

No 91. he should pay at the times, and in the manner agreed, wherein he having failed, he must lose the benefit of the restriction. Now, by law, transactions are *stricti juris*, and to be performed *in forma specifica*; that this was not a penal irritance, inflicting any punishment, but the whole debt in the adjudication was just and lawful before the agreement; and the defender here only loses a favour which was indulged to him by the creditors upon a potestative condition in the defender himself; which not being performed, the defender could blame none but himself for this loss; and yet, after all, he comes but to pay his own just debt.

*Answered* for the defender; Supposing the minute could be of the sense the pursuer pleads, yet it is wholly penal, as excluding the defender from just defences; and such clauses irritant, which are penal, have no effect till declarator, which does not only take place, in such irritancies, *in pignoribus*, but in all other cases, as the Lord Stair observes, B. 4. T. 18. § 3. where his words are, "sometimes clauses irritant bear that the right shall thereby become null, *ipso facto*, without declarator. But, notwithstanding of this, clauses irritant are not effectual without they be declared, where they are exorbitantly penal; for the Lords, *ex officio*, have power to modify exorbitant penalties, albeit they bear to be liquidate of consent of parties; and, for the same cause, they have power to qualify those clauses irritant, and to allow time for purging the same"; which words of the author appear by the sequel to be meant of clauses irritant in any kind of rights, as well as wadsets.

THE LORDS found the irritancy in the said agreement was purgeable at the bar by payment of what was resting of the principal sum, at such a time as the Ordinary in the cause should appoint; with certification, that, if payment was not so made, the pursuer should have access to the whole sums contained in the adjudication, excluding all defences and objections except payment.

Act. Arch. Hamilton.

Alt. Boswell.

Clerk, Robertson.

*Fol. Dic. v. 1. p. 490. Bruce, v. 2. No 37. p. 48.*

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GRIERSON of Lagg *against* His Eldest SON and the OFFICERS of STATE,

No 92.

ONE having contracted some personal debt, tailzied his estate with this irritant clause, "that in case the tailzier should happen to be charged with horning, or other diligence, done against him, that the heirs of tailzie must relieve him thereof within six months after intimation thereof, otherwise to amit and lose their right." The irritancy being incurred, the public, by a forfeiture, coming in place of the heir of tailzie, it was *argued*, that the design of this clause was nothing else but to relieve the tailzier of his personal debt; and here the public was ready to purge the irritancy, and answer to the tailzier for all damage sustained. THE LORDS found the irritancy not purgeable. See APPENDIX.

*Fol. Dic. v. 1. p. 490.*