

1725. *January 1.*STIRLING *against* GRAY.

No 93.

THE Earl of Dunfermline had a commission from the Crown, after the restoration, to call to an account the collectors, who, during the usurpation, had intromitted with the public money, and to uplift and discharge. In pursuance of this power, he made a transaction with Gray of Hayston, collector of Forfar, giving him a discharge upon receiving some part of 30,000 merks in ready money, and bonds for the rest. He also gave Hayston an obligation to obtain a ratification from the Crown of the discharge, and a remission, to be delivered betwixt and a certain day, to the effect the same might be expedite through the seals; or otherwise, if he prevailed not in procuring thereof, he was obliged to pay back the money then received, and deliver up the bonds, and each party was to be again in his own place.

The Earl having failed at the day to procure the ratification and remission, the question arose, if it was yet competent? And it was *pleaded*, that Hayston never suffered any thing by the want of these writs, nor could he now suffer; however, they were now ready to implement. THE LORDS found the resolute clause in the obligation was no penal irritancy, and therefore not purgeable upon performance, after elapsing of the day.

Fol. Dic. v. l. p. 490.

*** Edgar reports this case.

DURING the usurpation of Oliver Cromwell, the deceased Gray of Hayston was employed as collector of taxations and public impositions within the sheriffdom of Forfar.

When King Charles II. was restored, he granted an indemnity, wherein there were several exceptions, particularly one, as to the accounts of all persons who had received or intromitted with the public money from the year 1637 to the 1660.

The Earl of Dunfermline obtained two commissions from the Crown, one to call intromitters with the public money to an account, with a power to discharge them; the other empowering him only to call them to an account; the first of these did not pass the seals, but the last did.

In virtue of this commission, he called before him Gray of Hayston to account for his intromissions with the public money, which ended in this manner; Hayston was to pay to the Earl 30,000 merks; and, on the other hand, the Earl was to discharge Hayston of all accounts of his intromissions, to procure a ratification from the Crown of the said discharge, and to obtain for Hayston a remission under the King's hand.

In consequence of this bargain, Hayston paid the Earl 2000 merks, procured him a discharge of a debt of his to the Earl of Crawford of 14,000 merks,

No 93. and delivered four bonds blank in the creditor's name for the remaining 14,000 merks.

The Earl's part of the agreement was performed in this manner; he granted a discharge to Hayston, and likewise a backbond of the date of the bonds, viz. the 10th of September 1670, obliging himself to procure under the King's hand a ratification of the discharge then granted by him, together with the remission; and to deliver the said ratification and remission to Hayston betwixt the date thereof and 10th of November that year; otherwise, if he failed in procuring thereof, he obliged himself to pay back to Hayston the sums received, and to deliver up the bonds, with a discharge granted by the Earl of Crawford; so if he should not happen to procure the said ratification and remission, he and the said Hayston were to be each of them in their own places, as if there had been no agreement.

Subsequent to this agreement, two of these bonds were assigned by the Lord Dunfermline, and one of them was paid by Hayston, after expiring of the time agreed on for delivery of the ratification and remission.

Mr Walter Stirling, pursuer, deriving right by progress to the other two bonds, insisted against Gray of Inverighty, who was cautioner in them, for payment.

The *defence* made for Inverighty was, That the bonds pursued for were qualified by the Earl of Dunfermline's backbond; that in terms thereof, they were to be delivered up, and become void, upon his Lordship's failure to procure and deliver up the ratification and remission on or before the 10th November 1670; that since he had failed to deliver these securities to Hayston, not only at the time prefixed, but ever after, during the course of his life, the whole agreement became void, and the bonds which ought to have been delivered up to Hayston were in consequence null.

It was *answered* for the pursuer, That the irritancy of this transaction contained in the backbond, being penal against Dunfermline, was therefore purgeable at any time before declarator; that the Earl had obtained the ratification and remission, albeit not within the time limited in the backbond, which must be deemed sufficient, since Hayston had no damage through the Earl's not-performance precisely at the time limited, but was sufficiently protected by his discharge. *2do*, Albeit the transaction had been dissolved on account of the Earl's failure to procure the above writs in due time, yet the defender had homologated the same, by making payment of one of the bonds, after the time agreed on for the delivery of the ratification and remission.

It was *replied* for the defender, That though penal irritancies were purgeable before declarator, yet a clause inferring no penalty, but only resolving a bargain, and putting the parties in the same case they were in before it was made, was neither penal nor purgeable; that the case was the same, as if in place of a ratification and remission, the Earl had been obliged to deliver a quantity of victual worth 30,000 merks against a day certain, with a clause

resolutive in case of not-delivery; and if he absolutely failed in the performance, it could not be judged that Hayston would be obliged to accept of the grain at any time thereafter. The whole transaction depended entirely upon the Earl's delivery of these writs to Hayston; and since they were not delivered in terms of the bargain, the same was totally void. As to Hayston's sustaining no damage by the delay, it was *argued* for the defender, That if this could come under consideration in a case where contractors had made a plain explicit provision and agreement; yet now so long after Hayston's death, the defender could not be obliged to disprove his having been at no loss thereby.

It was *replied* to the homologation, That men's actions were not to be construed farther than their certain intention; and as Hayston had no sort of security from the Earl of Dunfermline, but the obligation to retrocess and dissolve the agreement, in case he did not against a day certain make good his part, the subsequent payment made by Hayston (in compliance with his own unfortunate circumstances) can be construed no farther than a wavour of the dissolution of the bargain, so far as that time it was incurred; but such payment can never be interpreted a new contract betwixt Hayston and the Earl, whereby he was bound to pay all the sums in the bonds granted by him, if at any time thereafter, the ratification and remission stipulated to him should be procured and delivered.

THE LORDS found the resolutive clause in the backbond is no penal irritancy; and therefore not purgeable upon performance after elapsing of the day; and found, that the payment made after the said day, was not a passing from the resolutive clause, but that Hayston could at any time after the said payment have insisted to be reponed in his own place.

Decisions cited for the pursuer, Durham against Durham, 12th December 1676, No 49. p. 3001.; Maitland against Gight, 20th July 1675, *voce* MUTUAL CONTRACT. For the defender, Hepburn against Nisbet, February 1665, No 62. p. 7229.; Jamieson against Wauch, 20th February 1680, No 81. p. 7258.

*Act. Dundas Advocatus, Graham. Ch. Erskine, Arch. Stewart, jun. Alt. Dun. Forbes,
H. Dalrymple sen. Clerk, Hall.*

Edgar, p. 141.

1726. February 1.

MR ARCHIBALD STEWART, Advocate, against DENHOLM of Westshield.

SIR WILLIAM DENHOLM of Westshield, in the year 1711, executed a bond of tailzie, whereby he "resigns his lands and estate in favours of, and for new infeftment, to himself, and the heirs male of his body; which failing, to the heirs female of his body; which failing, to Robert Baillie, and the heirs male of his body; which failing, to Mr Archibald Stewart," &c. with strict prohi-