

No 55.

*gandum moram*, and presently to pay the by-runs, it was answered, that there was here *dies et pœna adjecta*, et sic nullo modo locus fuit purgare moram, ut in L. 8. D. Si quis cautio. et mense Decembris, inter Hay et Moffat, *infra*. Reus etiam allegebat Bald. in L. 12. C. De contrahendo stipulatione, qui multas ponit ab hac regula exceptiones, viz. quando reus vul purgare moram, non ut suam, sed ut alterius sibi nesciam, ut in presenti casu, mora contracta fuit, et initium cepit ab auctore rei; et hæres qui in alterius locum succedit, justam habet ignorantiae causam. THE LORDS, after long reasoning at the bar, found the reason of the summons, by reason of the clause irritant, to be relevant, and so reduced the foresaid infestments.

*Fol. Dic. v. 1. p. 488. Colvil, MS. p. 414.*

No 56.

Where a conventional irritancy was contained in a tack, the defender's offer to purge was not admitted.

1586. December.

HAY against MOFFAT.

GILBERT HAY of — pursued one Robert Moffat, to hear and see a liferent tack of the lands of N. set to him by the said Gilbert, with consent of his mother, to be reduced and declared null, and the possession of the land to return again to the said Gilbert, likeas the said tack had never been set. The reason of the summons was founded upon a clause irritant, contained in the said tack that if three terms ran unpaid, the said tack should expire, and the possession of the lands to return again to the setter, as if the said lands had never been set. To which it was *answered*, As to the first term which was alleged to be unpaid, the cause thereof was the pest, *et casus fortuitus quem evitare non potuit reus*, the pest being in his house in such sort that he might not have access to come to his master to offer the payment of his duty; and as to the rest of his duties that was resting, he had soon after the running forth of the third term offered the same to his master, viz. within the space of a month after Whitsunday, which was the last term; and albeit there was a clause irritant, inserted in the tack, yet potuit tempestiva hac oblatione purgare moram, et si emphyteuta non soluti cannonis elapso bienno moram purgare potest, multo majus hæc equitas servanda est, simplici colono seu conductori.' To which it was *answered*, That there was here 'pactum oppositum contractui; et ubi dies est apposita certa, et pœna certa, nullo modo potest purgare moram ut in L. 8. (et ibidem Doctores.) D. Si quis cautio; et in L. 84. D. De verborum obligationibus, et ibidem Bart. et vide eundem pulcherimme disputantem in predict. L. 8. ubi hanc distinctionem, prout quod in judiciis et stipulationibus prætoriiis, ex æquitate admittitur purgare moram, sed in pactis conventionalibus prætor debet judicare ex conventionem partium et non ex sua æquitate; et multo clarius, Zoessius in L. 52, D. De verborum obligationibus; in stipulatione, inquit, conventionali, modus, forma, limitatio, argumentum, qualitas, et quicquid quod pertinet ad stipulationem pendere omnino ex contractibus; et alibi versiculo Z. ibid. partes contrahentes dant for-

nam et intellectum stipulationi conventionali, et semper tenendum est; quod ait Prætor, L. 7. § 7. D. De pactis; and so the failzie that was made by reason of the clause irritant *in pacto convento post caducitatem* could not be purged by any offer thereafter, except the parties would assent to the same; and, as was reasoned among the Lords, albeit in fens and heritable titles, the Lords are loath to retreat and reduce the same, *et aliquando oblatione, consignatione, et deposito, purgationem moræ admittitur*; yet into tacks and assedations, when any clause irritant of not payment is inserted in the same, they decern according to the same, *et instar mentem contrahentium; nam de jure et praxi nostra*, all tacks are *strictissimi juris*. THE LORDS found, by interlocutor, that by reason of the clause irritant *non obstante obligatione et moræ purgatione* the tack fell.

Fol. Dic. v. l. p. 488. Colvil, MS. p. 412.

1587. March.

BISHOP OF ORKNEY against SINCLAIR.

THE bishop of Orkney pursued one Sinclair to hear and see a tack of certain teind sheaves set by him to be reduced by reason of a clause irritant, that if the conductor, by the space of 40 days after the term, failed in not payment, the tack should expire. It was answered, that the most the bishop could crave owing to him, was but the payment of one term, and so *de æquitate potuit purgari hæc mora*, and it was a hard manner, *et summum jus, quæ fuit summa injuria* to reduce a nineteen year's tack for not payment of one term. The matter being reasoned among the Lords, some were of opinion *ut supra, quod contractus ex conventionione legem arripit, est in conventionibus in quibus dies et pæna adjecta est, non admittitur purgare moram*; L. 84. D. De verborum obligationibus; *et supra, inter Rhiscardine et Sheriff of Murray* No 55. p. 7225., and so by reason of the clause irritant expressed in the tack, the party could not be heard *ad purgandam moram*, albeit it was but *mora modica*; nevertheless, the Lords would not the tack should reduce.

Fol. Dic. v. 1. p. 488. Colvil, MS. p. 424.

\* \* The like was decided 9th March 1611, Seaton against Seaton, No 15. p. 7184.; and 26th July 1678, Pourie against Hunter, No 145. p. 2685., *vide* COMPENSATION.

1605. June 7.

WARDLAW against HEPBURN.

WARDLAW of Curriehill pursued the Laird of Riccarton to hear and see his feu farm infestment of Riccarton, held by the said Patrick Hepburn of the

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No 57.

A tacksman was allowed to purge at the bar, where it was pactioned that the tack should be null upon failure of payment of a single year's rent.

No 58.

The statuteable irritancy *ob non solutum canonem* found not