

1663. January 8.

GORDON *against* LEES.

No 79.

A CREDITOR having transacted with his debtor, and accepted of a lesser sum for his claim, under this condition, that if the money should not be punctually paid at a certain term, the creditor was to recur to his former right; and the term being elapsed without offer of payment; the LORDS found the same yet purgeable.

*Fol. Dic. v. 1. p. 490. Gilmour.*

\*\*\* This case is No 23. p. 2965. *voce* CONDITION.

1672. December 10.

The LADY CULTQUHEY *against* The LAIRD of ABERCAIRNIE.

No 80.

THE Lady Cultquhey having granted a renunciation of her liferent-right in favour of her son, his heirs and assignees, upon certain conditions, for relieving of her debts betwixt and such a day; and by a posterior bond it is declared, that if the same were not performed at the day, the renunciation should be null, *ipso facto*, as if it had never been made: The Lady pursues a declarator of the nullity, her son to whom it was granted being dead without issue. Comparence is made for the donatar of her son's ward, who alleged that the renunciation being made to her son, his heirs and assignees, he as donatar to the ward of the lands renounced, was a legal assignee; and as the son in his own time, if he had been thus pursued, might have offered to purge the irritancy by present performance, so may and doth the donatar offer to purge, as is ordinary in all clauses irritant, especially where it bears not 'to be void without declarator.' It was answered, That clauses irritant *in commissoriis*, where they are penal, and give the party more than their just interest, may be purged; but when a party gratuitously grants any right without a cause onerous, upon conditions, and a clause irritant, in case of not performance, such clauses cannot be purged; albeit clauses irritant in reversions, or back tacks, which are penal, and whereby the wadsetter gets more than his just interest, may be purged.

A lady granted a renunciation of her liferent right in favour of her son, upon his becoming bound to relieve her of her debts betwixt and a certain day. By a posterior bond it was declared, that if the condition were not performed at the day, the renunciation should be null *ipso facto*.---The Lords found irritancies of this nature, not being penal, could not be purged.

THE LORDS repelled the defence, and found irritancies of this nature; not being penal, could not be purged.

*Fol. Dic. v. 1. p. 489. Stair, v. 2. p. 130.*

\*\*\* Gosford reports this case:

IN an action of declarator of the nullity of a contract passed and subscribed betwixt the Lady and her son, whereby she disposed to him her whole liferent lands, upon express condition, that he should pay the debt, and pay L. 2000 to