of his tack duty, during the space of a year, it should expire, and that without any declarator. Yet the LORDS found it behoved to abide a declarator. No 60.

Fol. Dic. v. 1. *p.* 488. *Spottiswood*, (REMOVING.) *p.* 283.

1664. *December* 1. EARL of SUTHERLAND *against* HUGH GORDON.

No 61.
Irritancy of a feu found purgeable at the bar, if the declarator proceeded upon the act 250. parliament 1597; but if upon an agreement between parties, not purgeable.

THE Earl of Sutherland pursues a declarator against Hugh Gordon, his vassal, that his right being holden feu, two terms have run into the third, and thereby the right is extinct, not only by the act of Parliament, but by a particular clause in the defender's infeftment, at least in the disposition whereupon his charter and sasine proceed. There is also called an appriser, who *alleged*, that he being a singular successor, and a stranger to his author's rights, during the legal unexpired, is not obliged to possess, and cannot amit his right by his author's fault, or by his own ignorance.

THE LORDS having considered this case, and reasoning amongst themselves upon the difference of a clause irritant in an infeftment feu, and the benefit of the act of Parliament, they found, that if the pursuer insisted upon the act of Parliament, the defender might purge the failzie, by payment at the bar; but if he insisted upon the clause in the infeftment, it behoved to be considered, whether that clause was in the real right by the charter and sasine, either specially or generally, under the provisions contained in the disposition; or, if it was only in the disposition,

In which case, though it might operate against the vassal, or his heirs, yet not against the appriser, unless the sasine had been immediately upon the disposition; in which case, the disposition serves for a charter.

And therefore ordained the pursuer to condescend, and it is like, that in favours of the appriser, being a stranger, they would suffer him to purge at the bar, *utcunque* in this cause, it was not found necessary to cite all parties at the market-cross, albeit the letters bear so. See PERSONAL and REAL.

Fol. Dic. v. 1. *p.* 488. *Stair, v.* 1. *p.* 233.

1665. *February* 16. HELEN HEPBURN *against* ADAM NISBET.

No 62.
A tack found null without declarator, in consequence of a conventional irritancy, which was not allowed to be purged.

HELEN HEPBURN pursues Adam Nisbet to remove from a tenement in Edinburgh, who *alleged absolvitor*, because he had a tack standing for terms to run. It was *replied*, that the tack bore expressly, if two terms run in the third unpaid, the tack should expire and be null, *ipso facto*, without declarator. It was *answered*, that notwithstanding clauses so conceived, the Lords have been accustomed to put them to declarator, in which case, they have the privilege to purge the failzie at the bar, and if need be, the defender will now purge.

No 62.

The Lords found the reply relevant, in respect of the conception of the clause, and would not suffer the defender to purge; for albeit in declarators against feus, *ob non solutum canonem*, the Lords will suffer the defenders to purge at the bar, when the pursuit is upon the act of Parliament, yet they will hardly suffer them to purge where that clause irritant is expressed in the infeftment; so proprietors may pursue their tenants for failing to pay the duties of their tack, and to find caution in time coming, else to remove, when there is no such clauses irritant, and then they may purge; but when the clause irritant is expressed, there is far less reason they should have liberty to purge in tacks than in feus, where the penalty is much greater.

Fol. Dic. v. 1. *p.* 488. *Stair. v.* 1. *p.* 271.

*** Gilmour reports this case.

In an action of removing pursued at the instance of Helen Hepburn against Adam Nisbet, writer, there was a defence proponed upon a liferent tack. It was *answered*, That the tack was null, bearing, that in case two terms duties should run in the third unpaid, it should be null, without declarator; but so it is, the defender hath failed. *Replied*, That such clauses irritant are never sustained without a declarator of the failzie. *Duplied*, That though it were so in matters of heritage or great importance; but when a dwelling-house is set so, with a clause irritant for sure and precise payment of the mail, it is no reason to prejudge the setter of the liberty of her own house, if the tacksman fail in due payment of the mail; and in law and reason, the setter should not be put to a pursuit of declarator in such a case.

The Lords repelled the allegeance and reply, in respect of the answer and duply.

Gilmour, No 142. *p.* 102.

1675. *July* 14.

Old College of Aberdeen *against* The Earl of Northesk and Others.

No 63.
Where the defender has a probable ground of ignorance, tho' it be *ignorantia juris*, he is admitted to purge at the bar, upon payment of damages.

In *anno* 1612 there was a tack granted by some of the Masters of the College of Aberdeen, of the teinds of certain lands, for 50 years, for payment of L. 54, and containing these clauses, That if the tack-duty were unpaid for a year, then they should pay the double; and if for three years, that the tack should expire and be null. In *anno* 1618 the tack is prorogated for several 19 years, by the Commission for plantation. The right of the tack is now come in the person of the Earl of Northesk and others, who have right to several parts of the lands, and therewith to the teinds. The College pursues reduction of this tack; and did first insist on this reason, that it was granted *a non habentibus potestatem*, being only subscribed by a few members of the College, and not by