

S E C T. VI.

Irritancy *ob non solutum canonem*, when purgeable.

1586. *January.* PRIOR of PLUSCARDINE *against* SHERIFF of MURRAY.

THE Prior of Pluscardine pursues the Sheriff of Murray to hear and see a charter set by the said Prior's predecessors, in feu farm, to the umquile Dunbar, Laird of Cumnock, and Sheriff of Murray, guidsir to the defender, in feu farm, of the fishings of Spey, as proper part of the patrimony of the said benefice, to be reduced. The reason of the summons was, because of a clause irritant that was contained in the charter, that if three years ran unpaid of the feu-duty, the said charter should expire, and the said fishings return again, as if they had never been set; and true it was, that the duties of the said fishings had remained unpaid, ay since the first setting of the said feu, both in the time of the defender's guidsir, his father, and himself. It was *excepted* against the reason of the summons, That as to the time of not payment of the guidsir, it could not prejudice the defender, *quia unicuique sua mora est, et noxa caput sequitur*; and his guidsir was but a liferenter, and the deed of the liferenter ought not in any manner or sort to prejudice the heritable feuer; and as to his own time, he was ready instantly *ad purgandam moram*, and presently offered in presence of the whole Lords, *in pecunia numerata*, the whole by-runs, which extended to the sum of _____; and the fault in times bygone of the not payment ought to be rather imputed to the pursuer, because he had ay since his entry to the benefice, holden the defender and his predecessors in continual plea, and intented action to produce his feu-charter upon other heads, whereby he was not bound to acknowledge him to be his lord and master, *quia mutua et reciproca est inter dominum et emphyteutam obligatio, et sic factus fuit fundus litigiosus*, and the fault of not payment is by the pursuer, and not the defender, who would not receive him tenant, nor acknowledge him to be his vassal, like as the defender was never as yet received tenant or vassal to the pursuer, whereby his feu could not *cadere in commiss. quia privatio presupponit habitum*.

To all this was *answered*, That the reason of the summons was founded upon the express words of the clause irritant contained in the infestment, which was when either the guidsir, who was the first acquirer of the feu-farm, or any of his heirs and successors failed *in non soluto canone*, that the feu should *cadere in commiss.*; so, by reason of this bond *appositum contractui*, the fault of the guidsir, albeit he was but liferenter, would prejudice the feu, as well as the fault of the heritable successor, *quia hæres hic representabat personam defuncti et a ejus factum tenebatur*; and where it was alleged that the defender was ready *ad pur-*

No 55.
Conventional
irritancy
found not
purgeable.

No 55.

gandum moram, and presently to pay the by-runs, it was answered, that there was here *dies et pœna adjecta*, et sic nullo modo locus fuit purgare moram, ut in L. 8. D. Si quis cautio. et mense Decembris, inter Hay et Moffat, *infra*. Reus etiam allegebat Bald. in L. 12. C. De contrahendo stipulatione, qui multas ponit ab hac regula exceptiones, viz. quando reus vul purgare moram, non ut suam, sed ut alterius sibi nesciam, ut in presenti casu, mora contracta fuit, et initium cepit ab auctore rei; et hæres qui in alterius locum succedit, justam habet ignorantiae causam. THE LORDS, after long reasoning at the bar, found the reason of the summons, by reason of the clause irritant, to be relevant, and so reduced the foresaid infestments.

Fol. Dic. v. 1. p. 488. Colvil, MS. p. 414.

No 56.

Where a conventional irritancy was contained in a tack, the defender's offer to purge was not admitted.

1586. December.

HAY against MOFFAT.

GILBERT HAY of — pursued one Robert Moffat, to hear and see a liferent tack of the lands of N. set to him by the said Gilbert, with consent of his mother, to be reduced and declared null, and the possession of the land to return again to the said Gilbert, likeas the said tack had never been set. The reason of the summons was founded upon a clause irritant, contained in the said tack that if three terms ran unpaid, the said tack should expire, and the possession of the lands to return again to the setter, as if the said lands had never been set. To which it was *answered*, As to the first term which was alleged to be unpaid, the cause thereof was the pest, *et casus fortuitus quem evitare non potuit reus*, the pest being in his house in such sort that he might not have access to come to his master to offer the payment of his duty; and as to the rest of his duties that was resting, he had soon after the running forth of the third term offered the same to his master, viz. within the space of a month after Whitsunday, which was the last term; and albeit there was a clause irritant, inserted in the tack, yet potuit tempestiva hac oblatione purgare moram, et si emphyteuta non soluti cannonis elapso bienno moram purgare potest, multo majus hæc equitas servanda est, simplici colono seu conductori.' To which it was *answered*, That there was here 'pactum oppositum contractui; et ubi dies est apposita certa, et pœna certa, nullo modo potest purgare moram ut in L. 8. (et ibidem Doctores.) D. Si quis cautio; et in L. 84. D. De verborum obligationibus, et ibidem Bart. et vide eundem pulcherimme disputantem in predict. L. 8. ubi hanc distinctionem, prout quod in judiciis et stipulationibus prætoriiis, ex æquitate admittitur purgare moram, sed in pactis conventionalibus prætor debet judicare ex conventionem partium et non ex sua æquitate; et multo clarius, Zoësius in L. 52, D. De verborum obligationibus; in stipulatione, inquit, conventionali, modus, forma, limitatio, argumentum, qualitas, et quicquid quod pertinet ad stipulationem pendere omnino ex contractibus; et alibi versiculo Z. ibid. partes contrahentes dant for-