluding that he had an absolute and irredeemable right to the land, by his first disposition, and imfeftment granted to him and his son, and that the clause irritant is committed, and that thereby the minute is null; and concludes against the Duke, that the minute was put in his hands upon the terms foresaid, and that he ought to cancel, or deliver the same. The Duke's Advocate suffered him to be holden as confest, but did not produce the

minute. It was *alleged* for Balhaven, no process till the minute was produced, for it could not be declared null till it were seen. It was *answered*, that the copy of it was produced, and *verbatim* inserted in the libel, and the pursuer craved the minute in the terms libelled to be declared null, without prejudice to any other minute, if they could pretend it. No 18.

THE LORDS ordained process, but ordained the pursuer before extract to produce the principal minute.

It was further *alleged* for Balhaven absolvitor, because the minute being mutual, there could be no failzie in the defender, because the pursuer neither was, nor is able to perform his part of the minute, in respect the fee of the estate is in the person of the son, who cannot be denuded by any deed of the father, for as legal administrator he hath no power; neither can any father or tutor denude a pupil of their fee, but there must be interposed the authority of the Lords in a special process, instructing a necessary cause for the minor's utility, which cannot be in this case; and though the father could denude the son, as he cannot, yet he is minor, and may revoke; and yet it was offered to fulfil the minute, if the pursuer would secure the defender against the minors, by real security, or good caution. The pursuer *answered*, That the defence ought to be repelled, because the defender at the time of the minute, knew his right and his sons, and cannot pretend an impossibility to have made any such minute upon a ground then palpable and known, and yet contend to keep the minute above the pursuer's head; but he must either take it as it stands, or suffer it to be declared void. 2*do*, The pursuer is in sufficient capacity to denude his son, by the foresaid reservations contained in the first disposition, whereby he has full power to dispose of forty chalders of victual, and also power to do any deed he pleased in favour of Balhaven, and there could be no deed more rational, than to give a reversion of his own estate upon payment of all that the pursuer, had payed to him, or for him. The defender *answered*, that this general clause cannot be understood to be prejudicial to the substance of the disposition, and special clauses in favours of his son, and the defenders oye and their successors.

THE LORDS repelled the defence, and declared; but of consent of the pursuer, superceded to extract for a time, and appointed two of their number, by whose sight the pursuer and his son should be denuded, and the defender secured; so that it came to no debate, whether such a clause irritant as this in a reversion of that which was truly bought and sold irredeemably before, and no wadset could be purged.

*Stair*, *v.* 1. *p.* 494.

*** Dirleton mentions this case:

ROBERT HAMILTON Clerk, pursued the Lord and Lady Balhaven to hear and see it declared, that a minute betwixt him and them concerning the tenor and

No 18. articles libelled, is null, the clause irritant therein mentioned being committed.

THE LORDS refused to sustain the pursuit, unless the minute were produced; albeit it was *alleged* there could be no prejudice, in respect a minute of another tenor could not be prejudged; and a minute of that tenor libelled should be declared void upon the reason libelled.

*Dirleton, No* 118. *p.* 49.

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No 19.
A bond, containing a submission, accepted of a party, was considered a binding him to the submission, although not subscribed by him.

1669. *February* 3. JOHN BOSWEL *against* LINDSAY of WORMISTOUN.

JOHN BOSWEL being appointed Commissary of St Andrews by the King and before the restitution of bishops, after their restitution the archbishop named Lindsay of Wormistoun Commissary, and agreed him and John Boswell on these terms, that John should have the half of the profit of the place; whereupon Wormistoun grants a bond to John Boswel, to compt and reckon for the profits of the half, and to pay the same to John Boswel termly, and quarterly; and if any question should arise betwixt them in the account, that he should submit himself to the archbishop's determination, and acquiesce therein. John Boswel charges upon his bond; Wormistoun suspends. It was *alleged* for Wormistoun, That his bond did contain a submission to the archbishop, who is thereby the only judge constitute in these accounts. It was *answered*, That this bond was only subscribed by Wormistoun himself, and a submission must be subscribed by both parties, and that it behoved to be understood to last but for a year, and not to import a liferent submission, neither could it be exclusive of the LORDS to decline their authority. The suspender *answered*, that this submission being a provision in the bond charged on, which bond being accepted by the charger, his acceptance makes his consent to the submission, in the same way as if he had subscribed the same; and there is no law to exclude a submission for two years, or a lifetime, more than for one, and it is not a declining of the Lords' jurisdiction, it being most ordinarily sustained, no process, because there is no submission standing.

THE LORDS found that there is here a submission, not ending by a year, and accepted by the charger, and that thereby the archbishop, in the first place, ought to give his sentence; which if he refused, or if it was iniquous, the LORDS would cognosce thereupon, as in the case of other arbiters; and assigned therefore to the archbishop the first of June to determine thereupon.

*Stair, v.* 1. *p.* 596.