mam et intellectum stipulationi conventionali, et semper tenendum est; quod ait Prætor, L. 7. § 7. D. De pactis; and so the failzie that was made by reason of the clause irritant *in pacto convento post caducitatem* could not be purged by any offer thereafter, except the parties would assent to the same; and, as was reasoned among the Lords, albeit in feus and heritable titles, the Lords are loath to retreat and reduce the same, *et aliquando oblatione, consignatione, et deposito, purgationem moræ admittitur*; yet into tacks and assedations, when any clause irritant of not payment is inserted in the same, they decern according to the same, *et instar mentem contrahentium*; *nam de jure et praxi nostra*, all tacks are *strictissimi juris*. THE LORDS found, by interlocutor, that by reason of the clause irritant *non obstante obligatione et moræ purgatione* the tack fell. No 56.

*Fol. Dic. v.* 1. *p.* 488. *Colvil, MS. p.* 412.

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1587. *March.* BISHOP of ORKNEY *against* SINCLAIR.

THE bishop of Orkney pursued one Sinclair to hear and see a tack of certain teind sheaves set by him to be reduced by reason of a clause irritant, that if the conductor, by the space of 40 days after the term, failed in not payment, the tack should expire. It was *answered*, that the most the bishop could crave owing to him, was but the payment of one term, and so *de æquitate potuit purgari hæc mora*, and it was a hard manner, *et summum jus, quæ fuit summa injuria* to reduce a nineteen year's tack for not payment of one term. The matter being reasoned among the Lords, some were of opinion *ut supra, quod contractus en conventione legem arripit, est in conventionibus in quibus dies et pœna adjecta est, non admittitur purgare moram*; *L.* 84. *D. De verborum obligationibus*; *et supra inter Pluscardine et Sheriff of Murray* No 55. p. 7225., and so by reason of the clause irritant expressed in the tack, the party could not be heard *ad purgandam moram*, albeit it was but *mora modica*; nevertheless, the LORDS would not the tack should reduce. No 57.
A tacksman was allowed to purge at the bar, where it was pactioned that the tack should be null upon failure of payment of a single year's rent.

*Fol. Dic. v.* 1. *p.* 488. *Colvil, MS. p.* 424.

*** The like was decided 9th March 1611, Seaton against Seaton, No 15. p. 7184.; and 26th July 1678, Pourie against Hunter, No 145. p. 2685., *voce* COMPENSATION.

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1605. *June* 7. WARDLAW *against* HEPBURN.

WARDLAW of Curriehill pursued the Laird of Riccarton to hear and see his feu farm infeftment of Riccarton, held by the said Patrick Hepburn of the No 58.
The statutable irritancy *ob non solutum canonem* found not

No 58.
purgeable, the offer being made long after raising the declarator.

said William Wardlaw reduced for not payment of the feu duties therein contained, for the space of three or four years, conform to the act of Parliament made thereanent. It was *excepted*, That he ought to be assoilzied, because this pursuit not being upon a clause irritant, contained in the infeftment, nor in the King's property, but *inter privatos* upon the act of Parliament, which is relative to the law, civil and canon, of the law *licet purgare moram ante litis-contestationem*; likeas, the defender offers instantly to pay all bygones. It was *answered*, That this summons being founded *super provisione legis*, and there neither being payment made, nor any real offer, by the space of six years, the pursuer could not now be compelled to accept any such offer, not only after the expiring of so long time, but after the dependence of this so long a plea, seeing the summons was intented in *anno* 1602, and never an offer made before this day. The Lords having reasoned whether the oversight might be purged *ante litem contestatam, vel ante litem intentatam, vel ante diem comparationis*, they thought it meetest in this case to repel the allegeance, in respect of the state of the process, and that there was no offer made neither before the action, nor sinsyne, during so long dependence till this time.

*Fol. Dic. v.* 1. *p.* 488. *Haddington, MS. No* 802.

No 59.
Found, that a conventional irritancy might be pleaded by way of exception without declarator.

1622. *July* 16. Donaldson *against* Tenants.

In the action pursued by James Donaldson and Gilbert Kirkwood against the Tenants of Killeth, for removing; the tenants, and Mr Simon Ramsay who was infeft, *alleged*, that the pursuer could have no action to remove them upon his infeftment, because when the pursuer obtained his infeftment, he had set a back tack to the granter of the wadset, from whom they had right; albeit it contained a clause irritant, yet it required a declarator of the failzie before they could remove the tenants. The pursuer *answered*, That the back tack bears an express provision, that in case the tacksman failed in payment of the duty, the tack should expire and be null, without declarator. The Lords found, that in contracts of that nature, where the clause of nullity was consented to have effect without declarator, that they might be received by way of exception or reply without declarator.

*Fol. Dic. v.* 1. *p.* 488. *Haddington, MS. No* 2651.

No 60.

1628. *July* 4. Laird of Sauchy *against* His Tenants.

In a removing pursued by the Laird of Sauchy against his Tenants, *alleged* for one of the defenders, That he had a tack of the same lands, for terms to run the time of the warning, set to him by the pursuer. *Replied*, That tack contained an irritant clause, that in case the defender should fail in payment