No 66.

1686. *March* 23.

DRUMMOND of Riccarton *against* HAMILTON'S CREDITORS.

DRUMMOND of Riccarton seeks to reduce the rights of Bonhard, and the other creditors on the estate of Hamilton of Grange, *ob non solutum canonem*, for many years.—*Answered*, They offered to purge.—*Replied*, This being a conventional irritancy in the body of the writ, it was not purgeable now.—*Duplied*, They were creditors, and justly ignorant of the clauses contained in their debtor's right.——THE LORDS found it purgeable; though it was alleged to have been incurred before the debtor's own death.

Fol. Dic. v. 1. *p.* 488. *Fountainhall, v.* 1. *p.* 409.

1737. *June* 18.

JOHN CARRUTHERS of Holmains *against* JOHN JOHNSTON of Persbyhall.

No 67.
A conventional irritancy *ob non solutum canonem* was found purgeable at the bar, in respect it appeared, that the vassal had offered his feu-duties at the superior's place of residence.

CARRUTHERS of Holmains, in the year 1669, granted a feu of the lands of Persbyhall to Christopher Johnston, under this provision, 'That, if twelve 'terms of the feu-duty should run together unpaid, in that case, the disposition, '&c. should thereafter be null and ineffectual, as if the same had never been 'granted.' Upon this clause, Holmains brought a reduction and improbation against his vassal, in regard the feu-duties had not been paid since the year 1690.

The defence for Persbyhall resolved in these two points: 1*mo*, That the irritancy never was incurred, in regard the vassal had duly offered his feu-duties to the superior once every six years, since Martinmas 1690, when the last payment was made; for vouching of which, several instruments were produced. 2*do*, *Esto* no offer had been made, yet irritancies of this kind being odious, are always allowed to be purged at the bar any time before declarator.

Answered for the pursuer; That it was true there were several instruments produced by Persbyhall, said to be taken by him and his father against the superior, at different periods, from the year 1696 down to the year 1728, in order to take off the irritancy.

As to the *first* of which, it was observed; That it did not prove any offer was made by the vassal to the superior; for all it bears is, That the same was taken at Kirkwoodgate, without saying, in presence of the superior, or that an intimation was made to him, or any of his family, or the money told down, but only that the bygone feu-duties in general were offered. Now, if this instru-

No 67. ment is set aside, the irritancy is incurred without objecting to the others; because all the rest are taken a considerable time after the vassal had failed in payment of the twelve terms feu-duty; therefore, the only remaining question is, Whether or not it may be still purged at the bar? And here it falls to be observed, That there is a material difference betwixt irritancies which depend upon the law, and those that owe their origin to the convention of parties; the first are ordinarily allowed to be purged; but, to put the other upon the same footing, would be to counteract and overturn the settlement which parties have thought fit to make of their own rights; and, agreeable to this distinction, the Lords have often determined, not only in feus, but likewise in tacks, and other contracts containing irritancies.

The defender *replied*; That the first instrument was made at the gate of Kirkwood, where it is well known the superior then lived; and it appears by the second, That the first was intimated to him; so that the second instrument supports the first. But supposing, for argument's sake, it were not so formal, yet the smallest tender of payment ought to be sufficient to prevent the effect of an irritancy; as it would be hard, that the neglect or ignorance of a notary should forfeit a vassal of his property; especially where there is not the least appearance of ingratitude to the superior; on the contrary, the many instruments produced shew, that the vassal was not to blame for the non-payment of the feu-duty. Besides, by a letter dated at Kirkwood 11th May 1722, produced in process, the superior writes to the defender in the following terms: 'Sir, 'this shall oblige me to dispense with your not offering your feu at this term of 'Whitsunday allenarly; I do not design to make any use of this to you, nor 'no vassal of mine.' Whereby it is plain, that he had no notion the defender had forfeited his right, seeing he thereby indulges him in a delay for that term.

As to the distinction betwixt legal and conventional irritancies, it is without any foundation, seeing both are purgeable any time before declarator, as Lord Stair lays down, b. 4. t. 18. § 3.; where, treating of this subject, he says, 'The Lords 'have a power to modify exorbitant penalties, albeit they bear to be liquidate 'of consent of parties; and, for the same cause, they have power to qualify 'these clauses irritant, and to allow time for purging the same.' Which opinion is agreeable both to the principles of the canon law, and our practice.

The Lords sustained the defence, and found the irritancy not incurred.

C. Home, No 57. p. 98.