

No 82.
sum should not be duly paid, she might insist for her full annuity. This irritancy was found not purgeable.

of L. 200 Sterling yearly, because, by a transaction, they had restricted themselves to the sum of 3000 merks. *Answered*, That the restriction was not simple, but qualified with this provision, That if the defender should fail in payment of the 3000 merks punctually, at two terms in the year, at least at a certain day thereafter, and at a certain place condescended upon, betwixt the sun-rising and setting, the failzie being instructed by an instrument, bearing the pursuer's attendance at the respective days and terms mentioned in the agreement, that then the restriction should be null and void, and it should be leisome to the pursuer to make use of a right for the whole annuity; but so it was, the failzie was committed, as appears by the instrument. *Replied*, That notwithstanding the defender had failzied of punctual payment at the days specified in the agreement, yet the pursuer could not summarily adjudge for the same, unless it were first declared that the failzie was incurred; and if the pursuer were insisting in a declarator, the LORDS would allow the defender to purge the failzies, by payment of the bygone annuities; and clauses irritant are odious, and not to be extended. *Duplied*, That the restriction was appointed with that express qualification, which is not in the ordinary case of a clause irritant, which is adjected by way of penalty, and for which there was no preceding cause, but only purely and simply a penalty; but in this case the 600 merks given down was a part of the yearly annuity due by the pursuer's contract of marriage, and was given down upon this particular consideration, that the defender should make punctual payment at the days specified in the contract; in which case the failzie being incurred, the defender cannot be allowed to purge; for albeit some times when a party is obliged to perform a deed, with a penalty adjected in case of not performance, in that case the Lords will allow a party to purge by performance; but the foresaid 600 merks given down is not a penalty, but only a restriction in case of punctual payment, otherwise that the pursuer's right should be effectual as to the hail sum.—THE LORDS having remitted to one of their own number to consider if the Lady's liferent was an annuity, and if the restriction was gratuitous; upon report found, That for those years for which discharges are produced, the adjudication should proceed for the same, according to the restriction; but for subsequent years, the adjudication is to proceed for the whole sums, without respect to the restriction, and that the failzie is not purgeable, and needs no declarator.

Fol. Dic. v. 1. p. 489. Sir P. Home, MS. v. 1. No 17.

1686. November. NISBET against CREDITORS of DRYBURGH:

No 83.
A lady restricted her jointure in favour of her son.

By contract of marriage betwixt Patrick Yeaman of Dryburgh, and Margaret Nisbet, she being provided to the liferent of 16 chalders of victual; and after her husband's decease, she having entered into a contract with Patrick Yeaman, her son, whereby for the preserving of his estate and standing of his family, she

did restrict her jointure to 1000 merks yearly, in favour of the said Patrick and Henry Yeaman, her sons, and the heirs of their body; but not in favour of the heirs female, who are thereby excluded; and bear a clause irritant, That in case the 1000 merks were not paid yearly at the terms therein mentioned, so that two terms run in the third unpaid, in that case the restriction was to be null, and the said Margaret was to return to her former jointure; and the said Patrick, the oldest son, having deceased without children, and the said Henry, his brother, having lain out, and not entered, so that two terms did run in the third unpaid, the said Margaret did raise a declarator against Henry, her son, and his creditors, for declaring the restriction null, and that she might enter to her former jointure. *Alleged* for the Creditors, That there being *jus quasitum* to them by the foresaid restriction, as coming in place of Patrick Yeaman, their debtor, they ought to be allowed to purge the irritancy, upon payment to the pursuer of her bygone annuity, as the said Patrick might have done, especially seeing they did not know that the irritancy was incurred. *Answered*, That the foresaid restriction was only personal, in favour of her two sons, for the preservation of the estate, excluding her daughter; and the eldest son being deceased, without children, and the second son not entering to the estate, and craving the benefit of the restriction, and seeing the estate was not to be preserved in the son's persons, that restriction, which was but personal, and granted upon a particular consideration, was now ceased; the benefit thereof was not competent to the creditors, nor could they be allowed to purge the irritancy; but the pursuer ought to be restored to her full jointure, conform to the provision in the contract betwixt her and her sons.—THE LORDS found the irritancy purgeable by the creditors making payment to the pursuer of all bygones betwixt and the next term; but declared, That in case the irritancy were thereafter incurred, the LORDS would not allow them to purge the irritancy at the bar, providing always that the pursuer make intimation to the creditors by way of instrument, of her not being timeously satisfied.

Fol. Dic. v. 1. p. 489. Sir P. Home, MS. v. 2. No 818.

1694. January 4.

AGNES DEWAR, Relict of MASON, Shore-master in Leith, against WALTER LERMONY, present Shore-master there.

THE LORDS repelled the allegeance, that she could not transact her future aliment without the authority of a Judge, nor restrict it to a lesser sum, as she had done, to her prejudice: For the LORDS thought that the Roman law was equitable on that point, and favourable to liferenters, that they should not make prejudicial transactions without the intervention of a Judge's decret, as is clear from the *tit. D. and C. de transact.*; yet this had not been received in our law.

No 83.

upon condition that if the restricted sum should not be duly paid, the restriction should be *ipso facto* null. He having failed in payment, the LORDS found the irritancy purgeable by his creditors, but declared, that if they should fail in payment, they should not be indulged to purge a second time

No 84.

An annuity was to be restricted, if punctually paid. The failure was found applicable only termly.