

No 16. poned to the sum of 116,000 merks, upon this ground, that there was a clause irritant in the contract, that in case two terms should run in the third, in that case the contract should be null, and the pursuer reponed to the whole debt without any abatement; but so it is, that the whole principal sum of 56,000 merks, being obliged to be paid by the payment of 7000 merks yearly at every Whitsunday until complete payment, there were at Whitsunday last two terms outrun unpaid, whereby the clause irritant was incurred. It was *alleged* for the Earl, That the clause irritant being conceived in the terms foresaid, viz. in case two terms run in the third, could not be incurred, unless the third term were likewise outrun, whereas it was but scarce yet begun; seeing these clauses are in themselves most odious; and where the act of Parliament provides the nullities of feu-holdings, or in tacks for payment of tack-duties, in case two years run in the third, the LORDS have never been in use to interpret the meaning of the clause to be otherwise, but that three terms should be fully outrun, and even then do admit to purge at the bar. THE LORDS did sustain the defence, and found that the clause would not be incurred but by complete outrunning of three terms, both because the words themselves do so import, viz. that two terms should run in the third, which supposes that the third must exist, and that *in odiosis* all such clauses should be so interpreted to free the debtor whose case is favourable, seeing he dare not refuse to consent to the most rigorous penalties for eviting of present hazard, and all execution, personal and real; in consideration whereof, it hath always been held as an undoubted principle by all lawyers, that three terms should be completely outrun before such clause irritant can be sustained.

Gosford, MS. No 593. p. 339.

1729. February 19.

LADY BARRACK and HER HUSBAND *against* The TACKSMEN of the Lands of Reisgill.

No 17.

A declarator of irritancy of a tack was founded upon this clause, ' That in case the said tacksmen should fail in punctual payment of the said tack-duty therein mentioned, so far as that two years tack-duty should run in the third unpaid, that then the said tack shall be, *ipso facto*, void and null, without any declarator or process of law.' The *defence* was, *esto* the tack-duty for two full years were entirely due, no declarator of irritancy, because the import of the clause is, ' in case two years rent shall run in the third unpaid,' so that no less than three full years rent falling at once to be due, could found such a declarator. *Answered*, The natural signification of this clause is, *That two years rent shall run into the third without being paid*; or simply, *That two years shall remain unpaid*; because it is inconsistent that two years rent should remain unpaid without running into a third year. Found the irritancy in the tack incurred,

and that so soon as the two years tack-duties were run, and the third running unpaid. No 17.

*Fol. Dic. v. I. p. 483.*

1750. November 27. LADY BARHOLM against DALRYMPLE.

THE lands of Dunraggat were feued in 1621, for 100 merks of yearly feu-duty, by Gilbert Ross provost of Maybole, to Baillie, afterwards designed of Dunraggat, by contract, containing this clause, ' That if two terms of the feu-duty should run in the third unpaid, the vassal should be liable in double of ' the feu-duty *toties quoties.*'

The Viscount of Stair, who came to be superior in the right of his wife, daughter to the said Gilbert Ross, brought an action of poinding the ground in 1691, against Alexander Baillie then of Dunraggat, for several years bygone feu-duties, which at 200 merks yearly, being the double of the feu, extended to 2000 merks; at the same time concluding the irritancy of the feu-right upon the act of Parliament *ob non solutum canonem*; and obtained decree in absence on both conclusions, and thereupon obtained possession; and John, Viscount, afterwards Earl of Stair, who had acquired some collateral titles, sold the lands, property and superiority to James Dalrymple, afterwards designed of Dunraggat.

The Lady Barholm, in the right of an adjudication led by her predecessors in 1691, against Alexander Baillie of Dunraggat, pursued an action of mails and duties of the lands of Dunraggat in 1734; in which action compearance was made for James Dalrymple, who pleaded his exclusive titles, and was overruled; but as *inter alia* he had in his person some preferable debts, the Lady Barholm let the matter lie over, till now, that she believed these debts to be satisfied by intromission.

Having now renewed her process, James Dalrymple repeated a reduction of the former decree, obtained by the Lady Barholm, upon certain informalities. And supposing access to it, in point of form, this question *inter alia* occurred in point of law, How far the interlocutor finding the decree of declarator at the Viscount's instance void and null, in respect of the conventional duplication of the feu-duty, was agreeable to law.

It was *argued* for Dunraggat, That the conventional and the legal irritancy not being *ad idem*, they both subsisted. But the COURT was of opinion, that both could not subsist, as such could not be supposed to have been the intention of parties; and that wherever there is a conventional irritancy, the same is understood, though not expressed, to supersede the legal; and accordingly " Adhered to that interlocutor in the decree 1734," but remitted some other points to the Ordinary.

*Fol. Dic. v. 3. p. 337. Kilkerran, (IRRITANCY.) No 3. p. 298.*

No 18.

Where there is a conventional irritancy, it is understood, (though not expressed), to supersede the legal irritancy.