No 12. duty of the back-tack, all the terms wherein the failzies are alleged to have been omitted, he cannot seek declarator of the failzie, seeing a part of the back-tack duty was paid termly by the said mails of the fore-booth, which the Lords found relevant.

Auchinleck, MS. p. 111.

No 13. 1680. *July* 27. The Earl of Marr *against* Fraser of Techmurie.

The Lords found a clause irritant in a feu *ob non solutum canonem* not incurred by many years rests, but allowed a time to pay and purge, because the *reddendo* bore *si petatur*, and it was never demanded till this declarator and reduction.

Fol. Dic. v. 1. *p.* 484. *Fountainhall, MS.*

No 14. 1683. *November* 29. Sir Andrew Dick *against* ———.

'The Lords found, a back-tack in a wadset-right became null, and (irritancy) incurred through not payment of the back-tack duty by the space of two years together, like a feu by the 250th act of Parliament 1597; though it contained not the usual clause irritant, that in case two terms run in the third unpaid, then it should expire; and found that irritant clause equally inherent *de jure* as if it were expressed; but found it purgeable at the bar, or before extracting, by paying the bygone back-tack duties." The Lords sometimes now allow them to be instantly purgeable, even where the writ contains an express clause irritant *in gremio.* They had decided the same with this before in the case of tacks, where two years duty runs in the third unpaid.

Fol. Dic. v. 1. *p.* 483. *Fountainhall, v.* 1. *p.* 246.

SECT. II.

Conventional Irritancy *ob non solutum canonem.*

No 15. 1611. *March* 9. Mr George Seton *against* His Brother James.

In the action pursued by Mr George Seton against his brother James for reduction of his tacks *propter non solutum canonem*, the Lords found *quod mora-*

semel commissarion 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. No 15.

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

1673. *June* 19. SMITH *against* The Earl of MARISCHAL.

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.

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 Inverugy, 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 bene-'fit 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-