

1629. *March 18.*BARCLAY *against* STEVENSON.

No 12.

A CREDITOR having obtained infeftment of his debtor's lands, and having set a back-tack again to him, during the not redemption, with a clause irritant, that if the duty of the back-tack be unpaid two years, the same and the reversion should expire; upon the which failzie, declarator being sought, another creditor compearing alleged absolvitor, because the years libelled, whereon the failzie alleged was committed, the pursuer's self possessed an house of the lands set in back-tack; the mail of which house, as was used to be paid therefor the years before the pursuer's occupation, extended yearly to L. 10, whereby the pursuer must be counted to have received payment of a part of the said back-tack duty, and a part being paid for the years libelled, the failzie cannot be counted to have been committed, seeing the whole duty rested not owing. This exception of partial payment, and this manner of payment, viz. by occupation, was found relevant to elide the declarator; and also, it was found relevant to be proved by witnesses, and nowise necessary to be proved by writ.

Clerk; *Hay.**Fol. Dic. v. 1. p. 484. Durie, p. 438.*

* * * Kerse reports this case :

1630. *July 22.*

FOUND that payment of a part years excludes a clause irritant for not payment of the tack-duty. *Item*, Find compensation of a part extending to L. 10, offered now of the sub-tack of a part of the tenement bruiked by the wadsetters relevant to exclude, albeit the tack-duty was ——— years.

Kerse, MS. fol. 109.

* * * Auchinleck reports the same case :

ALEXANDER BARCLAY is infeft in a tenement in Stirling by one Stevenson, redeemable upon the sum of L. 1000. Alexander sets back the tenement to Stevenson for payment of L. 100 per year. There was a clause irritant contained in the back-tack, that if two terms run in the third, both the reversion and the back tack should expire. After failzie is committed, Alexander Barclay pursues a declarator of the expiring of the reversion and the back-tack; compears another creditor, who likewise was infeft in the said tenement, and to stay the declarator, alleges the reversion and back-tack could not have been declared to have fallen by the alleged failzie, because the pursuer had a tack of a fore-booth of the said tenement set to him by Stevenson before the wadset for payment of L. 5 termly, whereof he was in possession; and seeing the said mail of the fore-booth was unpaid and retained by the pursuer as a part of the

- No 12. duty of the back-tack, all the terms wherein the failzies are alleged to have been omitted, he cannot seek declarator of the failzie, seeing a part of the back-tack duty was paid termly by the said mails of the fore-booth, which the Lords found relevant.

Auchinleck, MS. p. III.

- No 13. 1680. July 27. The EARL OF MARR *against* FRASER of Techmurie.

THE LORDS found a clause irritant in a feu *ob non solutum canonem* not incurred by many years rests, but allowed a time to pay and purge, because the *reddendo bore si petatur*, and it was never demanded till this declarator and reduction.

Fol. Dic. v. 1. p. 484. Fountainhall, MS.

- No 14. 1683. November 29. Sir ANDREW DICK *against* ———.

‘ THE LORDS found, a back-tack in a wadset-right became null, and (irritancy) incurred through not payment of the back-tack duty by the space of two years together, like a feu by the 250th act of Parliament 1597; though it contained not the usual clause irritant, that in case two terms run in the third unpaid, then it should expire; and found that irritant clause equally inherent *de jure* as if it were expressed; but found it purgeable at the bar, or before extracting, by paying the bygone back-tack duties.” The Lords sometimes now allow them to be instantly purgeable, even where the writ contains an express clause irritant *in gremio*. They had decided the same with this before in the case of tacks, where two years duty runs in the third unpaid.

Fol. Dic. v. 1. p. 483. Fountainhall, v. 1. p. 246.

SECT. II.

Conventional Irritancy *ob non solutum canonem*.

- No 15. 1611. March 9. Mr GEORGE SETON *against* His Brother JAMES.

IN the action pursued by Mr George Seton against his brother James for reduction of his tacks *propter non solutum canonem*, the LORDS found *quod moro*