

1708. January 8.

MUNGO COCHRAN Merchant in Glasgow *against* My LORD BARGANY.

No 86.

A person took a tack of his own tithes and gave bond for a grassum, but took a back-bond, declaring that if he could produce, within a limited time, a better right to the tithes than the letter had, the bond should be null. This being a penal irritancy, he was allowed to produce a preferable right three years after elapsing of the term.

My Lord Bargany being charged on a bond for L. 1000 Scots, granted by him to Mungo Cochran, as the College of Glasgow's tacksman of the vicarage teinds of the parish of Calmonel; which Mr Cochran's back-bond of the same date bears to have been a grassum for a tack of my Lord's teinds in the said parish, to which he pretended to have a better right; which, if his Lordship produced betwixt and Whitsunday thereafter, the bond for the L. 1000 should be null, and if no better right were produced against that term, the back-bond should be null. My Lord suspended upon this reason, That his lands within the parish of Calmonel did never pay any vicarage teind to the College of Glasgow; consequently he could neither be liable for a grassum nor a tack-duty.

Alleged for the Charger; The reason not being instantly verified, is not receivable in a suspension. *2do*, The suspender having homologated the College's right, by taking a tack, and giving bond for the grassum, which by the quality of the back-bond, was to stand in full force against him, if a distinct and positive preferable right in his person were not produced against a precise term, the setter is not now obliged to regard the vagrant general allegiance of immunity, three years and a half after elapsing thereof, especially considering, that by the act of Sederunt, November 27. 1592, the Lords declared they would decide in all clauses irritant, according to the express words and meaning thereof.

Answered for the Suspender; He offers to prove that no vicarage teinds have been paid for his lands within the years of prescription; and the allegiance being *facti*, he must get a term for that effect, even in a suspension. *2do*, Though the back-bond had never been granted, the bond charged on falls *condictione indebiti chirographi errore facti dati*; it being granted upon supposition that the suspender had no right of immunity from vicarage teinds, which is now discovered to be an error in fact; and, where a man, through such a mistake, gives either money or bond, law allows him repetition. *3tio*, The suspender may purge the irritancy in the back-bond before declarator; and it has been found that a probable excuse exempted from irritancies more favourable than this, College of Aberdeen, No 63. p. 7230.

THE LORDS found, That if the suspender do as yet instruct a better right to the teinds of his lands in the parish of Calmonel, it is receivable; and remitted to the Ordinary to hear the parties upon the alleged immunity.

Fol. Dic. v. 1. p. 490. Forbes, p. 220.

* * * Fountainhall reports this case :

No 86.

1708. *January 9.*—MUNGO COCHRAN, merchant in Glasgow, being tacksman by the College of Glasgow of the teinds of the parish of Colmonnel; and the Lord Bargeny, for his lands in that parish, having entered into terms of agreement with him, by which he gives bond for L. 1,000 Scots as a grassum of a new tack of his vicarage, and L. 39 Scots to be the yearly tack duty thereafter; but in regard the Lord asserted he had a better right than the College, Cochran gives him a back-bond, that if my Lord should produce a better right to these vicarage-teinds betwixt and Whitsunday 1704, his bond in that case should be void; but if he failed in so doing, then his bond should stand in force against him, and Cochran's back-bond should be null. Three days before Whitsunday, my Lord offers by way of instrument to Cochran an old tack of these teinds, set to his grandfather, as yet unexpired, and craves to be free of his bond, in respect he had produced this as a preferable right; and being charged on his bond for the L. 1,000, he suspends, that he had a better right, not only by that tack, but, as patron of the said parish-church; he had right by the act 25 Parliament 1693, both to the parsonage and vicarage teinds, above the minister's stipend, and likewise had never been in use to pay any such teinds for his lands, but had prescribed an immunity, which law has allowed for these small teinds, though not as to parsonage tithes. *Answered* for Cochran the charger, and the College his constituents, That they founded on a clear right to these teinds by an express infeftment and possession, by setting tacks and other deeds of property; and, by his own instrument produced, it appears, that he bruik'd by tacks from them; so *esto* he were patron, that can give him no right, when it is expressly instructed to belong to another. *2do*, It is not competent now to recur to other pretended rights, they not having been produced before Whitsunday 1704, he being expressly limited by a special clause to that period of time; and, by the act of sederunt 27th November 1592, the Lords declared they would in all time coming declare in clauses irritant conform to the precise words and meaning thereof; and Durie observes, 19th July 1625, *Naira contra Napier*, No 38. p 7202, where nine score of days were allowed to purge, they would not prorogate nor enlarge the time any farther; and here my Lord Bargeny had seven months to perform, and now some years have since run. *Replied*, Though there had been no back-bond granted at all, yet Bargeny might reduce his bond *condicione indebiti ex errore facti dati*, as granted on a supposition he had no right to his teinds, when truly he had; but here is more, Mr Cochran declares he will admit any valid right shall be produced before Whitsunday 1704, and which is receivable even after that term, ay till he obtain a decret declaring the irritancy, which he has never yet done; all such clauses being odious, and like the *pacta legis commissoria* purgeable at the bar, as is clear by Stair's Institutions, lib. 4. tit. 18. anent declarators of clauses irri-

