

annualrent. It was *answered* for the legatar, That where any heritable right is disposed by the fiar, if the price be taken as a principal sum, albeit in the disponer's life he was not denuded, yet his heir upon his obligation will be obliged to denude himself, and yet will not have right to the price being moveable; for it being in the defunct's power to dispose of his own at his pleasure, he might take the price heritable in favour of his heir, or moveable in favour of his executor; and it will not follow, because the executor cannot fulfil the defunct's disposition, but the heir, that it will make any alteration to dissolve a bargain, or to make the price to fall to the heir; for when a creditor, by wadset or annualrent, charges or requires for his money, which is frequent, and dies before payment, the sum will belong to his executor as moveable, and yet his heir must infest himself in the wadset, and renounce the same in favour of the debtor upon payment, though payment must be made to the executor and not to the heir; nor doth it import that Mr John Smith, younger, was not served heir to his father, because Dr Jamison is served heir to Mr John younger, and so is obliged to fulfil his deed, and to dispoise to Lermont. It was *replied* for Dr Jamison, That he is not obliged to perfect the disposition to Lermont, either as heir to Mr John, younger or elder, because it contains a clause irritant, which is committed. It was *duplied* for the legatar, That before declarator of the clause irritant, it may be purged; and he offers to purge for Lermont, by consigning the price, which will purge the failzie, and he will have only right to uplift the same himself, as being moveable. It was *triplied* for the Doctor, That it is clear by this contract, that it was to remain deposited till Lermont fulfilled, and therefore never became Lermont's right; but the payment at the terms in the contract, being the conditions of the deposite, with a resolute clause, 'in case of failzie,' it requires no declarator, and so cannot be purged, but the bargain is dissolved, and it is not in the case of a clause irritant in a delivered right.

THE LORDS found this contract being a deposite writ, upon payment at certain terms, with a clause irritant, that the failzie to pay at these terms did annul the contract without necessity of declarator, and could not be purged after the failzie, and therefore found Waugh the legatar to have no right to the sum which Lermont was to pay.

Fol. Dic. v. 1. p. 490. Stair, v. 2. p. 761.

1681. November. MURRAY and PEARSON *against* NISBET.

DAME MARGARET MURRAY, relict of the deceased — Nisbet of Craigintinnie, being infest in an yearly annuity of L. 200 Sterling, out of the lands of Dean, during her lifetime, she and Mr William Pearson, her husband, having pursued an adjudication against Alexander Nisbet of Craigintinnie, her son; *alleged* for the defender, That the pursuer could not adjudge for the hail sum

No 82.

A lady restricted her annuity in favour of the heir, with this provision, that if the restricted

No 82.
sum should not be duly paid, she might insist for her full annuity. This irritancy was found not purgeable.

of L. 200 Sterling yearly, because, by a transaction, they had restricted themselves to the sum of 3000 merks. *Answered*, That the restriction was not simple, but qualified with this provision, That if the defender should fail in payment of the 3000 merks punctually, at two terms in the year, at least at a certain day thereafter, and at a certain place condescended upon, betwixt the sun-rising and setting, the failzie being instructed by an instrument, bearing the pursuer's attendance at the respective days and terms mentioned in the agreement, that then the restriction should be null and void, and it should be leisome to the pursuer to make use of a right for the whole annuity; but so it was, the failzie was committed, as appears by the instrument. *Replied*, That notwithstanding the defender had failzied of punctual payment at the days specified in the agreement, yet the pursuer could not summarily adjudge for the same, unless it were first declared that the failzie was incurred; and if the pursuer were insisting in a declarator, the LORDS would allow the defender to purge the failzies, by payment of the bygone annuities; and clauses irritant are odious, and not to be extended. *Duplied*, That the restriction was appointed with that express qualification, which is not in the ordinary case of a clause irritant, which is adjected by way of penalty, and for which there was no preceding cause, but only purely and simply a penalty; but in this case the 600 merks given down was a part of the yearly annuity due by the pursuer's contract of marriage, and was given down upon this particular consideration, that the defender should make punctual payment at the days specified in the contract; in which case the failzie being incurred, the defender cannot be allowed to purge; for albeit some times when a party is obliged to perform a deed, with a penalty adjected in case of not performance, in that case the Lords will allow a party to purge by performance; but the foresaid 600 merks given down is not a penalty, but only a restriction in case of punctual payment, otherwise that the pursuer's right should be effectual as to the hail sum.—THE LORDS having remitted to one of their own number to consider if the Lady's liferent was an annuity, and if the restriction was gratuitous; upon report found, That for those years for which discharges are produced, the adjudication should proceed for the same, according to the restriction; but for subsequent years, the adjudication is to proceed for the whole sums, without respect to the restriction, and that the failzie is not purgeable, and needs no declarator.

Fol. Dic. v. 1. p. 489. Sir P. Home, MS. v. 1. No 17.

1686. November. NISBET against CREDITORS of DRYBURGH:

No 83.
A lady restricted her jointure in favour of her son.

By contract of marriage betwixt Patrick Yeaman of Dryburgh, and Margaret Nisbet, she being provided to the liferent of 16 chalders of victual; and after her husband's decease, she having entered into a contract with Patrick Yeaman, her son, whereby for the preserving of his estate and standing of his family, she