

penal irritancies do not become final till declarator; so it is competent to the party against whom it is pleaded, to purge the same, by making full performance of what ought to have been before performed; *Sawer contra Rutherford*, 25th November 1662, No 42. p. 7205.; the Earl of Tullibardin *contra Murray*, 1st February 1667, No 43. p. 7200.; *Gordon contra Lees*, 8th January 1663, No 79. p. 7257.

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"THE LORDS found the irritancy purgeable any time before declarator."

Reporter, Lord Auchinleck.
J. M.

Act. *Monro, Ferguson.*
Fol. Dic. v. 3. p. 337.

Alt. *Lockhart.*

Fac. Col. No 1. p. 1.

1766. November 18.

WILLIAM GEORGE, &c. *Ross against WILLIAM MONRO of Newmore.*

By the two entails of the lands of Aldie and of Newmore, it appeared to be the intention of the proprietors, the makers of the entails, that the two estates should not centre in one person; for, by a clause in the entail of the estate of Aldie, it is provided, 'That the heirs therein mentioned shall be obliged to assume, and constantly use and bear, the surname of Ross of Aldie, and arms of the family of Balnagown, without any alteration or diminution whatever, as their surname, designation, and arms, in all time after their succession to the proper estate of Aldie, under the pain of incurring the irritancy of tinsel of the estate.' And by a clause in the entail of Newmore, it is provided, 'That the heir, whether male or female, and their heirs, who shall succeed to the estate of Newmore, shall be obliged to assume, and take, and ever thereafter use, the name and arms of Monro; and the title and designation of Newmore, without joining or bearing any arms, names, or title therewith.'

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An heir of entail allowed to purge an irritancy, after an action was brought by the next substitute in the entail, for declaring the forfeiture.

In virtue of the tailzie of the estate of Aldie, William Ross succeeded, and enjoyed the possession of that estate, without making up titles thereto; but bore the arms of the family of Balnagown, and used the name of Ross of Aldie, as appointed by the tailzie.

William Ross, by the death of the former heir of tailzie of Newmore, came to have a title by the entail to that estate; also, in virtue whereof, he assumed possession of the estate of Newmore, keeping also possession of the estate of Aldie; but allowing himself to be designed Monro of Newmore, and designing himself also that way by his subscription,

William George Simon David Ross, the next substitute in the entail of Aldie, thinking that the defender had thereby incurred an irritancy, sufficient to forfeit him of his title to that estate, brought a process for declaring the same, in which he *pleaded*, That, from the anxious clauses in the entails of the estates of Aldie and Newmore, it was plainly the intention of the makers of these entails, that the estates should be possessed by different proprietors, and

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their families differently represented ; and, therefore, that the will of the different proprietors of these estates, which was clear, ought to be followed as the rule in judging of the cause ; and, if it was so, there could be no doubt, from the *species facti* above set forth, that the irritancy was incurred, and would be declared, according to the rule laid down by Sir George M'Kenzie in his Institutes, b. 2. t. 5. p. 13, and Dic. Decis. Tit. IRRITANCY, where a distinction is made betwixt statutory and conventional irritancies, the one being purgeable at the bar, the other not ; and it was said, that there was no doubt, that the irritancy, sought to be declared, was a conventional one ; and, therefore, not purgeable : And the case of Denholm of Westshield, February 1st, 1726, No 94. p. 7275. was appealed to, where it was found, that an irritancy in an entail could not be purged.

Answered for the defender, That, whatever rigour prevailed in the ancient law, with regard to the not allowing irritancies of this kind to be purged ; yet that, at present, that rigour was softened ; and wherever no damage could be alleged to have accrued to the estate, the law now allowed an omission, such as the present, to be purged by a compliance with the terms of the entail, which the defender has now done, by re-assuming the name of Ross of Aldie, and the arms of the family of Balnagown, in so far as he is allowed. *2do*, It was *pleaded*, That the obligation imposed by the tailzie of the estate of Aldie, of assuming the name and title of Ross of Aldie, &c. without any alteration or diminution whatever, was not inconsistent with assuming the name, &c. of any other family, as an addition to those of Aldie, *esto* that, from the words in the entail of the estate of Newmore, the doing so would incur a forfeiture of the defender's right to that estate ; yet, that being *jus tertii* to the pursuer, it was not competent for him to found an argument upon it. *3tio*, It was *pleaded*, That, as the obligation imposed by the tailzie of Aldie, of assuming the surname of Ross of Aldie, and bearing the arms of Balnagown, made but one condition in part imprestable, the not complying with that part of the condition that was prestable could not forfeit the defender of his title to the estate. And, *lastly*, it was said, That the decision in the case of Westshield was altered in the last resort ; and, therefore, could have no weight ; and the case of Sir John Gordon against Mr Charles Hamilton Gordon, No 96. p. 7281. and that of Cromwell Price, * were appealed to, to shew that irritancies, such as the present, were purgeable at the bar.

" THE LORDS sustained the defence, assolizied the defender, and decerned."

Act. Burnet.

Alt. Lockhart.

Clerk, —

Fol. Dic. v. 3. p. 338. Fac. Coll. No. 45. p. 79.

* Not reported.