

semel commissum erat purgabilis per oblationem pensionis in pacto conventionali; next they found, that when the clause irritant bore that the tack should fall for not payment if two terms ran in one; that the expiring of two terms without payment, made the tack to fall; when the tack bore that two terms running in the third the tack should fall, that it required that three terms should expire unpaid before the tack fell.

Fol. Dic. v. 1. p. 483. Haddington, MS. No 2185.

No 15.

1673. June 19.

SMITH against The Earl of MARISCHAL.

DAME GILES SMITH pursues a declarator of failzie against the Earl of Marischal, on this ground, That she having right to 116,000 merks in wadset, upon the Earl's barony of Inveragy, did by a contract with the late Earl, for getting sure and timeous payment, accept of 56,000 merks, to be paid by 7000 merks at every Whitsunday, imputed first to the annualrents, and then to the principal sum, with this express clause, 'That if two terms of the said 7000 merks should happen to run in the third unpaid, that the Earl should lose the benefit of the abatement, and to pay the whole sum;' so that now there being two terms past before the summons, therefore craving the clause irritant to be declared. The defender *alleged*, That this clause irritant being frequent in contracts, hath always been understood in this sense, 'That if two terms run in the third term, so that the third term be complete and come,' otherwise it would be committed by the running of one day after the second term, and so import no more but two terms running together; and, the clause being ordinarily in back-tacks, it ought not to be strictly interpreted, these being penal, and a great damage to parties, and this clause being expressed in the act of Parliament; anent annulling feus, 'If two terms of the feu-duty run in the third unpaid,' it hath never been sustained but when the third term was complete. It was *answered*, That the interpretation of this clause must be by the running, and not the completing of the third term, otherwise it would import no less than if it had borne, 'if three terms run together unsatisfied,' and so would have been expressed in these terms; and the case here is no way penal, the pursuer only demanding her own right as before it was restricted.

THE LORDS found, that the clause imported that the third term behoved to be complete.

Fol. Dic. v. 1. p. 483. Stair, v. 2. p. 190.

. Gosford reports this case:

In a declarator at the instance of Dame Giles Smith against the Earl of Marischal, to hear and see it found, that a contract, whereby the Earl was obliged to pay 56,000 merks, was void and null, and that she ought to be re-

No 16.

A clause bearing, 'if two terms run together in the third unpaid, the benefit of a restricting clause should be void,' was found to mean the completion, and not the currency, of the third term.

No 16. poned to the sum of 116,000 merks, upon this ground, that there was a clause irritant in the contract, that in case two terms should run in the third, in that case the contract should be null, and the pursuer reponed to the whole debt without any abatement; but so it is, that the whole principal sum of 56,000 merks, being obliged to be paid by the payment of 7000 merks yearly at every Whitsunday until complete payment, there were at Whitsunday last two terms outrun unpaid, whereby the clause irritant was incurred. It was *alleged* for the Earl, That the clause irritant being conceived in the terms foresaid, viz. in case two terms run in the third, could not be incurred, unless the third term were likewise outrun, whereas it was but scarce yet begun; seeing these clauses are in themselves most odious; and where the act of Parliament provides the nullities of feu-holdings, or in tacks for payment of tack-duties, in case two years run in the third, the LORDS have never been in use to interpret the meaning of the clause to be otherwise, but that three terms should be fully outrun, and even then do admit to purge at the bar. THE LORDS did sustain the defence, and found that the clause would not be incurred but by complete outrunning of three terms, both because the words themselves do so import, viz. that two terms should run in the third, which supposes that the third must exist, and that *in odiosis* all such clauses should be so interpreted to free the debtor whose case is favourable, seeing he dare not refuse to consent to the most rigorous penalties for eviting of present hazard, and all execution, personal and real; in consideration whereof, it hath always been held as an undoubted principle by all lawyers, that three terms should be completely outrun before such clause irritant can be sustained.

Gosford, MS. No 593. p. 339.

1729. February 19.

LADY BARRACK and HER HUSBAND *against* The TACKSMEN of the Lands of Reisgill.

No 17.

A declarator of irritancy of a tack was founded upon this clause, ' That in case the said tacksmen should fail in punctual payment of the said tack-duty therein mentioned, so far as that two years tack-duty should run in the third unpaid, that then the said tack shall be, *ipso facto*, void and null, without any declarator or process of law.' The *defence* was, *esto* the tack-duty for two full years were entirely due, no declarator of irritancy, because the import of the clause is, ' in case two years rent shall run in the third unpaid,' so that no less than three full years rent falling at once to be due, could found such a declarator. *Answered*, The natural signification of this clause is, *That two years rent shall run into the third without being paid*; or simply, *That two years shall remain unpaid*; because it is inconsistent that two years rent should remain unpaid without running into a third year. Found the irritancy in the tack incurred,