

1713. February 18.

THOMAS GORDON, Son to the deceased Thomas Gordon, Writer to the Signet,
against The DUKE of GORDON.

No 89.

Compensation was allowed to be proponed by way of suspension, although the contrary had been stipulated by contract, in case an irritancy should be incurred by not performing an engagement at a particular day, which day had been allowed to pass.

THE Duke of Gordon having granted a bond of corroboration of other two bonds, to Thomas Gordon and his curators, for the accumulate sum of L. 17,301 Scots, with this provision, 'in case his Grace should, betwixt and the term of Martinmas 1707, make appear and instruct, that he had at any time made payment of any part of the sums for which the bond was granted, the same should be discounted, and allowed *pro tanto*; without prejudice of any action of recourse competent in law, for repetition of any part of the sums above-mentioned, even after elapsing of the said term; declaring, nevertheless, that the above provision should not afford or furnish any ground of suspension after the said term.' Thomas Gordon charged the Duke to pay the remainder of the said sum, after deduction of partial payments; who suspended, upon this ground, that he made some payments before the date of the bond of corroboration; and for instructing thereof produced several writs.

Alleged for the charger; No payments of the sums corroborated, that were not instructed before Martinmas 1707, can, in the terms of the bond, be now a ground of suspension; because, *pacta dant legem contractui*, unless where they are *contra bonos mores*, or reprobated by our municipal law, which cannot be pretended in this case. For why may not a man oblige himself not to suspend upon such reasons? Nay, since our law doth not allow compensation to be received after decret, may not this very well be the ground of a stipulation? *2do*, Albeit law allows purgation of legal penalties, after elapsing of the pactioned term, that holds not in the case of conventional penalties incurred; especially such as do irritate property or heritable rights. *3tio*, A bond of corroboration doth naturally stop suspension upon preceding grounds of compensation, which a party is understood to have renounced by the granting such a bond, June 28. 1672, Murray *contra* Spalding, *voce* VIS ET METUS; and much more should this hold, where the reason of suspension is expressly excluded by paction.

Answered for the suspender; *imo*, Albeit just and equal pactions are to be regarded, captious and insidious pactions are not, L. 7. § 16. *D. De pactis*. Nor was the compensation here renounced, but only it was provided, that nothing should furnish a ground of suspension, save legal instructions of payment at the term above express. The refusing such grounds of compensation, *hoc statu per modum exceptionis*, would render them ineffectual; for, being constituted allenary by holograph writs, they would be excluded by prescription, if pursued *via actionis*, and *iniquum est aliquem locupletari cum alierius jactura*. No distinction is to be put betwixt penalties concerning heritage, and those concerning moveables and contracts; since, in all moveable bonds, the penalties, when exceeding damage and interest, are constantly reduced thereto; and Mr Gordon can

qualify no prejudice by the not producing those grounds of compensation sooner. *3tio*, The decision cited for the charger differs from the present case; for there the bond of corroboration was taken with an express view to shun the compensation, whereas here it was specially pactioned, 'that no suspension should be offered, but upon instructing payments received.'

THE LORDS allowed the compensation proponed by his Grace by way of suspension, notwithstanding the writs were not offered before the term of Martinmas 1707.

Forbes, p. 670.

1714. December 14.

DUNDAS of Brestmiln *against* The REPRESENTATIVES of MURRAY of Skirling.

THE lands of Skirling, belonging to Sir James Murray, having been appraised by several of his creditors, another apprising is thereafter also led by Dundas of Brestmiln in *anno* 1659; but, in the year 1662, the preferable creditors enter into a contract with Sir James, (Brestmiln being none of these contractors), whereby they prorogate the legal reversion (then expired) for four years longer, and also restrict their debts considerably; but provided, that if, within that space, Sir James should fail to sell the land, and with the price to pay them, the contract should be void, and the said creditors their respective debts return to their full extent, and are declared irredeemable for ever, without necessity of any declarator, &c.

The common debtor not having made use of the benefit afforded him by the contract, these creditors sold their interests to Lieutenant-General Douglas, who being taken bound to pay to Sir James's representative L. 1500 Sterling, for a right in his person, and for his good-will; Brestmiln raises declarator for having it found, that he, by virtue of his apprising, was preferable upon the said balance yet lying in the purchaser's hands; where it being *alleged* for the defenders, that their apprisings were effectually expired, and therefore excluded Brestmiln's apprising. And Brestmiln, on the other hand, founding upon the said contract in *anno* 1662, whereby he alleged these apprisings were still open and restricted, as in the terms thereof; the question was, Whether, from the above clause irritant, the creditors contractors their apprisings were duly expired, without necessity of declarator? And,

It was *contended* for the Murrays, That, by the plain words of the contract, it appears to have been the design of the contractors, that the creditors their return to the extent of their rights, should immediately take place upon Sir James's failing to pay; and where both the express words of the contract, and design of parties agree, law cannot fail to support the agreement, otherwise it is impossible to know by what words to make a contract obligatory. And that no declarator should be needful, appears from the great abatements given.

No 89.

No 90.

A contract, contained an irritancy upon non-performance. Found not purgeable, not being penal.