

“ THE LORD ORDINARY, in respect of the decree having been obtained *in foro contentioso*, repelled the reasons of reduction.” No 73.

And, on advising a reclaiming petition and answers,

The Court, considering the statute in question as still in force, and that, though irritancies, such as the present, might be purged at the bar, this opportunity had been here neglected, and could not be renewed, found themselves under the necessity of assoilzieing from the reduction, as the Lord Ordinary had done; but not without expressing regret, that it was not in the power of the Court to give relief to the pursuer.

A petition, reclaiming against this judgment, was appointed to be answered; but, upon being advised, along with the answers, it was refused.

Lord Ordinary, *Dreghorn.* Act. *Honyman.* Alt. *Craig, A. Campbell, Jun.*  
Clerk, *Gordon.*

*S.* *Fol. Dic. v. 3. p. 339. Fac. Coll. No. 221. p. 465.*

## SECT. VII.

### Irritancies in Feus, Tacks, and Rentals, how purgeable.

1566. *January 22.* The ABBOT OF KILWINNING against N.

No 74.

THE Abbot of Kilwinning pursued N. to remove from certain lands, which he was rentalled in by the pursuer, with provision, that, if he made over the right of his rental to any other, without the Abbot's consent, he should lose his tack and rental *ipso facto*, without further process. *Alleged*, That, notwithstanding of that provision, the pursuer behoved to obtain a declarator of failzie, before he were decerned to remove. *Replied*, The nullity of the tack might be received by way of exception, even as the nullity of the law; because, it is the same to be null of the law, and to be null by the consent of both parties. THE LORDS found the exception relevant.

*Fol. Dic. v. 1. p. 489. Spottiswood, (REMOVING.) p. 282.*

\*.\* Maitland reports this case.

IN an action of removing, moved by the Abbot of Kilwinning against —, desiring him to be decerned to flit from the lands of ———, it was *excepted*, That the said defender was rentalled in liferent, and, therefore, ought not to

No 74.

remove. It was *replied*, That it was provided in the rental, that, if he gave his title of this rental to any other, without consent of the Abbot, he should tyne his tack and rental *ipso facto*, without farther process. It was *answered* That, notwithstanding that provision, he behoved first, by way of action, to be declared to have tint his tack, for the cause foresaid. It was *replied*, That the said nullity of the tack might be received by way of exception, likeas the nullity of the law, and be null by consent of both the parties. THE LORDS found, by interlocutor, that he could not be decerned to remove, before that he was declared, by way of action, to have tint his tack.

*Maitland, MS. p. 209.*

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NASMITH *against* KINLOCH.

No 75.

IN an action betwixt John Nasmith and John Kinloch, the LORDS found, that the taking of annualrent, after the failzie, purged the clause irritant, a- nent the expiring of the reversion, in case of not-payment at a precise day.

*Kerse, MS. fol. 109.*

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1693. December 15.

BAILLIE of JERVISWOOD *against* The TOWN of LANARK.

No 76.

A clause in a feu charter, obliging the heir to enter within year and day of his predecessor's death, under the penalty of losing the feu, found purge-able before declarator.

THE LORDS repelled their reasons of suspension, on report of Lord Mersington, and decerned them to grant a charter, and enter him in that land held of them. The reason was, that, by his charter, he was bound, within year and day of his predecessor's death, to crave an entry, under the pain of losing the feu, and he had suffered sixteen months to elapse after his restitution.—THE LORDS found this irritancy purgeable, there being no declarator raised by them upon his failzie. The 2d was, That they had paid his proportion of cess for these lands, and they were not bound to receive him as vassal till he refunded them. THE LORDS found this was not liquid, and no part of the *reddendo* of his holding, and so could not stop his entry, reserving action for the same, as accords. The third was, That he had committed purprision, and amitted his feu in tilling up a high way, which he was obliged by his charter to give them to a croft of land called the Well-eyes. He *alleged*, He had prescribed immunity from that servitude. THE LORDS found this reason not competent *hoc loco*, but reserved it to them, when they should insist in a declarator.

1694. February 28. IN the question between George Baillie of Jerviswood, and the Town of Lanark, about entering him in a piece of land he held of them, (mentioned 15th December 1693), the LORDS found they could not dispense