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

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.