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.

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.

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.

The creditors *alleged* no process to annul their bonds and apprising *hoc ordine*, by way of declarator, but the pursuer must *via ordinaria* reduce; in which case the creditors will have terms granted them to produce the writs called for to be reduced; which privilege being in their favour, ought not to be taken from them in this extraordinary unformal way.——THE LORDS repelled the defence, and sustained the summons; in respect there was no bond craved to be produced, or simply reduced; but only that any bonds granted to the defenders since the tailzie are null, and all following thereupon, as to the lands in tailzie, which is no more than that they affect not the lands in the tailzie; and there is no necessity of reduction but where the writs must be produced before they can be reduced; and even in that case, if the pursuer satisfy the production himself, the defender hath no delay; and here the pursuer produces all that is necessary, and craves the rest to be declared null in consequence.

THE LORDS sustained the summons.

Fol. Dic. v. 1. p. 174. Stair, v. 1. p. 85.

No 52.

1666. *November 7.* THOMAS CANHAM *against* JAMES ADAMSON.

No 53.
A father having disponed a subject to his daughter under an irritancy; in this case, considered to be favourable for the disponer, the irritancy was allowed to be declared by exception.

JAMES ADAMSON having disponed a tenement to Joseph Johnston, who married his daughter, in conjunct fee, and the heirs betwixt them, which failing, to divide between their other heirs; in the disposition there was expressly this clause, providing that the said Joseph, and his foresaids, make payment to the said James Adamson, or any he shall name, the sum of L. 600, wherein, if he failzie, the said right and disposition shall expire *ipso facto*. In the infeftment the former clause was repeated, but not the clause irritant. This Canham apprises the land from Joseph Johnston, upon Joseph's debt, and being infeft, did pursue James Adamson for removing, who, objecting the proviso, was notwithstanding decerned to remove. Now he pursues for the mails and duties during his occupation. James Adamson alleges that he ought to have the L. 600, because he had disponed with that provision. It was *answered*, This was but personal to pay, and could never oblige a singular successor; and all the pursuer could do was to proceed upon the clause irritant by way of declarator.

THE LORDS, in the end of the last session, having only seen the disposition containing the said clause, but not the infeftment, repelled the defence, but reserved the declarator; but now having seen, that the proviso of payment was in the infeftment, the cause being so favourable, a person disponing to his own daughter, and goodson, and the disponer yet in possession, they did, without multiplying further process, sustain it by exception.

Fol. Dic. v. 1. p. 174. Stair, v. 1. p. 464.