1777. *January* 16. CAMPBELL *against* M'ALISTER.

No 72.

IN a suspension of a decree of removing, on act of sederunt 1756, against a tenant, the suspender *urged*, That, immediately after the summons of removing had been executed, he had consigned the rents due; and that, nevertheless, the agent for the charger had proceeded in his process, and obtained decreet, and used a symbolical ejection of the suspender from the farm; of which, however, he continued in possession. THE LORDS were of opinion, that all irritancies of this nature are purgeable at the bar, and that though decree had passed in absence, and had been extracted, it would be hard, on that account, to subject the tenant to so heavy a penalty; and that, moreover, in the present case, the tenant's consignation ought to be held equivalent to a timely purging of the irritancy; therefore, they suspended the letters.—See APPENDIX.

Fol. Dic. v. 3. *p.* 339.

1792. *July* 6. JOHN BALLENDEN *against* The DUKE of ARGYLE.

No 73.
After decree of declarator of irritancy, *ob non solutum canonem*, has been pronounced and extracted, the irritancy cannot be purged.

THE statute of 1597, cap. 250. enacts, 'That in case it shall happen, in time 'coming, any vassal or feuer holding lands in feu-farm of us, or any other superior, immediately in feu-farm, to failzie in making payment of his feu-'duty, by the space of two years hail and together, that they shall amit and 'tyne their said feu of their said lands, conform to the civil and canon law, 'sicklike, and in the same manner, as if a clause irritant were specially engrossed and inserted in the said infeftments of feu-farm.'

Ballenden held the lands of Wester Pitgober in feu of the Duke of Argyle, the feu-duty being L. 4: 14 Scots, together with 10 bolls of barley, and 2 bolls of oats.

He having failed to make payment of the feu-duties during five years, the Duke raised against him, on the above mentioned statute, (his charter not containing any irritant clause,) a process of declarator of irritancy, in which appearance was made for the defender. But, as he failed, nevertheless, to purge the irritancy, the Duke obtained decree.

An action of reduction of this decree was afterwards brought by Ballenden; in the course of which he made offer of full payment of the arrears of feu-duties, with interest upon interest, and whatever else should be necessary for affording complete indemnification to the superior; and insisted on the hardship of his property, estimated at L. 3000 Sterling, being forfeited, on account of a demand comparatively so trifling, and which, to the utmost limits of justice, he was ready to satisfy; the political circumstances which gave occasion to this ancient enactment having now undergone a thorough change.

"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