

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, assolvizied 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

they had any such paper, it would be yet receivable, the taking advantage of those irritancies being odious in law.

No 87.

*Fol. Dic. v. 1. p. 491. Fountainhall, v. 2. p. 544.*

1709. December 24.

Mrs ELIZABETH SCOT, Relict of JOHN LOCKHART of Lee, against JAMES LOCKHART of Lee.

No 88.

THE deceased Cromwell Lockhart of Lee disposed his estate, in the form of entail, to Richard Lockhart, his immediate younger brother, and his other heirs substitute, with several clauses irritant, and provisions; particularly, that it should not be in the power of any of the said heirs to provide their Ladies in jointures exceeding a third of the free rent of the estate for the time, and that in full satisfaction of all right of terce. Upon the foot of this tailzie, John Lockhart, who succeeded to Richard, provided his Lady in an yearly annuity of 2000 merks; who, after his decease, pursued James Lockhart of Lee, her husband's heir of tailzie, for payment of the said provision, and an interim aliment.

A lady having restricted her liferent annuity, the ease thereof was found affectable for a provision to the relict of a former heir, as long as the lady who restricted did not claim the benefit of her full annuity; although the irritancies in the restriction had been incurred.

*Alleged* for the defender; The rent of his estate was exhausted by annual-rents of debts, and Ladies' liferents, prior to the pursuer's; particularly with 5500 merks of annuity in favours of Martha Lockhart, relict of the said Cromwell Lockhart, now Lady Stevenson.

*Replied* for the pursuer; The Lady Stevenson had restricted her annuity to 4000 merks for the weal and standing of the family of Lee, which must be profitable to the pursuer, who is a lady and mother in the family.

*Duplied* for the defender; The restriction was made with several strict clauses irritant, which have been incurred; so that the estate is liable to the burden of the Lady Stevenson's full liferent, when she pleases to take herself to it.

*Triplied* for the pursuer; Although the Lady Stevenson might recur to her full liferent, yet she has not done it; and so long as she does not exercise that faculty competent to her, the ease of her jointure continues a subject affectable for the pursuer's provision and aliment.

*Quadruplied* for the defender; It is all a matter in this case, whether the Lady Stevenson be actually insisting for the whole 5500 merks or not; seeing she may do it, and *illud est debitum, quod exceptione perpetua summoveri non potest.*

THE LORDS found, that the Lady Stevenson's jointure is only to be reckoned at 4000 merks yearly, ay and while she recur to the irritancies in that restriction.

*Forbes, p. 377.*