resolutive in case of not-delivery; and if he absolutely failed in the performance, it could not be judged that Hayston would be obliged to accept of the grain at any time thereafter. The whole transaction depended entirely upon the Earl's delivery of these writs to Hayston; and since they were not delivered in terms of the bargain, the same was totally void. As to Hayston's sustaining no damage by the delay, it was *argued* for the defender, That if this could come under consideration in a case where contractors had made a plain explicit provision and agreement; yet now so long after Hayston's death, the defender could not be obliged to disprove his having been at no loss thereby. No 93.

It was *replied* to the homologation, That men's actions were not to be construed farther than their certain intention; and as Hayston had no sort of security from the Earl of Dunfermline, but the obligation to retrocess and dissolve the agreement, in case he did not against a day certain make good his part, the subsequent payment made by Hayston (in compliance with his own unfortunate circumstances) can be construed no farther than a wavour of the dissolution of the bargain, so far as that time it was incurred; but such payment can never be interpreted a new contract betwixt Hayston and the Earl, whereby he was bound to pay all the sums in the bonds granted by him, if at any time thereafter, the ratification and remission stipulated to him should be procured and delivered.

THE LORDS found the resolutive clause in the backbond is no penal irritancy; and therefore not purgeable upon performance after elapsing of the day; and found, that the payment made after the said day, was not a passing from the resolutive clause, but that Hayston could at any time after the said payment have insisted to be reponed in his own place.

Decisions cited for the pursuer, Durham against Durham, 12th December 1676, No 49. p. 3001.; Maitland against Gight, 20th July 1675, *voce* MUTUAL CONTRACT. For the defender, Hepburn against Nisbet, February 1665, No 62. p. 7229.; Jamieson against Wauch, 20th February 1680, No 81. p. 7258.

Act. *Dundas Advocatus, Graham. Ch. Erskine, Arch. Stewart, jun. H. Dalrymple sen.* Alt. *Dun. Forbes,* Clerk, *Hall.*

Edgar, p. 141.

1726. *February* 1.

MR ARCHIBALD STEWART, Advocate, *against* DENHOLM of Westshield.

No 94.
Irritant clauses in tailzies are not purgeable.

SIR WILLIAM DENHOLM of Westshield, in the year 1711, executed a bond of tailzie, whereby he "resigns his lands and estate in favours of, and for new infeftment, to himself, and the heirs male of his body; which failing, to the heirs female of his body; which failing, to Robert Baillie, and the heirs male of his body; which failing, to Mr Archibald Stewart," &c. with strict prohi-

No 94.

bitory and irritant clauses. The tailzier having died without heirs male or female of his body, the succession devolved upon Robert Baillie, *alias* Sir Robert Denholm; and no infeftment having followed upon the tailzie, which was never registered, he was served and retoured heir of tailzie in general, without inserting the conditions, limitations, and irritancies, in the retour. Robert Bailie, *alias* Sir Robert Denholm, possessed the estate during his lifetime, and his possession was continued by his son this defender; against whom the said Mr Archibald Stewart insisted in a declarator of irritancy, on this special ground, " That the general retour above mentioned did not contain the conditions and clauses irritant inserted in the said retour;" which was a legal irritancy introduced by the act 1685, cap. 22. anent tailzies.

Against which declarator it was *pleaded*, That this irritancy was introduced by the act, to protect entailed estates from the negligence or fraud of heirs, who, by omitting to insert the clauses of the entail, left the estate open to their debts; and therefore can never be extended to the omission of heirs, whose estates would be subjected to the diligence of creditors, whether the clauses be inserted or left out; but so it is, that this tailzie, never having been registered, is not effectual against creditors, though the clauses had been inserted according to the strictest interpretation of the act; whereby it is not by the heir's neglect or omission to insert these clauses, that the estate becomes exposed to creditors. 2*do*, Robert Baillie's retour is only upon a general service, whereas the irritancy insisted on relates to retours upon special services; which is plain from the act in which the clauses are ordained to be inserted in the " procuratories, precepts, charters, and instruments of resignation," as well as repeated in the subsequent conveyances, besides the registration of the tailzie; and then adds, " It being so inserted," &c. which can no otherwise be understood, than inserted not only in the register of tailzies, and in the conveyances, but likewise in an infeftment, without which the tailzie is never completed; so that the repeating of the clauses can refer only to a special service, after the tailzie is clothed with infeftment. And it will not be found, that any general service ever contained the irritancies of the right upon which the successor is served: Nor is there need they should; for a general service was never a title to, or conveyance of an estate; only gives right to an unexecuted procuratory of resignation, or precept of sasine, in order to expede charters and infeftments thereupon; in which indeed the clauses irritant are to be repeated, but never in a general service. Which will be further clear from this consideration, that as long as the tailzie remains in terms of a personal right, there is no danger of the estate's being carried off by creditors; because they can never affect a personal right, but in the terms and conditions in which it stands: So that it is the same thing, whether the provisions be repeated in the general service or not; and therefore the law was never intended to reach personal conveyances of tailzied estates, but only infeftments; which no condi-

tions can qualify, but what are in the infeftments themselves, or in the records. No 94.

