

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.

No 77. have been found not purgeable, as appears by Spottiswood, *voce* Removing, and *voce* Rentals, (*See* APPENDIX.) And if this defence were good, that it was purged before any process quarrelling it, then it might have defended Shemei against Solomon, who had a tack of his life, on condition he should not go out of Jerusalem, now he had returned and purged the irritancy; yet that did not save him, but he was put to death. And such irritancies cannot be declared till they be committed and incurred, so the removing them out of the way at that time can never excuse the prior delinquency. THE LORDS thought all the three sorts purgeable before they were quarrelled; and suppose the case of a tailzie, under an irritant clause, not to contract debt, if it be paid before the next substitute heir of tailzie quarrel it, it can never be a ground for tinsel of the property; and even so in a recognition, if one alienate and take on debt above the half of the ward-lands, and disburden them by payment before the gift, the LORDS would not find the recognition incurred; even so here, the irritancy was purgeable, and therefore the LORDS assoilzied from the reduction of the tack and the removing, and refused to declare the irritancies incurred in this case.

Fol. Dic. v. 1. p. 489. Fountainhall, v. 2. p. 471.

S E C T. VIII.

Conventional Irritancy in Bargains, Contracts, and Entails, if purgeable.—Irritancy relative to *legatum liberationis*, when purgeable.

1609. *July.* EARL OF MORTON *against* DOUGLAS.

No 78.

IN an action pursued by William Earl of Morton against Hugh Douglas of Billbruckt, to hear and see a bond made by his Lordship, whereby he has promised to set a tack of the mill of Morton to the said Hugh, providing he paid to him 500 merks at a certain term, to be rescinded and declared ineffectual, because Hugh Douglas had not paid the said sum at the said precise day, the LORDS found the bond null, and to be expired, notwithstanding there was no clause irritant contained therein; and that notwithstanding Hugh offered to prove, that within ten days after the term he had really offered the money.

Kerse, MS. fol. 108.