

and that so soon as the two years tack-duties were run, and the third running unpaid. No 17.

*Fol. Dic. v. I. p. 483.*

1750. November 27. LADY BARHOLM *against* DALRYMPLE.

THE lands of Dunraggat were feued in 1621, for 100 merks of yearly feu-duty, by Gilbert Ross provost of Maybole, to Baillie, afterwards designed of Dunraggat, by contract, containing this clause, ' That if two terms of the feu-duty should run in the third unpaid, the vassal should be liable in double of ' the feu-duty *toties quoties.*'

The Viscount of Stair, who came to be superior in the right of his wife, daughter to the said Gilbert Ross, brought an action of poinding the ground in 1691, against Alexander Baillie then of Dunraggat, for several years bygone feu-duties, which at 200 merks yearly, being the double of the feu, extended to 2000 merks; at the same time concluding the irritancy of the feu-right upon the act of Parliament *ob non solutum canonem*; and obtained decree in absence on both conclusions, and thereupon obtained possession; and John, Viscount, afterwards Earl of Stair, who had acquired some collateral titles, sold the lands, property and superiority to James Dalrymple, afterwards designed of Dunraggat.

The Lady Barholm, in the right of an adjudication led by her predecessors in 1691, against Alexander Baillie of Dunraggat, pursued an action of mails and duties of the lands of Dunraggat in 1734; in which action compearance was made for James Dalrymple, who pleaded his exclusive titles, and was overruled; but as *inter alia* he had in his person some preferable debts, the Lady Barholm let the matter lie over, till now, that she believed these debts to be satisfied by intromission.

Having now renewed her process, James Dalrymple repeated a reduction of the former decree, obtained by the Lady Barholm, upon certain informalities. And supposing access to it, in point of form, this question *inter alia* occurred in point of law, How far the interlocutor finding the decree of declarator at the Viscount's instance void and null, in respect of the conventional duplication of the feu-duty, was agreeable to law.

It was *argued* for Dunraggat, That the conventional and the legal irritancy not being *ad idem*, they both subsisted. But the COURT was of opinion, that both could not subsist, as such could not be supposed to have been the intention of parties; and that wherever there is a conventional irritancy, the same is understood, though not expressed, to supersede the legal; and accordingly " Adhered to that interlocutor in the decree 1734," but remitted some other points to the Ordinary.

*Fol. Dic. v. 3. p. 337. Kilkerran, (IRRITANCY.) No 3. p. 298.*

No 18.

Where there is a conventional irritancy, it is understood, (though not expressed), to supersede the legal irritancy.