No 8.
of the *salvo* at the end of that act, of all rights and securities in favour of private parties, as the feu was not confirmed, which ought to have been done.

might have confirmed it, and having neglected that remedy *tibi imputes*. *Replied*, There is a *salvo* in the end of the rescissory act, of all rights and securities in favours of private persons, under which this feu must be comprehended. *Duplied*, The reservation is only of the private acts past in these Parliaments in favours of particular persons, whom it was hard to prejudge, though the Parliament itself was *funditus* annulled *ob defectum auctoritatis*; and in the odious casuality of recognition, (yet more unfavourable than wards,) the LORDS found the acts taking them away did not defend after the restitution in 1661, unless the parties did apply to the Exchequer after that time, and get them confirmed, Pitreichie *contra* Geicht, *voce* RECOGNITION; 29th July 1672, Lord Halton *contra* The Earl of Northesk, IBIDEM; 12th February 1674, Kilsyth *contra* Hamilton, IBIDEM; and 7th January 1676, Cockburn *contra* Cockburn, IBIDEM. THE LORDS found, though Stobs' feu was granted *tempore licito*, yet the casualities now acclaimed being due after the rescissory act 1661, the feu became thereby null, and cannot defend, unless it had been confirmed. There was also another point decided in this cause, that Stobs, if he founded on the back-bond, must not take it by halves, but must either take it or want it altogether, and cannot accept a part, repudiating the rest; but, if he would have any benefit by it, he must take it as it stands.

Fol. Dic. v. 1. *p.* 296. *Fountainhall, v.* 1. *p.* 716.

1749. *February* 10.

NEIL MACVICAR, *against* COCHRAN of Hill and KER of Crummock.

No 9.
Clause in a vassal's charter, exempting from legal irritancies, makes part of his real right.

ALEXANDER CRAWFURD of Fergushill, feued out to James Cochran, the lands of Hill for a duty of L. 24 Scots, and relieving him of the teind and dry multure payable out thereof; disponing to him 'all and sundry the casualties of the 'said lands, that might fall or become in the hands of the superiors thereof, either as liferent-escheat, non-entry, or by contingency of not timeous payment of the feu-duties thereof, by and through the said James and his heirs 'and successors, being put to the horn the space of year and day, or through 'the heirs of the said James, or his foresaids, lying out unentered to the samen, after the death of their predecessors, or by not timeous payment of the 'said feu-duty.'

Dr Thomas Crawfurd of Fergushill, sold these lands to Neil Macvicar, writer in Edinburgh; 'assigning him to all feu-rights or contracts, redeemable or 'irredeemable, past betwixt him, his authors and predecessors, and James 'Cochran; and to the hail *reddendos* of the said rights, with the hail clauses, 'obligements and conditions therein mentioned, conceived in favour of him, his 'authors and predecessors, concerning the superiority and property of the said 'lands.'

Neil Macvicar pursued James Cochran, and James Ker of Crummock, his real creditor upon the lands, in a declarator of tinsel of the feu, *ob non solutum canonem;* who defended themselves on the quality of their right: And the LORD ORDINARY, 21st July 1748, 'repelled the defence.' No 9.

Pleaded in a reclaiming bill; The irritancy sought to be declared, is no natural consequence of superiority; it is no part of the feudal law, and was only introduced into ours by statute 1597, 'in the same manner as if a clause irritant 'were ingrost in infeftments of feu-farm:' It cannot be doubted that it might be stipulated, a failure for ten years should be necessary in order to irritate the right; and the irritancy may as well be effectually discharged. Clauses of this nature in a feu-charter were found effectual, 9th November 1748, Nasmith of Ravenscraig against Storie of Braco, *voce* HOMOLOGATION; in which indeed, it was pleaded, that the successor in the superiority was expressly burdened with the feu-right; but the general point was also argued; and the present case is similar in the specialty, the feu-contract with Cochran being assigned.

Answered; A feu cannot be so constituted as to be contrary to law, and subsist to the prejudice of a successor in the superiority. By the nature of feu-holdings, an irritancy is incurred by failing to pay the duty; and, it is no matter that this irritancy is peculiar to this country, and introduced by statute, as the feudal law is local. A feu cannot subsist without a duty; and it might as well be pleaded, that a duty might be constituted, but that it might be stipulated, there should ly no action of poinding the ground for recovery thereof. This case is not similar to that of Ravenscraig and Braco, where the superior's right was burdened with the feu-contract; but here, the contracts are assigned to the purchaser, in so far as conceived in the superior's favour.

THE LORDS found the clause in the defender's charter and sasine, exeeming him from the legal irritancy, *ob non solutum canonem*, was real, and therefore sustained the defence.

Act. *Lockhart.* Alt. *Miller.* Clerk, *Murray.*

Fol. Dic. v. 3. p. 206. D. Falconer, v. 2. No 53. p. 51.

1751. *July* 25. SALMON of Whin *against* The LORD BOYD.

No 10.
A clause in a feu-charter, 'that the feu-'duty should 'be doubled 'the first year 'of the entry 'of each heir, 'as use is, of 'feu-farm,'

THE estate of Linlithgow and Callendar being forfeited by that Earl's accession to the rebellion 1715, was disponed to the York-buildings Company, and by them set in tack to the Earl and Countess of Kilmarnock, and longest liver of them; as more particularly mentioned in the decision, 22d November 1749, Lord Boyd against the King's Advocate, *voce* FIAR.

The Countess surviving her husband, came to have right to the tack; in which she was succeeded by James Lord Boyd her son, whom Patrick Salmon of