

case not so strong; refuses the desire of the representation, and holds the representor as bound to pay interest for the interest accumulated, as in the former interlocutor."

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Rae again represented upon this point; and likewise claimed the benefit of compensation upon a debt which was due to himself by John Geils. And this representation having been also refused, he next reclaimed to the Court, founding chiefly upon an agreement between the trustees and his father in 1743, whereby he was to retain the balance of the price till the incumbrances were cleared, and security given him as therein mentioned; and he was only taken bound to pay the said balance, with the interest thereof, according to law, "upon the performance of the obligation before written;"—and, *2do*, That in this case, the delay was altogether on the part of creditors and their trustees;—but if, after all, he should be subjected to this accumulation upon the debt due by him, he contended it would be equally just, either to allow him retention from the same, of the debt which was due to him by Geils, contracted so early as the 1725; or at least to accumulate, in like manner, the bygone interest, which is now due upon it for no less than 48 years past.

Upon advising the petition and answers, the COURT "adhered to the Lord Ordinary's interlocutors."

Act. Mat. Ross.

Alt. D. Rae.

Clerk, Gibson.

Fol. Dic. v. 4. p. 253. Fac. Col. No 94. p. 238.

SECT. VII.

Lex Commissoria.—Condition that the Purchaser shall find Caution for the Price within a Time.

1785. March 9. JOHN YOUNG *against* JAMES DUNN.

JOHN YOUNG sold to James Dunn a house belonging to him, at the price of L. 2500, which was to be paid or secured in a certain manner, at the term of Lammas following; otherwise the agreement to become void, and Mr Dunn to be considered as the lessee of the house, at the yearly rent of L. 225.

Mr Dunn not having implemented the first part of this bargain, Mr Young, sometime after the term of Lammas, proceeded, without any premonition, to dispose of the house to a third party. He then brought an action of removing, in which Mr Dunn

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A house was sold at a price payable at a fixed time, otherwise the sale to be void, and the purchaser to be considered as a tenant at a certain rent. On failure,

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the seller sold
to another
without pre-
monition.
Found enrit-
led to do so.

Pleaded in defence; The sale of the house was not a conditional one, to be valid only upon payment of the price within the stipulated period; it was truly a finished sale, with a clause entitling the seller to resolve the bargain, in case the price was not duly paid or secured according to the agreement. It thus resolved into an example of the *Lex Commissoria*, in which the seller, for putting an end to the contract, must premonish the buyer; it being contrary to reason, that he should be allowed to hold the other party bound, after the obligation on his party has become ineffectual; l. 4. § 4. *D. De Leg. Commis.*

The alternative condition, too, of the extravagant rent to be paid on the sale becoming void, must be an insuperable bar to the present action. In penal irritancies, the intention of him who exacts a stipulation of that sort, is not to derive, from the inadvertency or embarrassment of his neighbour, an unreasonable benefit to himself, but merely to ensure performance of the contract; and to this intention courts of equity have imparted a proper effect, by determining, that upon a fulfilment of the bargain within a reasonable time, or before a decret of irritancy can be extracted, the other party may be released from the penal consequences of his delay; Erskine, B. 2. Tit. 5. § 25. Dict. *voce* IRRITANCY. Neither, for affording this equitable relief, is it necessary that such a method of compelling performance of the contract has been used, by directly stipulating a sum of money in name of penalty. The decision must be the same, where the penalty annexed to a sale is conceived in the form of a rent infinitely greater than the seller could have expected, either from the purchaser or any other person.

Answered for the pursuer; In proper sales, where the agreed price is precisely equal to the value of the subject sold, the doctrine of penal irritancies has never been admitted; Stair, B. 1. Tit. 13. § 14.; Bank. B. 1. Tit. 9. § 29. 32.; Dict. *voce* IRRITANCY. There, conditions of the nature here occurring are to be observed in their literal sense; nor can a court of equity interpose, to give any greater latitude than has been precisely stipulated. But there is here, in truth, no penalty, which from equitable notions can be modified or retrenched. By the express agreement of the parties, which no court can convert into another diametrically opposite, it has been provided, that in the event which has really happened, the possession should be ascribed, not to the contract of sale, but to a lease at a fixed rent. As, therefore, it was no longer in the power of the seller to insist for implement of the prior bargain, it would be unjust to enforce against him the counterpart of that obligation. For the same reason, the equity of the rule adopted in the *Lex Commissoria*, is not applicable to the present case.

Several of the Judges expressed their opinion, That unless for the secondary bargain of lease, Mr Young could not, without some premonition, have departed from the sale. Others, however, thought, that in that contract the condition here interposed was to be strictly observed.

"THE LORDS repelled the defences, and decerned in the removing,"

Lord Reporter, *Montbodo.* Act. *Blair.* Alt. *H. Erskine.* Clerk, *Hume.*
G. *Fac. Col. No 207. p. 324.*

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1787. February 10. ALEXANDER WALKER against JAMES GAVIN.

By the articles of roup of the lands of Mainsneil, which were sold judicially, it was provided in the usual manner, "That on the highest offerer failing to give security for the price within thirty days after the sale, the one next to him should be preferred, on his finding security within thirty days after; intimation being at the same time to be made to him of the devolution in his favour within ten days after it had taken place."

The highest offerer was Mr Gavin, who, by some oversight, allowed the thirty days to elapse. The day after, however, he offered a bond, signed by proper cautioners; but not before Mr Walker, whose offer was next to his, had insisted on being preferred in pursuance of the above condition. Minutes of debate were made out, in which Mr Walker

Pleaded; Articles of roup form a mutual contract between the exposers and offerers, by which all the parties are equally bound. Since, therefore, Mr Walker was here unquestionably obliged, on the failure of his competitor, to fulfil the offer he himself had made; so the exposers must be under a similar obligation to perform their part of the agreement. This indeed is clearly implied in the words here used; the bidder next to the highest being to have the preference on the failure of this offerer, in the same way as, before, he was to be preferred on his performing the conditions required from him. It is true, that the person who carries on the sale is obliged to make intimation, within a limited time, to the offerer on whom the purchase has thus devolved; but this was intended for the accommodation of the latter, and not to give to the former an arbitrary power of preferring one offerer to another.

Answered for Mr Gavin; The clause which gives rise to the present question has been inserted in judicial sales, the expense of which is very great; in order to provide against the necessity of a second roup, in case the highest offerer should be found unable to pay the stipulated price. It is solely intended for the benefit of the exposers; and hence, if they do not, within a short period, notify to the preceding offerer, that they mean to avail themselves of it, it is held to be of no consequence. If, therefore, they chuse, even after the day fixed for that purpose, to accept of the security proffered by the highest bidder, or if they think it unnecessary to demand security of any sort, no other person has any right to interfere.

"THE LORDS preferred Mr Gavin the highest bidder."

Reporter, *Lord Swinton.* For Mr Walker, *J. Erskine.* For Mr Gavin, *C. Hay.*
G. Clerk, *Colquhoun.*
Fol. Dic. v. 4. p. 254. Fac. Col. No 312. p. 481.

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Condition, that if the highest offerer at the sale do not find caution within a limited time the purchase should devolve on the next offerer, found not to give the next offerer a right to claim the purchase, where the exposers are satisfied with the first offerer, although he has not strictly complied with the condition.