No 62.
failure of payment. Although he had raised inhibition, he did not come in the place of the principal.

reduced, (it being reduced for not production, and in absence of the party, and this sub-tacksman not being called to that reduction) that was found no ground wherefore the sub-tack should fall, seeing it was subscribed, and consented to by the pursuer, and so who could not be prejudged by that decreet, whereto he was not called, and who could not be mis-known by the pursuer, if he had intended that the sub-tack should fall, having consented thereto; and sicklike the failzie of the clause irritant, contained in the sub-tack, was not any reason competent to this pursuer, who had consented to the sub-tack, wherein he was astricted to pay his duty to the setter of the sub-tack, and not to the pursuer, which setter quarrelled not the defender upon the said failzie; and this was so found, albeit the pursuer *replied*, in fortification of the reason, That by the reduction of the principal tack, and by serving of inhibition since, at the pursuer's instance, upon the teinds contained in the tack, the pursuer was become in the place of the principal tacksman, whose right was taken away by the said reduction, and the pursuer thereby had devolved in his person all the right to the teinds, which the principal tacksman had, and that consequently the right to the duty addebted by the tacksman belonged to the pursuer, and the defender ought to have paid the same to him, especially seeing the inhibition foresaid, served at the pursuer's instance, was intimated to this same defender, in so far as he had intented thereupon action of spuilzie of these same teinds against the excipient; from the which albeit the defender obtained absolvitor, in respect of an exception proponed by him, founded upon this sub-tack then standing, yet the same was of that force to make it known to the defender, that the pursuer had right to the duty of the sub-tack, and that he ought to have paid the same to him, for eschewing of the clause irritant; it being of verity, that at no time sincesyne, nor since the intenting of this action (there being diverse terms past since the raising thereof) the defender hath never offered, nor paid his duty of his sub-tack to the pursuer; all which was repelled, and absolvitor given, as said is; for the LORDS found, that the pursuer could not seek declarator upon the failzie of the sub-tack, except first that the pursuer had obtained it declared, that the right of the duty thereof was established in his person, as succeeding in the place of the principal tacksman, and that the defender ought to pay the same to him. See RES INTER ALIOS.

Act. *Stuart* & *Neilson*. Alt. *Scot*. Clerk, *Scot*.

*Fol. Dic. v.* 1. *p.* 522. *Durie, p.* 245.

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1630. *March* 24. MURRAY *against* the COMMISSARY of DUNKELD.

No 63.

In a special declarator of the Commissary of Dunkeld's escheat, pursued by Mr Patrick Murray, the defender proponed an allegeance upon the ordinary back-bond given to the treasurer by the donatar, which bore, that he should

not use the gift to the prejudice of the rebel's creditors. This the rebel *alleged* might be proponed in his own name, as well as in the creditors, seeing he was interested to see his creditors rather paid by his own escheatable goods, than that the donatar should meddle therewith, and then the creditors should have recourse to his lands or his person. THE LORDS repelled it as not competent to be proponed in the rebel's own name, 23d March 1630.

No 63.

Next, because the donatar craved three or four year's crops of land laboured by the rebel since the rebellion, the LORDS deducted the expenses bestowed by him upon the winning of the corns, with the seed likewise.

*Spottiswood*, (ESCHEAT.) *p.* 103.

*** See Durie's report of this case, No 11. p. 3622. *voce* ESCHEAT.

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1631. *February* 10. EARL of GALLOWAY *against* BURGESSES of WIGTON.

No 64.

ONE infeft feu in lands, which pertained once in burgage to a town, pursuing a removing against some burgesses, it was *objected*, That his title was null, by the 36th act, Parliament 1491, and by act 185th, Parliament 1593, which statutes, that the burghs may not set their common-good for longer space than three years. This was repelled, seeing neither the town, nor any party having better right, challenged the title.

*Fol. Dic. v.* 1. *p.* 522. *Durie.*

*** This case is No 21. p. 7193. *voce* IRRITANCY.

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1637. *March* 28. HAMILTON *against* TENANTS.

No 65.
Nullity of a gift of escheat, as taken for the rebel's behoof, sustained not only in favour of the one at whose instance he was denounced, but in favour of his other creditors.

JOHN HAMILTON apothecary, being confirmed executor creditor to umquhile John Glendinning of Drumrash, pursues the Tenants of the said Drumrash's lands, for payment of their duties to him of certain years, resting unpaid before Drumrash's decease; wherein it being *alleged* for William Glendinning of Lagan, That he had intromitted with these duties by tollerance of John Glendinning of Perlan, who was donatar to the escheat and liferent of the said John Glendinning of Drumrash, and who had obtained general declarator thereon; and it being *replied*, That that gift of escheat must be presumed to be simulate, in respect of the act of Parliament 1592, whereby all such gifts are declared simulate and null, where the rebel remains in possession of the lands, and goods, &c., and true it is, that this rebel remained in possession of his lands and goods peaceably, and continually all the years after the gift and declarator, by the space of diverse years, and ay and while this year controverted, and of which year the duties are yet in the tenants hands unuplifted; and the de-