Answered to the *first*, The import of the act of Parliament is plain: It gives authority to entails made under such irritancies as the maker pleases; and, in order to the entail's being effectual against creditors, it appoints 'the entail to 'be recorded, and the irritancies to be inserted, not only in the first original 'infeftment, but in the after conveyances;' and these, indeed, are the necessary requisites, without which no tailzie can have any strength against creditors: But then the act goes further, and, by a perfect separate clause, in order to prevent the fraudulent eluding of the act, provides, 'That, notwithstanding such entails shall not be effectual against creditors, without such 'requisites, yet, as to the heir, in case the said provisions and irritant clauses 'be not repeated in the rights and conveyances, whereby any of the heirs of 'entail shall bruik and enjoy the tailzied estate, such omission shall import a 'contravention.' It is true, the law has not made the not recording of the entail an irritancy upon the heir, which justly might been done, and which seems to be an omission in the act. But still, without regard to that, the not repeating the clauses is made an irritancy upon the heir; such is the unavoidable letter of the law. But, in the *next* place, Although the not registering the entail is not by the act made an irritancy, yet it is what is incumbent upon the heir to do, in implement of the will of the maker, who, no doubt, intended that the tailzie should be effectual against creditors, which an unregistered tailzie is not. Now, if the heir fraudulently, and contrary to the intention of the maker, do not register the entail, he can never profit by his fraud or neglect; and, therefore, when the law has appointed two things to be done, one of them under an express irritancy, the heir cannot escape the force of the irritancy, or justify one fault, *viz.* his not repeating the clauses, by alleging he hath been guilty of the other fault, *viz.* not recording the entail. And, were it otherwise, there would be an end of all entails not registered in the life of the maker: The heir would have no more to do, but neglect recording the entail, and then pretend he is not bound to notice or perform any other part of the act. To the *second*, *answered*, The irritant clauses are, indeed, provided to be inserted in the infeftments; but that is in case there be infeftments; for, if none, still to make the tailzie effectual against creditors, it must be recorded, and the irritancies repeated in the personal conveyances. The law here is express, the words being, "Conveyances by which the heir "bruiks and enjoys the estate;" and, perhaps, this is the first time ever it was asserted, that a general service is not a *conveyance*. Robert Baillie, *alias* Sir Robert Denholm, possessed by no other; and, however he might have purged the irritancy before he was quarrelled, by completing the infeftment, and inserting the irritancies, that cannot now avail the defender, since he never corrected his mistake. 2*do*, Where heirs do expede general retours, without inserting the irritancies, they take care not to bruik and enjoy by virtue

No 94. of these retours, but first to complete their infeftments, and then to possess; and, in doing so, they fall not under the act, because the words are, "Con-"veyances by which the heir bruiks and enjoys the estate." But, in this case, Robert Baillie continued to bruik by virtue of the retour only, and so fell directly under the words of the act.

"The Lords found, that Sir Robert Denholm, retouring himself heir of provision to Sir William Denholm, maker of the tailzie, without repeating in the retour the provisions and irritant clauses of the tailzie, and bruiking and enjoying the tailzied estate, by virtue of the retour, does import an irritancy of the heir's right."

1726. *February* 1.—In the *next* place, it was *pleaded* for the defender, That, notwithstanding this irritancy incurred by his father, he, the son, ought to be assoilzied from the declarator, 1*mo*, Because the irritancy sustained being wholly *penal*, without any damage accruing by the omission to any person, the same not being declared in any proper process against Sir Robert in his life, the action is not competent against this defender; it being a principle, that *pœnales actiones non transeunt in hæredes*. 2*do*, Supposing the action competent, yet, as all other penal irritancies, it is *purgeable*, and the defender is willing to serve heir in proper form, and to engross all the irritant and resolutive clauses *per expressum*.

As to the *first*, That the conclusion insisted on for the pursuer is altogether penal, cannot well be denied: That the clauses, irritant and resolutive, were not engrossed in the general retour, is attended with no manner of damage to the pursuer, though he should succeed as heir of tailzie, in the regular order established by the entail; for the debts of Sir Robert, who never was vested in the estate, or had further in his person than a personal right, affected with very express prohibitory clauses *de non contrahendo*, can never affect the entailed estate, nor any of the heirs of tailzie succeeding therein. It is an omission without any fraudulent design; and if, on this account, the estate be forfeited, nothing can be more of the nature of a *pura pœna*. Had, indeed, this irritancy arisen from any clause in the tailzie, something might have been pleaded; because, all actions *ex contractu* pass against heirs; but, being founded in the statute, it is plainly a penal law, which, neither by the Roman law nor ours, is effectual against heirs; which is *triti juris* in the case of vitious intromission, and there is the same reason here. As to the *second* defence, The nature of all penal irritancies is such, that they are purgeable before declarator, especially of those which consist *in omittendo*. And the circumstances of this case are particularly favourable; for it is certain, before the above decision, that omitting to insert the irritant clauses in general services, was never reckoned an irritancy. Now, it is a rule in law, that *juris error, ubi de damno evitando agitur, non nocet; ubi de lucro captando nocet*. See *l.* 7. *et* 8. *D. De jur. et*

fact. ignoran. And it were exceeding hard to make this decision, upon a new point, have a penal retrospect. No 94.