No 86.

tant, and by Spottiswood's Practicks, (see Appendix), and the Practique, 14th July 1675, Old College of Aberdeen *contra* The Earl of Northesk, No 63. p. 7230, and others, where all such clauses are found purgeable. THE LORDS found Bargeny's allegiance upon his better right to these vicarage-teinds was yet receivable, notwithstanding the term taken by him for producing his better right was elapsed, and remitted him to the Ordinary to hear him on his defences, both as patron and as having prescribed an exemption of immunity; and the College's reply on interruptions and possession, either of the teinds themselves, *ipsa corpora*, or the tack-duty.

Fountainball, v. 2. p. 416.

No 87.

An agreement for a sum, was to be restricted, if a prior agreement for a less sum could be produced by a certain time. Restricted although the prior agreement not produced within the time.

1709. December 21. DUCHESS OF HAMILTON *against* FAIRHOLM.

By a mutual contract past betwixt the said Duchess and Mr William Kintore of Kinglass, the Duchess gives him the liberty of a cart-way through her lands of Borrowstounness, for carrying his coals to the harbour; for which he obliges himself to infest her in an annuity of L. 100 Scots yearly, to be uplifted out of his lands of Kinglass, with this quality, that if he can produce any prior agreement containing a less sum than the said L. 100, then the Duchess declared she would restrict herself thereto; and Lammas 1701 was the term allowed him for searching and finding out the same. Kintore failing in payment, the Duchess. on her infestment, pursues a pointing of the ground before the Sheriff of Linlithgow, and obtains a decret. Thomas Fairholm coming now to be heritor of Kinglas, suspends on this grounds, *1mo*, That there was nothing produced for the title but a naked sasine, which is no more but the assertion of a notary, and not probative without the contract, which is the notary's warrant. *2do*, Lammas 1701 was allowed for producing any prior agreement restricting it to less, and yet by anticipation you take your decret in July before. *3tio*, You not only conclude a pointing of the ground, but likewise a personal conclusion against the tenants for payment. *Answered* to the *first*, That a sasine alone was good enough against tenants who had no right, and it is presumed there were two doubles of the contract, whereof their master would have one in his custody. To the *second*, It is true he is indulged till Lammas 1601 to produce the prior agreement, if any was; but this clause was noways suspensive of the execution; for the Duchess had a present right to the L. 100 yearly, and immediate access, ay till a restriction were shewn, which is not done to this hour. To the *third*, The tenants being personally apprehended might be decerned as well as the ground to be pointed. THE LORDS repelled the first two reasons of suspension; but in regard it does not appear what the tenants were then owing, assoilzied them from the personal conclusion, but decerned in the pointing of the ground. THE LORDS thought, albeit the time limited for producing any instruction was elapsed, yet the failzie was still purgeable, and if