in the first place; or, if there is no conquest, out of the father's separate estate; and that neither the 5000 merks of tocher paid to the pursuer's sister, nor the sums given to himself by his father, during his life, are to be computed in extinction thereof. Found that the pursuer is entitled to the lands of Barnentaig, &c., which were acquired by his father, during his first marriage, from M'Alister of Tarbet, and also to the lands of Daricnakeirichmore, acquired by him from Campbell of Kildalvan; but found that he cannot take both the conquest lands and the special provisions, unless so far as there shall appear to be sufficiency of conquest to pay the special provision, over and above the lands; and remitted to the Ordinary."

Act. J. Campbell, H. Dundas. *Alt.* R. M'Queen.

Reporter, Gardenston.

1770. *July* 20. THOMAS LOCKHART *against* ARCHIBALD SHIELLS.

ADJUDICATION—GROUNDS AND WARRANTS—IRRITANCY.

An Adjudication proceeding upon a special charge to enter to the Predecessor, who was not himself infeft in the Subject, reduced and declared null and void.

Objections to a Decreet of Constitution.

The Irritancy in a Feu-contract, *ob non solutum canonem,* not incurred *ipso jure,* and capable of being purged before declarator.

[*Faculty Collection, V.* 121; *Dictionary,* 7,244.]

MONBODDO. The objection that the adjudication proceeded upon a special charge, not upon a general special charge, ought to be repelled. A general special charge is a fiction of the writers, not of the law. Whether the predecessor was infeft, or had only a personal right, it is all the same thing: if the heir is charged to enter heir in special, that is enough. It is argued that the irritancy could not be incurred without a declarator. I do not think that the irritancy was purgeable; and, consequently, there was no occasion for a declarator. But it is to be observed that the feu-duties were demanded in the decreet of constitution; and this demand takes away any plea of irritancy.

COALSTON. Conventional irritancies are purgeable when penalties are exorbitant; and here they are exorbitant from the rise of the rent of the ground. But he who asks equity, must give equity,—and therefore, as from equity, I allow the irritancy to be purged, so, from equity, I would sustain the adjudication as a security for the sums due, accumulated from the date of the decreet.

HAILES. I think this adjudication is too rotten to be mended. The adjudging for the penalty, in the personal contract, and for the duplicand, on the entry of an heir, is too much to receive countenance in any Court.

KAIMES. Equity may interpose as to *pluris petitio*,—but this adjudication seems totally null and void. The predecessor was not infeft,—and yet a special charge is given, which is a contradiction.

AUCHINLECK. The adjudication is plainly null. A conventional nullity, *ob non solutum canonem*, is not purgeable; but still the superior must let the vassal know his resolution of taking benefit of the irritancy. Here a decreet was taken for the feu-duties yet to run; nevertheless, the superior says, that the right of the vassal is irritated, which is a contradiction.

PITFOUR. There are many charters with severe penal irritancies, though, by convention, the Court has allowed them to be purged. No irritancy can be stronger than the legal statutory irritancies in tacks, and yet they may be purged. In tacks, the case is different; for, there, from the exact correspondence between the two parts of contract, the irritancy is supposed not penal. A rule which makes property precarious ought not to be followed. If the *nobile officium* is to be interposed in one way, it ought in the other.

ALEMORE. I should be sorry to enter upon a dry point of law. The words of an Act of Parliament are certainly as broad as the conventional irritancy; and yet it is certain that the words of the statute concerning tailyies, notwithstanding such irritancies, are purgeable.

PRESIDENT. Where there is a severe penal irritancy, there must be a declarator. This adjudication is liable to great exceptions. It is of little moment whether it be sustained to a certain extent or not, for there has been possession and intromissions.

On the 20th July 1770, "The Lords found the decreet of adjudication void and null, and reduced accordingly; Repelled Archibald Shiells's defences, that the feu-contract is void *ob non solutum canonem*, and found that he is liable to account for the rents of the lands contained in the feu-contract;" adhering to Lord Elliock's interlocutor.

14th November, adhered.

Act. A. Lockhart. *Alt.* R. M'Queen.

Diss. Coalston and Barjarg, who thought adjudications good for bill, interest, and bygone duties.