Answered for the pursuer to the *first*, That the question here is not upon any penal law or custom, but concerning the transmission of an estate from one to another, on account of non-performance of a condition of the settlement; which action does not arise from a delict, but from the will of the maker of the tailzie, who imposed that law, "That, in case of such events, "the succession should go from one person, and devolve upon another." Nor does it alter the case, that this particular irritancy arises from the force of the law, more than from the will of the tailzier; because, it is nothing but a further declaration, in order to make the will of the tailzier more effectual; and which declaration every tailzier of consequence is understood tacitly to acquiesce in, and give authority to for that reason; and so the action upon this irritancy is no more penal, than upon any of the other irritancies inserted in the tailzie. It is a condition on which the law has declared the estate shall go to the next branch of the entail. The present heir has it in his power to fulfil the condition or not. If he does not fulfil, he virtually renounces the estate, and makes way for the next branch; but that is neither crime nor delict, and, consequently, the action for declaring the effect of the condition is not penal. This will yet be plainer, if the very nature and name of the action be considered. The pursuer is now in an action for *declaring* the right of the estate to be in him; no penal action can properly be *declaratory* of the right of another, the effect is only to impose a punishment upon the delinquent; and the distinction is obvious, betwixt a sentence imposing a punishment upon a delinquent, on account of his commission of a certain fact, and another sentence, declaring a right to have arisen to a third party, by and through either the commission or omission of such a fact: Yea, in several cases, the same fact may infer both consequences, and make way for both kind of actions; one for punishing the committer of the fact, the other for declaring a right that has accrued to some third party thereby: In which case, the action for imposing the punishment could not be pursued but during the life of the delinquent; the other, any time within the long prescription. But the nature of all declarators of irritancy in entails, is to transfer the property, and no ways to hurt the contravener, except in consequence of the transference: And the like examples arise from the laws against Papists, and others of that nature, wherever, in certain events, estates are appointed to devolve from one person to another. From this it is evident, there is no similitude betwixt this case and vitious intromission, which arises allenarly from the delinquence or irregularity of the vitious intromitter, whose act of intromission, without a title, is a culpable transgression of the national law; whereas, there is no manner of vitiosity in neglecting or transgressing any condition or quality of the tailzie. The law has not declared it a culpable transgression in an heir to neglect inserting the irritancies in his titles; but gives him his

No 94. choice, inserting them to preserve the estate, or neglecting them to lose it. But, in the *next* place, It is not the full and adequate reason why vitious intromission goes not against heirs, that the consequence has something penal in it; but, as our consuetudinary law has established the penalty, so has it the restriction, "That the action shall not be pursued after the death of the intromitter;" because the titles of moveables not remaining upon record, it is next to impossible to know the intromitter's title; whereas, in this case, it is directly otherwise, the record itself proving the incurring of the irritancy.

This makes also an answer to the *second* defence. For, if this irritancy be not penal, then it follows not that it is purgeable; and there is great necessity, beside, that irritancies in tailzies be not purgeable, because it would be a means of overturning the best constituted tailzies; for no heir would insert the irritancies in his infeftments, till he were obliged by a declarator, which might be delayed long enough, by the non-existence, ignorance, want of ability, or even connivance of the posterior heirs of tailzie; and, in the mean time, the estate would be liable to be torn to pieces by creditors; and thus tailzies would seldom fail to be evacuated at some time or other. Taking the matter now in this view, that the irritancy is not penal, the favour pleaded for the defender will signify nothing; for, though *error juris* will plead strongly to alleviate a punishment, it applies not where a *condition* has precisely fallen out, whether by accident or design, under which an alienation was made; for the *condition* existing, the *effect* must follow.

"THE LORDS found the defender cannot purge the irritancy."—See TAILZIE.

Fol. Dic. v. 1. *p.* 490. *Rem. Dec. v.* 1. *No.* 79. & 80. *p.* 155.

*** It was afterwards found on appeal, that no irritancy had been incurred, see APPENDIX.

1727. *January* 12. BURNET *against* KER.

No 95.

IN a contract betwixt a liferentrix and her son, she sells and dispones her liferent to him, and he becomes bound to pay her a certain sum, less than the liferent, at two terms in the year, with annualrent for each moiety from the terms of payment; and there is this clause, 'That, in case the son should fail 'in punctual payment of the said annuity, at most within a month after each 'term, then the liferentrix should have full and free recourse to her former 'right, above disponed.' THE LORDS found this irritancy not purgeable.—See APPENDIX.

Fol. Dic. v. 1. *p.* 489.