

appears the fact was such as he found ; so that the irritancy had been then truly incurred ; and it was in such a case *ultra vires* of the Sheriff, to have assigned terms, *ex proprio motu*, for purging that irritancy. Nor could the offer and consignment made by Bennet's assignee, after extracting and executing the precept, stop the effect of the irritancy, which was already declared, even before the assignation was granted by Bennet, who had never offered, and was unable to pay. The decerniture to remove, contained in the interlocutor of the 15th of April, was altogether superfluous.

“ THE LORDS found the letters orderly proceeded, and decerned.”

For Sir James, *Rae.*

Alt. *Macquenn.*

Reporter, *Colston.*

N. B. As Bennet's bill of suspension had been passed by three Ordinaries, 'in respect of the consignment of the bygone rents found due by him,' a warrant on the clerk to deliver up the money to Sir James was afterwards demanded ; but as the money was proved to have belonged to Miles, who advanced it in expectation that his right to the tack would have been sustained, the Lords ordered it to be redelivered to him.

D. R.

Fol. Dic. v. 3. p. 338. Fac. Col. No 181. p. 322.

1761. June 30.

FINLAYSON and WEIR *against* CLAYTON.

THE Duke of Hamilton's commissioners set a tack of the lands of Potterhill, to Finlayson and Weir for nineteen years. The tack contained this clause :
 ' That in case two terms of the said tack-duty shall run into the third unpaid, in that case the present tack shall, at the option of the said Duke and his fore-saids, become thenceforth extinct, void and null, without the allowance of being purged at the bar.'

The Duke of Hamilton sold these lands to Clayton, and the tenants having incurred the irritancy, Clayton brought a process against them before the Sheriff for payment of three year's rent, and concluding that they should be decerned to remove in terms of the above clause. The tenants claimed some articles of compensation, and offered instantly to pay the balance. The Sheriff, after allowing these articles of compensation, found a balance due amounting to more than three terms rents, and decerned in the removing. The tenants presented a bill of advocation, which was taken to report.

Pleaded for the 'Fenants ; That immediately upon the balance being ascertained, they consigned the sum in the hands of the clerk of court, and offered to find caution for payment of the rents during all the years of the tack. That it is an established point in the law of this country, That the legal irritancy of feu-rights *ob non solutum canonem*, introduced by statute, may be purged at the bar : That it was found in a case observed by Lord Fountainhall, 23d March

No 68.

No 69.

A conventional irritancy in a tack, by which it was provided that it should not be allowed to be purged at the bar, found not to be purge-able.

No 69.

1686, Drummond against the Creditors of Hamilton, No 66. p. 7235. that a conventional irritancy in a feu-right may likewise be purged: That though there are several decisions to the contrary, the above case is certainly more agreeable to law. The end sought after by these irritancies, whether legal or conventional, is the same: They are introduced *in terrorem*, to compel the vassal to pay his feu-duty within a certain time. It is impossible therefore to discover a reason for making a distinction betwixt the legal and the conventional irritancy. The act 1597, c. 250. expressly declares, 'That vassals failing to make payment of their feu-duties for the space of two years, shall amit and lose the feu of their lands.' Notwithstanding these express words, the legal irritancy has always been allowed to be purged; and the same must be the law with regard to the conventional irritancy. Irritancies in tacks are upon the same footing. They are only intended to force the tenants to pay regularly; and if payment is made, it is all that can be desired. The legal irritancy may be purged at the bar, and the law must be the same with regard to the conventional irritancy; and so it has been found by some old decisions. The only question is, whether this can hold in the present case, where it is particularly provided, that the irritancy shall not be purgeable: And though in strict law the irritancy cannot be purged, yet the Court may give relief as a court of equity, especially as the tenants have consigned the whole of the rents due, and have offered to give security for regular payment in time to come.

Pleaded for Clayton; That the clause in question is most express; and as it is agreeable to law, there is no reason why it should not have its effect. Every man may renounce any right that is competent to him, and supposing this irritancy might have been purged at common law; yet, as the tenants have expressly renounced this privilege, they cannot now pretend to claim it.

Other similar clauses in tacks have their effect, and there can be no reason why that in question should not. A tenant must be warned to remove forty days before Whitsunday; and yet, if he has bound himself to remove without warning, he can be removed summarily; and the act of sederunt 1756 allows a charge of horning in such cases. That act too provides, that if the tenant shall allow two years rent to be in arrear, he may be summarily removed, and that irritancy is not allowed to be purged.

"THE LORDS found, That the irritancy could not be purged; and therefore refused the bill of advocation."

Reporter, *Lord Auchinleck*.
Clerk, *Pringle*.

For the Tenants, *Wight*.

Alt. *Lockhart*.

P. M.

Fol. Dic. v. 3. p. 338. Fac. Col. No 45. p. 98.