

No 74.

remove. It was *replied*, That it was provided in the rental, that, if he gave his title of this rental to any other, without consent of the Abbot, he should tyne his tack and rental *ipso facto*, without farther process. It was *answered* That, notwithstanding that provision, he behoved first, by way of action, to be declared to have tint his tack, for the cause foresaid. It was *replied*, That the said nullity of the tack might be received by way of exception, likeas the nullity of the law, and be null by consent of both the parties. THE LORDS found, by interlocutor, that he could not be decerned to remove, before that he was declared, by way of action, to have tint his tack.

*Maitland, MS. p. 209.*

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NASMITH *against* KINLOCH.

No 75.

IN an action betwixt John Nasmith and John Kinloch, the LORDS found, that the taking of annualrent, after the failzie, purged the clause irritant, a- nent the expiring of the reversion, in case of not-payment at a precise day.

*Kerse, MS. fol. 109.*

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1693. December 15.

BAILLIE of JERVISWOOD *against* The TOWN of LANARK.

No 76.

A clause in a feu charter, obliging the heir to enter within year and day of his predecessor's death, under the penalty of losing the feu, found purgeable before declarator.

THE LORDS repelled their reasons of suspension, on report of Lord Mersington, and decerned them to grant a charter, and enter him in that land held of them. The reason was, that, by his charter, he was bound, within year and day of his predecessor's death, to crave an entry, under the pain of losing the feu, and he had suffered sixteen months to elapse after his restitution.—THE LORDS found this irritancy purgeable, there being no declarator raised by them upon his failzie. The 2d was, That they had paid his proportion of cess for these lands, and they were not bound to receive him as vassal till he refunded them. THE LORDS found this was not liquid, and no part of the *reddendo* of his holding, and so could not stop his entry, reserving action for the same, as accords. The third was, That he had committed purprision, and amitted his feu in tilling up a high way, which he was obliged by his charter to give them to a croft of land called the Well-eyes. He *alleged*, He had prescribed immunity from that servitude. THE LORDS found this reason not competent *hoc loco*, but reserved it to them, when they should insist in a declarator.

1694. February 28. IN the question between George Baillie of Jerviswood, and the Town of Lanark, about entering him in a piece of land he held of them, (mentioned 15th December 1693), the LORDS found they could not dispense

with the Chancery ordering three precepts to be issued out by vassals against their superiors for receiving of them, whereof the last two are called *furcæ et meminimus*; and that till these were executed they would not allow him to enter by the King, who was the town's superior.

*Fol. Dic. v. 1. p. 489. Fountainball, v. 2. p. 578. 618.*

No 76.

1708. December 11.

FORSYTH and JOHNSTON, Portioners of Over Hallieths, *against* JOHN KENNEDY, in Hallieths.

ONE Carruthers sets a tack of these lands to Kennedy, under these two express irritancies, that he shall not assign nor subset the said tack or lands, and that he shall take in no goods upon his grass but his own proper goods allenary; if he contravene any of these, the tack shall be *ipso facto* void and null. The lands being afterwards sold to Forsyth and Johnston, they raised a reduction and declarator, that Kennedy had lost the benefit of the tack, by subsetting and taking in other men's goods on his summer grass, and pursued him to remove on a warning executed against him. *Alleged*, He had a tack for many years yet to run, by virtue whereof he was in possession long before their right to the lands. *Answered*, You have incurred the irritancies of the tack, by subsetting, and herding other goods than your own. *Replied*, All I did was by verbal tack for one year, I set a small part of the lands to another, and their right was expired, and they removed off the lands long before you quarrelled the same; and as all such failzies are purgeable when quarrelled, much more when it is done before any declarator is raised, as here. *Duplied*, There are three sorts of irritant resolute clauses; the *first* is the common sort, That if payment be not made of the feu or back tack-duty, and two years suffered to run in the third unpaid, then the right shall be void and null, as in feu-charters, in wadsets, and tacks; this is ever looked upon as penal, and so purgeable at the bar. The *second* formula is, When it is conceived in affirmative terms, *ut aliquid fiat*, and if that be not done, then the right to be null; as, for example, a tacksman of land is taken obliged to build a house on the ground, and if he neglect, the tack to be null. If he build the steading any time before the declarator, the Lords will find the irritancy purged; and the reason is, because there was no more here but the *mora*, and delay, which is purged by performance afterwards. But the *third* sort, which is the present case, is not so purgeable, viz. Where the irritant clauses prohibit *ne quid fiat* as here, you shall not assign nor subset, and you shall take in no goods but your own; and seeing you have contravened, it is no good answer, that the impediment was removed before intending your declarator; for what is once done cannot be undone, *quod semel factum est infectum fieri nequit*, no more than yesterday can be recalled; it not being a *simplex mora*, but a positive deed of contravention; and such irritancies

No 77.

A tacksman, notwithstanding a clause in his tack, that if he should subset, the tack should be *ipso facto* null, granted a verbal subset for a year. After the subtenant was removed, a declarator was raised. This action was dismissed, the irritancy being purged before raising declarator.