

did restrict her jointure to 1000 merks yearly, in favour of the said Patrick and Henry Yeaman, her sons, and the heirs of their body; but not in favour of the heirs female, who are thereby excluded; and bear a clause irritant, That in case the 1000 merks were not paid yearly at the terms therein mentioned, so that two terms run in the third unpaid, in that case the restriction was to be null, and the said Margaret was to return to her former jointure; and the said Patrick, the oldest son, having deceased without children, and the said Henry, his brother, having lain out, and not entered, so that two terms did run in the third unpaid, the said Margaret did raise a declarator against Henry, her son, and his creditors, for declaring the restriction null, and that she might enter to her former jointure. *Alleged* for the Creditors, That there being *jus quasitum* to them by the foresaid restriction, as coming in place of Patrick Yeaman, their debtor, they ought to be allowed to purge the irritancy, upon payment to the pursuer of her bygone annuity, as the said Patrick might have done, especially seeing they did not know that the irritancy was incurred. *Answered*, That the foresaid restriction was only personal, in favour of her two sons, for the preservation of the estate, excluding her daughter; and the eldest son being deceased, without children, and the second son not entering to the estate, and craving the benefit of the restriction, and seeing the estate was not to be preserved in the son's persons, that restriction, which was but personal, and granted upon a particular consideration, was now ceased; the benefit thereof was not competent to the creditors, nor could they be allowed to purge the irritancy; but the pursuer ought to be restored to her full jointure, conform to the provision in the contract betwixt her and her sons.—THE LORDS found the irritancy purgeable by the creditors making payment to the pursuer of all bygones betwixt and the next term; but declared, That in case the irritancy were thereafter incurred, the LORDS would not allow them to purge the irritancy at the bar, providing always that the pursuer make intimation to the creditors by way of instrument, of her not being timeously satisfied.

*Fol. Dic. v. 1. p. 489. Sir P. Home, MS. v. 2. No 818.*

1694. January 4.

AGNES DEWAR, Relict of MASON, Shore-master in Leith, against WALTER LERMONT, present Shore-master there.

THE LORDS repelled the allegeance, that she could not transact her future aliment without the authority of a Judge, nor restrict it to a lesser sum, as she had done, to her prejudice: For the LORDS thought that the Roman law was equitable on that point, and favourable to liferenters, that they should not make prejudicial transactions without the intervention of a Judge's decret, as is clear from the *tit. D. and C. de transact.*; yet this had not been received in our law.

No 83.

upon condition that if the restricted sum should not be duly paid, the restriction should be *ipso facto* null. He having failed in payment, the LORDS found the irritancy purgeable by his creditors, but declared, that if they should fail in payment, they should not be indulged to purge a second time

No 84.

An annuity was to be restricted, if punctually paid. The failure was found applicable only termly.

No. 84.

The next point was, whether that clause in the restriction, that how long he made punctual payment, she should not trouble or augment him, imported an irritant resolute clause, that if he failed, she might recur to the first bargain, and crave the whole, if it was incurred? They were ordained to be further heard thereon; but the LORDS at the time seemed to incline, that it was equivalent to an irritancy.

1694. June 28.

AGNES DEWAR having an aliment of 200 merks yearly out of the shore-master of Leith's dues, she did restrict it to L. 50 yearly, with this quality, that on thankful payment of the said L. 50 she should not trouble him for any more; nor augment it. He having failed in payment, she pursues to be repöned to her own place, of exacting the full 200 merks. The doubt was, if the clause was truly irritant and resolute.—It was *argued affirmative*, because she says, on thankful payment I shall exact no more, *ergo a contrario sensu*, if you do not pay me daly, I will seek the whole.—On the other hand it was *alleged*, That *pacta legis commissoria* were unfavourable, and not to be extended beyond the express words and conception of them.—*Answered*, This held in odious penal irritancies, as *in pignoribus*, or in reversions; but not in so favourable a case as an aliment.—THE LORDS were divided on the point. Some thought it not resolute. Others that it was purgeable by payment at the bar. At last, the LORDS agreed on this, that he had incurred the failzie and forfeiture for bygones, and so behoved to pay at the rate of 200 merks for these; and that in time coming, she should have right to the whole, unless he paid the restricted sum within eight days after each term as it fell due.

*Fol. Dic. v. I. p. 489. Fountainball, v. I. p. 588. & 623.*

1703. December 29.

THE EARL OF SOUTHESK and SIR WILLIAM BRUCE *against* SIR DAVID ARNOT of that ilk.

No. 85.

An adjudger was allowed to offer proof, in a reduction of a prior comprising, that the legal could not expire, because, by transaction with the debtor, the comprising had been restricted to a particular sum.

SIR WILLIAM BRUCE having adjudged Sir Alexander Bruce of Earlshall's estate, for debts owing him; he pursues a reduction and improbation against the Laird of Arnot, of a comprising led against the same lands by Mr John Bairdie, who assigned it to his daughter Sophia, and she, in her contract of marriage, disponed it to Mr Robert Alexander, one of the Clerks of the Session, her husband, and he conveyed it to Sir David Arnot. The reason of reduction was, That Mr Bairdie had transacted with Earlshall and his trustees, and had restricted his comprising to a particular sum; and so being acquired in by the common debtor's means, its legal could not expire, but it can only subsist for the sum agreed on; and offered to prove this by the said Mr Robert's oath, to be taken *ex officio*, and by Bruce of Bunyan, who was the said Sophia's curator, and consentor to her disposition, in her contract of marriage.—*Alleged*