qualify no prejudice by the not producing those grounds of compensation sooner. No 89.
3*tio*, 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.

No 90.
A contract, contained an irritancy upon non-performance. Found not purgeable, not being penal.

THE lands of Skirling, belonging to Sir James Murray, having been apprised 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 90.

Answered for the pursuer, That the legal of the apprisings having once been open, and they turned into conventional redeemable securities under an irritancy, they would never after expire without a declarator of that irritancy, however the contract was worded, since *pactis privatorum non derogatur juri communi*. And this was found in the case between Sir Robert Miln, and Sir George Hamilton, and Colonel Erskine, No 48. p. 7212.

Replied for the defenders; That *provisione hominis tollitur provisio legis, et cuique licitum est juri pro se introducto renunciare*; and therefore, if the creditors' return by the said clause had been simple, the pursuer's commentary might have taken place; but when the return is declared effectual without any declarator, no necessity of one can be pleaded, otherwise all agreements, though never so express, would be precarious. For though irritant clauses, when penal and odious, may require a declarator for their completion; yet it is not so when they are adjected to lucrative concessions, as the Lords found, 20th June 1678, Scot *contra* Falconer, No 6. p. 98. This also the Viscount of Stair gives as his opinion, B. 4. T. 18 § 3. 'That clauses irritant are effectual without a 'declarator, where they are not exorbitantly penal. And (says he) such clauses 'are adjected to gratuitous concessions, because then they are not penal, but 'are conditions and provisions qualifying the right, and need no declarator.'

The Lords found, That the clause contained in the contract 1662 not being penal, the creditors contractors did return to the full extent of their rights and diligences after the expiration of four years, the estate not being sold within that time, and that without declarator.

1715. *January* 21.—In this process, as remarked 14th December 1714, Brestmiln now founds upon another clause in the contract 1662, subsequent to the clause irritant, viz. 'That if the price to be obtained therefor extend to 'more than the restricted sums of the creditors, and the annualrents for the 'time, (viz. of the sale), then the superplus of the price is to be applied to Sir 'James's other creditors.' And *alleged*, That the design plainly was, in case the redemption should not be used, then the lands should be sold by the creditors, and the price applied for their payments in the first place, and the superplus for Sir James's other creditors; but not, that these creditors, by virtue of their expired legals, should carry off the estate, or whole price thereof, more than satisfied their debts.

Answered for the representatives; That that provision was only in case Sir James made use of the power given him by that contract, *i. e.* should sell the lands within the four years; and, by his not making use of that power, the creditors only returned to their own place, but did not get an express title to sell, for that they needed not; so that the clause was only calculated for the event, in case Sir James should sell the land himself. Nay, otherwise this were to make the contract have effect after it is void and null, it being incongruous

to say, that it should be void and null as to all effects betwixt Skirling and the contractors, and yet stand effectual as to the creditors not contracting. No 90.

Replied for the pursuer, That, by the clause irritant, the contract is not to be null, since it only says, (That then, and in that case, this present reversion shall expire and be void, &c.) but the effect of the irritancy is, that the reversion was to be null, and that the creditors were to have power to sell, and the contract to subsist as a discharge of the reversion in favours of the creditors contractors, and as an obligation upon them to apply the superplus of the price in favours of the other creditors.

THE LORDS, in consideration of the above clause in the contract 1662, subsequent to the clause irritant, found, that Brestmiln, by virtue thereof, hath right to affect the superplus price in the hands of Lieutenant-General Douglas his heirs, after the restricted sums in the contract are satisfied and paid, together with the annualrents of the same.

Alt. *Ro. Dundas.* Alt. *Sir Ja. Nasmyth et Spottiswood.* Clerk, *Dalrymple.*

Fol. Dic. v. 1. *p.* 490. *Bruce, v.* 1. *No* 17. *p.* 22. *& No* 37. *p.* 46.

1716. *November* 27.

WATSON of Saughton *against* HAMILTON of Monkland.

No 91.
An adjudging creditor agreed to accept of a less sum than that in his adjudication, upon condition, that if it should not be paid at a certain day, he should be allowed to recur to the adjudication. Found, that the irritancy was purgeable after the term of payment.

ROBERT HAMILTON, younger of Wishaw, (from whom Saughton has right by progress), having adjudged the estate of Monkland, against which adjudication there are important objections very obvious; several years thereafter, it was agreed betwixt them, that, upon Wishaw's disponing the adjudication to Monkland, he Monkland should pay a certain sum (to which by paction the adjudication was restricted) at four several terms therein mentioned. The defender did accordingly make some payments; but neither of the whole sums agreed, nor at the respective terms contained in the agreement, but posterior thereto, notwithstanding of an irritancy therein, declaring, that, in case punctual payment be not made at the terms stipulated, that then the said minute of agreement should be void and null, except as to allowance of what Wishaw should actually receive, and that the said minute was only a corroboration of Wishaw's diligence above-mentioned; but the defender contending, that the above clause was an irritancy, and therefore purgeable at any time before declarator, the question came to turn upon this, viz. whether the pursuer could lay hold on the minute of agreement as corroborating Wishaw's adjudication, and at the same time refuse to accept of the restricted sum in that minute, after deduction of payments made?

And here it was *contended* for the pursuer; That all irritancies are not of the same kind; that here there was a transaction betwixt a debtor and his creditor; here was *liquide remissum* to the debtor, but conditionally and provisionally, that