No 80.

her daughters, wherein there is a clause irritant, that in case of not performance, the disposition should be void and null; it was *alleged* for Abercairney, who was donatar to the ward of the fiar, who had succeeded to his deceased brother, who was party contractor, that he having now right to the lands disponed by the Lady, whereof she was denuded by the said contract, there could be no declarator upon the clause irritant, because he was willing to purge the same and perform all deeds to which her son was obliged, in whose place the donatar now succeeds. It was *replied*, That the irritant clause being committed during her son's lifetime, who never performed, and the disposition of her liferent being to her own son, flowing *ex pietate materna*, and out of affection to him, the donatar was not in the same case, and could not crave the benefit to be admitted to purge, as her son must have done.——THE LORDS did sustain the declarator, and found that the donatar could not be admitted to purge the clause irritant, which was long before committed, and thereby prejudge the Lady and her children of that which she only intended for their benefit, out of that affection that she carried to her own children.

Gosford, MS. No 534. *p*. 283.

1680. *February* 20. JAMISON *against* WAUCH.

No 81.
A contract, containing an irritancy, upon non-performance, was found not purgeable, not being penal.

ELIZABETH MONIPENY being infeft in an annualrent out of the estate of Balcomie, dispones the same by her contract of marriage with umquhile Mr John Smith minister, her husband, who always uplifted upon his wife's right, yet was never infeft; but after his death there is a contract betwixt his son and his relict, and Mr Robert Lermonth, whereby 'they dispone to Mr Robert this annualrent, and he becomes obliged to pay a sum as the price to young Mr John, his heirs and assignees, at such terms,' with this provision, 'That the contract should be deposited till Mr Robert performed, and if he failed in whole or in part, he should be excluded *pro tanto*, and the disponer's right should continue with themselves.' Mr John Smith, younger, dies unentered heir to his father, and leaves a legacy to Wauch, who thereupon insists against Mr Robert Lermont for payment of this sum in the contract, as being moveable. Compearance is made for Dr Jamison, heir to Mr John Smith, elder and younger, and now infeft in the annualrent, who *alleged*, That the executor or legatar of Mr John Smith could have no right to this sum, because Mr John Smith, younger, was never served heir to his father; so that any disposition by him was ineffectual, and he, nor none representing him, could obtain Lermont infeft in the annualrent, and therefore could not demand the price; but the price behoved to belong to Dr Jamison, who is served heir to Mr John, elder, and infeft in the annualrent, and who could only dispone the annualrent effectually; and albeit the price be conceived in the terms of a moveable obligation, yet the executor or legatar can have no right to the price, seeing he has no right to the infeftment of the

No 81.

annualrent. It was *answered* for the legatar, That where any heritable right is disponed by the fiar, if the price be taken as a principal sum, albeit in the disponer's life he was not denuded, yet his heir upon his obligement will be obliged to denude himself, and yet will not have right to the price being moveable; for it being in the defunct's power to dispose of his own at his pleasure, he might take the price heritable in favour of his heir, or moveable in favour of his executor; and it will not follow, because the executor cannot fulfil the defunct's disposition, but the heir, that it will make any alteration to dissolve a bargain, or to make the price to fall to the heir; for when a creditor, by wadset or annualrent, charges or requires for his money, which is frequent, and dies before payment, the sum will belong to his executor as moveable, and yet his heir must infeft himself in the wadset, and renounce the same in favour of the debtor upon payment, though payment must be made to the executor and not to the heir; nor doth it import that Mr John Smith, younger, was not served heir to his father, because Dr Jamison is served heir to Mr John younger, and so is obliged to fulfil his deed, and to dispone to Lermont. It was *replied* for Dr Jamison, That he is not obliged to perfect the disposition to Lermont, either as heir to Mr John, younger or elder, because it contains a clause irritant, which is committed. It was *duplied* for the legatar, That before declarator of the clause irritant, it may be purged; and he offers to purge for Lermont, by consigning the price, which will purge the failzie, and he will have only right to uplift the same himself, as being moveable. It was *triplied* for the Doctor, That it is clear by this contract, that it was to remain deposited till Lermont fulfilled, and therefore never became Lermont's right; but the payment at the terms in the contract, being the conditions of the depositation, with a resolutive clause, 'in case of failzie,' it requires no declarator, and so cannot be purged, but the bargain is dissolved, and it is not in the case of a clause irritant in a delivered right.

THE LORDS found this contract being a depositate writ, upon payment at certain terms, with a clause irritant, that the failzie to pay at these terms did annul the contract without necessity of declarator, and could not be purged after the failzie, and therefore found Waugh the legatar to have no right to the sum which Lermont was to pay.

Fol. Dic. v. 1. *p.* 496. *Stair, v.* 2. *p.* 761.

1681. *November.* MURRAY and PEARSON *against* NISBET.

No 82.
A lady restricted her annuity in favour of the heir, with this provision, that if the restricted

DAME MARGARET MURRAY, relict of the deceased —— Nisbet of Craigintinnie, being infeft in an yearly annuity of L. 200 Sterling, out of the lands of Dean, during her lifetime, she and Mr William Pearson, her husband, having pursued an adjudication against Alexander Nisbet of Craigintinnie, her son; *alleged* for the defender, That the pursuer could not adjudge for the hail sum