could give him no action; because his umquhile father, to whom he was as nearest and lawful air retourit, renuncit all right, interest, and title, that he had to the said lands; for the truth was, that the lands being wadset to him be the Earl of Huntly, and his brother, and Patrick Gordon, the lands were lawfully redeemit frae him, and he renuncit all right, title, and interest, that he had to the said lands. It was *replied*, and the persewar offered him to prove, That if any such renunciation was made, it was done *metus causa*; and the persewar deduced the matter *cum variis circumstantiis metus qui potuit cadere in constantem virum*. It was *duplied*, That he could not be heard by way of reply to allege *metum et quod metus causa fuit factum facta hac renunciatione et præcipue contra tertiam personam qui vim aut metum non intulit* whilk was the tenants: Nor yet could the persewar be heard to allege the same against the Earl of Huntly, his infeftments and renunciations standing unreduced. To this was *answerit*, That, conform to the law and daily practic, the exception, *quod metus causa*, will be ay refused be way of exception *et de jure, prout in L. quod metus causa est actio in rem scripta nec solum personam vim facient reducet, sed adversus omnes restitui velit quod metus causa gestum est*; and the persewar, be way of reply, not only persewed the Earl of Huntly *qui vim et metum intulit*, but also the tenants and possessors of the ground.——THE LORDS fand be interlocutor, that *exceptio quod metus causa gestum fuit* might come in be way of exception or reply, conform to the act of Parliament, whereby nullities are ordained to come in by way of exception or reply, and therefore ordained the persewar to qualify his reply *quod metus causa* in writ, and the defenders to answer the same. No 49.

*Fol. Dic. v. 1. p. 173. Colvil, MS. p. 469.*

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## SECT. XII.

### Irritancy how Proponable.

1629. *January* 29. STEVENSON *against* BARCLAY.

No 50.
Found that a back-tack with a clause irritant of two years running in the third, could not be taken away by exception, but behoved to abide a declarator.

BY contract between Robert Stevenson and Alexander Barclay, Robert disponed to Alexander a tenement in Strivling redeemable upon 1400 merks; and, during the not redemption, Alexander set a back-tack to Robert for 140 merks yearly. Alexander, having caused registrate the contract, raised a charge of horning thereupon against Robert, which he suspended. The charge was, to enter him to the possession of the house disponed. The reason of suspension was upon the back-tack during the not redemption. To this *answered*, That

No 50.

the back-tack was expired, in so far as it contained a clause irritant, if two terms should run in the third. *Replied*, This back-tack could not be taken away so, before it were declared expired. The Lords found it behoved to abide a declarator.

*Fol. Dic. v.* 1. *p.* 174. *Spottiswood*, (Tack) *p.* 327.

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1631. *June* 29. Boswel *against* Tenants.

No 51.
In a case similar to the above, the Court found the pursuit of removing equivalent to a declarator of irritancy; the defender not offering to purge by payment of bygones.

David Boswel of Auchinleck being heritably infeft in the lands of Sundrum, by the Lord Cathcart, convened the tenants for payment of the farms thereof, for the years 1629 and 1630. *Alleged* by the Lord Cathcart, compearing for his interest, The tenants should not pay the duties to the pursuer, because any infeftment he had, proceeded on a contract, containing a back-tack of the said lands during the not redemption of 8000 merks, for payment of 800 merks to the pursuer by the Lord Cathcart, in respect whereof the farms belong to him. *Replied*, That ought to be repelled, in respect the back-tack contains a clause irritant; that, if two terms should be unpaid together, the back-tack should expire, and it should be lawful to the pursuer to intromit with the saids duties, without any farther declarator.——The Lords repelled the exception in respect of the reply, and found the pursuit equivalent to a declarator; and this was because the defender never offered to purge the bygone failzie by payment of all that was owing.

*Fol. Dic. v.* 1. *p.* 174. *Spottiswood*, (Tack) *p.* 328.

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No 52.
Declarator of the nullity of bonds to creditors by a fiar in tailzie sustained without a reduction.

1662. *January* 21. Laird Balvaird *against* Creditors of Annandale.

The Laird Balvaird, as heir of tailzie to David Viscount of Stormont, in the lands of Skun, pursues the heirs of line of the said David and Mungo Viscount of Stormont, and several their creditors; libelling, That, by an infeftment of tailzie of the saids lands, made by the said David Viscount of Stormont, it is expressly declared and provided, that none of the heirs of tailzie shall do any deed prejudicial to the tailzie, or contract debt, whereby the tailzie may be altered, otherways the debt so contracted shall be null, and the contracter shall *ipso facto* lose his right of property, which shall belong to the nearest person of the tailzie; and subsumes that the late Earl of Annandale, last heir of tailzie, contracted debts which might affect the saids tailzied lands; and concludes, that it ought to be declared, that thereby he incurred the clauses irritant in the tailzie, and lost his right of property, and that all the bonds contracted by him, and apprised upon, are null, *quoad* these lands; and that the pursuer, as nearest heir of tailzie, may enter heir in these lands to David and Mungo Viscounts of Stormont, and enjoy the same free of any debt contracted since the tailzie.