

1695. December 12. The COUNTESS DOWAGER of HOME *against* The EARL of HOME.

ANSTRUTHER reported the Countess Dowager of Home against the Earl of Home, being a declarator that he had forfeited the benefit of the contract whereby she had restricted her jointure of 5000 merks *per annum* to 3000 merks, with this irritancy, that, if she were not punctually paid within thirty days after the term, she had liberty to recur for the whole 5000 merks, and he should be personally bound for the same; and that he had for several terms bygone incurred the failie.

ANSWERED,—He had, by way of instrument, offered it within a few days after the term prefixed, and she refused to accept it, lest it should have been construed a passing from the irritancy; but that one term she pointed the money offered; and that he was ready to pay her bygone terms, and assign her a locality for the future: And all these irritancies were always purgeable at the bar, as had been oft found, and particularly on the *25th February* 1692, between *David Burnet* and *Mr Alexander Johnston*.

The Lords considered that *pactum legis commissoriæ in pignoribus* was odious and unfavourable; but, ladies' annuities being alimentary, and seeing life-renters get little trust, they were not so; and, if the Earl had been personally liable for the whole 5000 merks prior to this contract, and she had *ex gratia* restricted it, she might have adjected what condition she pleased in her own favour; and it behoved to be precisely, *et in terminis specificis*, observed, according to the old act of sederunt, anent clauses irritant, in 1597. But here the Earl was not previously bound; but, in contemplation of 2000 merks of abatement, entered into a transaction with her, ratifying her right, and communicating his own, which was the stronger of the two. This was a clear *synallagma*, and the *contractus innominatus, do ut facias*; so that, if the Lady crave to return to the whole 5000 merks, he may also crave to be in his own place as he was before the contract, whereby he could reduce her right, except in so far as he could be overtaken on the new Act of Parliament, 1695, for obviating the frauds of apparent heirs: Therefore, the Lords found the failie purgeable at the bar, and gave him to the 1st of January to pay the bygones, with this quality, That, if they were not paid her betwixt and that day, she should have right to the whole 5000 merks by year; and found, That, unless he paid or offered within thirty days after the term, in time coming, her declarator should take place; and they should not hereafter be purgeable at the bar, to prevent his suspending of new for subsequent terms, as they fell due; and, finding the termly failies of £40 below her true expense she had been put to, they modified 500 merks against the Earl for the bygone damages and expenses he had put her to in this pursuit, and by lying out of her money for these two years bygone.