

APPENDIX.

PART I.

IRRITANCY.

1777. *January 16.*

ARCHIBALD CAMPBELL of Askomill, Charger, *against* DUNCAN M'ALLISTER,
Merchant in Campbelltown, Suspende.

IN 1753, Thomas Frazer, Collector of the Customs at Campbelltown, then proprietor of the lands of Achalochy, let that farm to the suspende, and James Fullarton of Corse, their heirs, assignees, and subtenants, for the term of thirty years, from and after the terms of Whitsunday and Hallowday 1753, at the rent of 200 merks Scots, with one boll of teind bear yearly, and relieving the proprietor of all schoolmasters' fees, cesses, taxations, services, and other public burdens imposed or to be imposed on these lands. The charger's father having purchased the property, he, having right to it as heir to his father, brought an action of removing against the suspende, to whom Mr. Fullarton had assigned his share of the lease, upon the act of sederunt 1756.

The suspende, immediately after the execution of this summons, consigned, in the hands of the Town Clerk of Campbelltown, in the neighbourhood of which place the lands lay, the full sum specified in the libel to be resting owing, and informed Askomill's factor, who resided at the distance of fifty or sixty miles, that he had done so; and having no doubt that some person would have been empowered at Campbelltown, to uplift the rent so consigned, the suspende gave himself no further trouble about the removing. Askomill's factor, however, had proceeded in the removing, and obtained a decree in absence before the Sheriff Court at Inverary, although it was usual to sue persons residing in Kintyre before the Sheriff Substitute residing at Campbelltown; and hav-

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Whether a suspension of a decree of removing be competent, after symbolical ejection has taken place?

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No. 1. ing extracted the decree, and obtained a precept of ejection, he caused the suspender to be charged to remove at Whitsunday 1775. M^cAllister presented a bill of suspension, upon which a sist was obtained. Answers having been given in to this bill of suspension, averring that the suspender had run two years in arrear, and that his tack contained an express stipulation irritating the lease in that event; upon a verbal report, (10th August 1775,) the bill was refused. The suspender presented a second bill, on which a sist having been granted, it was intimated to Askomill's factor upon the 28th September 1775. Nevertheless, on the afternoon of that day, a symbolical ejection was used against the suspender, and instruments taken by a notary to that purpose. But the suspender had not been dispossessed of the farm, but continued in the possession of it. The Court, upon the report of Lord Alva, having directed the bill of suspension to be passed, and having remitted to him to discuss the reasons of suspension, his Lordship, after a hearing, ordered memorials, and reported the cause to the Court.

It was contended by the charger, that a legal irritancy having been incurred, the suspender could not purge that irritancy by making payment after the decree was extracted, and diligence in consequence thereof had begun to be executed. And that at any rate, a bill of suspension must be entirely incompetent, when the very decree brought under review by that suspension has actually been carried into execution. Therefore it is only in the form of reduction, not by suspension, that the tenant can proceed; for the conclusion of the suspension is, to suspend the decree of removing; but supposing it were suspended, still that could not affect the ejection which had actually taken place.

It was answered by the suspender, that the legal irritancies being penal, and implying forfeitures, are purgeable in all cases, as long as the tenant, or proprietor, is in possession. That in the case of feus, though it is declared by express statute 1597, Cap. 250, That a feuer shall loss his right to the lands on allowing two years feu to run in arrear, yet the legal irritancy is uniformly allowed to be purged at any distance of time; and surely the Court would not listen to a superior rigorously insisting upon the forfeiture of the feu under pretext of a decree in absence declaring the irritancy incurred; much more must this hold in the case of a tack, where the irritancy is declared not by an act of the legislature, but by an act of sederunt. That a decree in absence declaring an irritancy of a tack, and decerning in a removing, cannot be more favourable than any other decree in absence; and as in all other cases, a party never fails to be reponed upon just cause shown, against the decree in absence, there can be no reason for refusing it in this case, where it is attended with such penal consequences to the suspender.

The Court considered that legal irritancies, whether in heritable rights or tacks, are purgeable at the bar. In decrees of absence, where the defender had made no appearance, and had not therefore an opportunity of purging the

irritancy, it would be extremely hard to prevent him from doing so after the decree had been extracted ; for in feu rights the feu duties are often very trifling, and are allowed to lie over for a great many years. Supposing, then, that the vassal was out of the country, and a decree in absence had passed against him, the superior would certainly not be allowed to follow out a forfeiture of his estate, upon that decree in absence being extracted.—The case of the tenant was equally hard. The following interlocutor was therefore pronounced, (16th January 1777). ‘ On report of Lord Alva, and ‘ having advised the information for the suspender, and the memorial for the ‘ charger, the Lords repel the objection to the competency of the suspension, ‘ suspend the letters simpliciter, and decern, find expenses due, and ordain an ‘ account thereof to be given in.’ A reclaiming petition having been afterward presented ; the Court adhered to their former interlocutor ‘ reserving ‘ to the charger to age against the suspender for finding caution for five years ‘ as accords.’

Lord Reporter, *Alva.* Charger, *J. Campbell.* Suspender, *Geo. Wallace.* Clerk, *Tait.*

D. C.