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

those who had power by the foundation; and the defenders having proponed the defence of prescription, viz. that albeit the tack had been defective *ab initio*, yet they and their authors having bruiked the teinds thereby, by the space of 40 years without interruption, all action for quarrelling the said tack is prescribed by the general clause of the act of prescription 1617, cap. 12. providing that whatever right is clad with possession 40 years, that all action for quarrelling the same is excluded. No 63.

Which defence the Lords sustained.

The next reason insisted on, was, that the tack contains a clause irritant, which is incurred by twelve years failing to pay the tack-duty, and thereupon craved the tack to be annulled, at least in time coming, and to have the double of the tack-duty for the years by-gone, conform to the provision of the tack. Upon which reason the defenders having offered to prove that the tack-duty was paid, they succumbed in probation, but now they offer to purge, before sentence, by payment. The pursuers *alleged*, That clauses irritant in tacks were valid, and being incurred, could not be purged; for though the irritancy of feus, *ob non solutam canonem*, by the feudal customs, and the act of Parliament, hath been by custom found purgeable at the bar, yet where the irritancy is *ex pacto* in the feu, the same hath not been found purgeable, much less ought express clauses irritant in tacks be purged; for feus are presumed to be granted for a just price, and therefore the failzie is most exorbitant by the loss both of the land and price: but in tacks the damage is nothing so exorbitant, for as the setter recovers what is set, so the tacksman is free of the tack-duty; and therefore such irritancy hath never been found purgeable by any decision, but on the contrary, several decisions both old and late were produced against purging of such irritancies. It was *answered*, That albeit clauses irritant, in feus, tacks, and other rights, be of their own nature valid, and that *pacta legis commissariæ in pignoribus* be reprobated by the civil law, yet the Lords, by an act of sederunt, have declared, that in pactions of parties, they will judge according to the agreement of parties, without exceptions of clauses irritant in wadsets; yet the Lords being a Sovereign Court, having *officium nobile*, they may *ex nobile officio* modify and retrench the exorbitancy of penal agreements, as they every day do in the cases of liquidated penalties of parties, which though liquidated by consent, excluding all objections and exceptions, yet if they be grievous and exorbitant far beyond equity and the interest of parties, the Lords may and do modify and restrict them *secundum bonum et æquum*; upon which ground it is that in irritancies of feus by the act of Parliament, the Lords have allowed parties before sentence to purge by payment of the feu-duties *cum omni causa*; and albeit irritancies *ex pacto* in feus, have not been found purgeable at the bar, the vassal having put his superior to a process therefor, and having contumaciously stood out to the last, because otherways such clauses expressed would have no effect; for by the act of Parliament alone, the feu would become null, if not

No 63. purged at the bar; yet where contumacy appears not, the Lords would allow even irritancies expressed in feus to be purged, as if the vassal should pay, or offer, and consign when the feu-duties were required, either by instrument or requisition or citation; or if there were *justa excusatio ignorantiæ*, as if an appriser being infeft in feu-lands, containing a clause irritant in the old infeftments, should fail in three years payment before he saw or knew the old infeftments; yea even if an heir so failing should depone that he did not see nor know his predecessor's infeftments; and therefore albeit clauses irritant in tacks be ordinarily effectual, yet upon the same ground, if an exorbitant loss arise thereby to the tacksman, as when he pays a great grassum, and hath not by his possession recovered satisfaction, the Lords *ex nobili officio* would restrict the exorbitancy of the penal clause, or if there were *excusatio probabilis ignorantiæ*; both which occur in this case, for this tack bears to be granted 'for sums of money,' which after so long a time cannot be known as to the quantity, and therefore must be presumed equivalent to the ease then obtained according to the value of the teinds as they then were, above sixty years ago. 2*do*, There is here a probable ignorance in the defenders, for they having but parcels of this teind, might very well be in doubt, whether they were liable for any more of the tack-duty but their proportional part, which was neither divided nor liquidated, and so they could not know what to pay. It was *replied*, *Ignorantia juris neminem excusat*, they might and should have known, that whosoever sets lands or teinds, hath all the possessors subject to his payment, not *pro rata*, but *in solidum*, in so far as the value of their possession extends. It was *duplied*, That this is questionable, and though it were true, it is in *apicibus juris*, in which *ignorantia juris excusat imperitos*.

The Lords found, that there being a probable ground of ignorance, the defenders might be admitted to purge at the bar, by payment of the whole tack-duty and damages; in place whereof they allowed the double of the tack-duty to be paid, according to the first clause of the tack; but would not admit any of the defenders to purge *pro rata*, but by payment of the double of the whole tack-duty. See Prescription.

Fol. Dic. v. 1. *p.* 488. *Stair, v.* 2. *p.* 344.

