No. 84.

The next point was, whether that clause in the restriction, that how long he made punctual payment, she should not trouble or augment him, imported an irritant resolutive clause, that if he failed, she might recur to the first bargain, and crave the whole, if it was incurred? They were ordained to be further heard thereon; but the LORDS at the time seemed to incline, that it was equivalent to an irritancy.

1694. *June* 28.

AGNES DEWAR having an aliment of 200 merks yearly out of the shore-master of Leith's dues, she did restrict it to L. 50 yearly, with this quality, that on thankful payment of the said L. 50 she should not trouble him for any more, nor augment it. He having failed in payment, she pursues to be reponed to her own place, of exacting the full 200 merks. The doubt was, if the clause was truly irritant and resolutive.—It was *argued affirmative*, because she says, on thankful payment I shall exact no more, *ergo a contrario sensu*, if you do not pay me duly, I will seek the whole.—On the other hand it was *alleged*, That *pacta legis commissoriæ* were unfavourable, and not to be extended beyond the express words and conception of them.—*Answered*, This held in odious penal irritancies, as *in pignoribus*, or in reversions; but not in so favourable a case as an aliment.—THE LORDS were divided on the point. Some thought it not resolutive. Others that it was purgeable by payment at the bar. At last, the LORDS agreed on this, that he had incurred the failzie and forfeiture for bygones, and so behoved to pay at the rate of 200 merks for these; and that in time coming, she should have right to the whole, unless he paid the restricted sum within eight days after each term as it fell due.

Fol. Dic. v. 1. *p.* 489. *Fountainhall, v.* 1. *p.* 588. & 623.

1703. *December* 29.

The EARL of SOUTHESK and SIR WILLIAM BRUCE *against* SIR DAVID ARNOT of that Ilk.

No 85.

An adjudger was allowed to offer proof, in a reduction of a prior comprising, that the legal could not expire, because, by transaction with the debtor, the comprising had been restricted to a particular sum.

SIR WILLIAM BRUCE having adjudged Sir Alexander Bruce of Earlshall's estate, for debts owing him; he pursues a reduction and improbation against the Laird of Arnot, of a comprising led against the same lands by Mr John Bairdie, who assigned it to his daughter Sophia, and she, in her contract of marriage, disponed it to Mr Robert Alexander, one of the Clerks of the Session, her husband, and he conveyed it to Sir David Arnot. The reason of reduction was, That Mr Bairdie had transacted with Earlshall and his trustees, and had restricted his comprising to a particular sum; and so being acquired in by the common debtor's means, its legal could not expire, but it can only subsist for the sum agreed on; and offered to prove this by the said Mr Robert's oath, to be taken *ex officio*, and by Bruce of Bunyan, who was the said Sophia's curator, and consenter to her disposition, in her contract of marriage.—*Alleged*

for Arnot, Mr Robert Alexander being denuded in my favour for onerous causes, his oath can never be taken to my prejudice.—*Answered*, The cedent's oath must be taken here, because it was made litigious against Mr Robert before he denuded in favour of Arnot, by Sir William's raising and executing his reduction against them, prior to the said disposition.—*Replied*, The summons is indeed executed against Mr Robert and Arnot, anterior to the disposition in 1697, but it expressly bears relation to a prior right Mr Robert had assigned, but by accident had come to be lacerated and spoiled, and therefore Mr Robert found himself in conscience and duty obliged to renew it; and which torn paper they produced, not as a probative writ, but to fortify, astruct, and adminiculate the second disposition, as depending on an antecedent cause to the *litis pendentia* founded on, and so must be connected and drawn back *ad suam causam*.—*Duplied*, The lacerated paper can signify nothing, nor operate any effect whatsoever; besides, Sir William called for it, and has a certification against it; and as to Mr Robert Alexander's warrant in the second disposition, his assertion can prove as little, seeing *non creditur referenti nisi constet de relato*; and if this were sustained, it were easy to make up collusive narratives to the prejudice of inhibitions or other intermediate diligences.——THE LORDS found the second disposition could not be so conjoined with the first as to support it, the first being null, and certification passed against it.—Then *alleged*, 2*do*, Mr Robert Alexander's oath could not be taken to prejudge a singular successor; for it could not be stronger, than if he, or Mr John Bairdie, his father-in-law, had granted a back-bond restricting his sum, and acknowledging the agreement, in which case it would not have met Arnot, seeing Mr Bairdie was infeft under the Great Seal on an expired apprising; and however back-bonds or other personal rights may qualify and restrict apprisings within the legal, yet they have never been sustained after the same was expired; for then there is no more a debtor or creditor, but he transacts as proprietor, and what he gets, (though from the old heritors) is not as payment of his sums, but as a price of lands; and though Mr Robert Alexander had known of such a transaction, he was not bound to take notice of it, as Dirleton shows, 24th July 1666, Petrie *contra* Riccart, No 22. p. 5638.; and private knowledge does not supply the want of an intimation, 15th June 1624, Adamson *contra* Macmichell, No 61. p. 859.; and 14th March 1626, L. of Westerraw *contra* Williamson, No 62. p. 859.; and lately, among the Creditors of Skene of Hallyards, a creditor's private knowledge of the debtor's being insolvent, and of the co-creditor's rights, was found not to hinder the person who thus knew, to obtain a security preferable to and exclusive of others. THE LORDS before answer, what Mr Robert Alexander's oath can import, ordained him to depone anent his knowledge of his father-in-law's transacting and restricting his apprising, whence it may appear, if it was within or after the expiration of his legal. See PERSONAL and TRANSMISSIBLE.

Fol. Dic. v. 1. p. 490. Fountainhall, v. 2. p. 206.

No 85.

*** There is no case in Fountainhall, of date 21st Dec. 1707, between these parties, although that date is mentioned in the Fol. Dic.