*** Gosford reports this case.

In a reduction at the instance of the King's College of Aberdeen against the Earl of Northesk, the Laird of Thornton, Tutor of Craigievar, and others, of a tack of the teinds of the barony of Thornton, for payment of L. 54 Scots, yearly, and 40 merks to the minister of the parish, and of a decreet of the commission of platt, prorogating the said tack for five nineteen years after expiration thereof in *anno* 1618, in consideration of an augmentation of L. 19 granted to the minister; the first reason *insisted* on being, That the tack was made and granted only by three members subscribing, and prebends of the College, whereas, by the

foundation of the prebendary and College, there ought to have been at least five of their number;—it was *answered*, That the tack being set in the year 1612, and prorogated, as said is, by a decreet of platt; and the defenders and their authors having been in peaceable possession above 60 years, their right is prescribed, and cannot be reduced.—It was *replied*, That prescription cannot run against an university, who cannot be wronged by the deed of any members contrary to the foundation.——THE LORDS did sustain the defence, upon prescription founded upon the act of Parliament, wherein there was no exception of colleges or universities.—The second reason *insisted* on was, That the tack did contain a clause irritant, that if the tacksmen should fail in payment of the tack-duty at St Bartholomew's day, yearly, or at the least 40 days thereafter, that they should be liable for double of the tack-duty, and if two terms payment should run in the third, that then the tack should be void and null; but so it is, that now they have been deficient for the space of twelve years, and so both the tack and prorogation thereof, as being only accessory thereto, ought to be reduced as void and null.—It was *answered* for the defenders, That the tack could not be reduced upon that reason, nor the double of the feu-duty decerned; because, that for any bygones, the defenders had made offers thereof, and were content to consign and purge at the bar, which was sufficient to free them from a clause irritant, which could only have been craved upon the account of failzie. And the Lords have been not only constantly in use to find so in failzies of contracts and bonds, but in reversions bearing irritant clauses. Likewise, where reductions were founded upon the act of Parliament reducing feu holdings *ob non solutum canonem*, by the space of two years, notwithstanding thereof the Lords did constantly sustain the offer to purge at the bar; and by a late decision, in *anno* 1669, after a declarator pronounced in a case betwixt George Dallas and the Lord Strathnaver *, the Lords did allow the defender to purge upon present payment; as likewise, in a case of Paterson against Sarah Logan, it was found, that a clause irritant in a reversion was purgeable at the bar in *anno* 1657*.—It was *replied*, That the irritant clause being committed in this case, which is betwixt the granters of a tack and tacksmen, is far different from any case of reversion or feu charter, or of bonds or contracts bearing only a clause irritant in case of not payment or performance at a certain day; likeas the Lords, by many decisions, did find clauses irritant not purgeable, as appears in Durie's Practiques, the 19th March 1631, in a case Scott against Dickson, No 40. p. 7203. where the Lords did declare by an act of sederunt, That a clause irritant in securities betwixt parties was not purgeable; and my Lord Haddington in his Practices, Murray of Philiphaugh against the Countess of Winton and Sir James Durham, and several others *. The Lords did long debate amongst themselves in this case, and agreed, that in the case of tacks betwixt the granter and the setter, or their heirs, clauses irritant are not

No 63.

* Examine General List of Names.

No 63. purgeable; but this case being betwixt the representatives of a college and singular successors, to the lands of Thorntoun, who were tacksmen, and that the whole barony was now divided amongst the heritors, whose several proportions and quots were never yet determined, they found, That the offer of full payment was yet receivable, if it were really performed within a few days, and that it ought to be done by all the defenders, or some of them, if they could not agree upon their several proportions; as also they found, that they were liable for the double of the tack-duties, notwithstanding of any offer now made, there being so many years deficient, and so for bygones were liable to the double of the tack-duty.—It being further *alleged*, That the first tack being expired in *anno* 1617, and that they possessed by virtue of an act of prorogation of the committee of platt, which was a decreet of Parliament, and did bear neither clause irritant nor double of the tack-duty;—it was *answered*, That the decreet of prorogation did not extinguish the same; so that the granters of the tack ought to have the benefit of all years therein contained, during the whole years of the prorogation.

Gosford, MS. No 779. p. 488.

1682. *November.* PHIN *against* PHIN.

No 64. THE LORDS sustained a declarator for finding a tack null, *ob non solutum canonem*, although the tack wanted a clause irritant, unless the tacksman would purge by payment of the tack-duty betwixt and a certain day, and find caution for payment thereof in time coming.

Fol. Dic. v. 1. p. 488. Sir P. Home, MS.

*** This case is printed by mistake, No 288. p. 6076. *voce* HUSBAND and WIFE.

1683. *November* 29. DICK *against* ——.

No 65. A LEGAL irritancy of a tack, *ob non solutum canonem*, found purgeable at the bar, or before extracting, by payment of the bygone tack-duties.

Fol. Dic. v. 1. p. 489. Fountainhall.

*** This case is No 14. p. 7184.

The like was decided, 29th January 1729, Duke of Roxburgh against Ker. See APPENDIX.