The plea urged by Sir John is, that the debts, being moveable, ought to be paid out of the moveable succession, and that the clause in question imports no more than a security for creditors in case the fund of executry should prove short: That so it was determined, *Russells* against *Russell*, 23d *January*, 1745, and *Campbell* against *Campbell*, 12*th June* 1747.

To which it is ANSWERED,—That it is not disputed that moveable debts are to be paid out of executry. But this is always upon the supposition that the testator does not will otherwise; but here the testator had no such will concerning the payment of her debts. She did not provide, nor had any occasion to provide, for the security of her creditors. Her creditors were safe, whether their payment was to be operated out of her heritables, or out of her moveable subjects. The two cases quoted for Sir John Forbes do not apply. In the first the clause ran thus,—" I hereby expressly burden this right and disposition, not only with the payment of my funeral charges," &c. The other thus,—" And further, it is hereby expressly provided and declared, that the said Dugal Campbell, &c., shall be holden and obliged to pay the portions and provisions."

In these two cases the clauses were so conceived as to show that nothing more was meant than an additional security to creditors; and it is to be remarked, that in both these cases the debts were considerable, and the funds of executry small. But here the clause is conceived in words more definite and more obligatory upon the heir, " *they shall by their acceptance hereof be bound.*" This implies an election offered to the heir, either to repudiate the succession altogether, or to accept it under such condition; and, as the heir has accepted, he must perform the condition, for that condition is a mode of his right.

On the 14th November 1766, the Lords refused the desire of the petition, and adhered to the Ordinary's interlocutor unanimously.

1766. *November* 18. WILLIAM GEORGE SIMON DAVID ROSS *against* WILLIAM ROSS, *alias* MONRO.

IRRITANCY.

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

[*Faculty Collection, IV.* 79; *Dictionary*, 7289.]

ON the 23d May 1722, William Ross of Aldie executed an entail of the lands of Aldie in favour of Simon Ross, his son, and the heirs-male of his body; whom failing, to certain other substitutes.

This entail contains the following proviso,—" That all the heirs of tailyie and provision therein mentioned, and the descendants of their bodies, who shall happen to succeed, according to the said destination, shall be obliged to assume, and constantly use and bear the surname of Ross of Aldie, and arms

of the family of Balnagowan, without any alteration or diminution whatever, as their proper surname, designation, and arms, in all time after the said succession, upon pain of incurring the irritancy under-written."

The entail contains other prohibitive, irritant, and resolutive clauses, such as, that the heirs should only enjoy the estate in virtue of the entail, and that they should timeously enter and infeft themselves.

It also contains a clause irritating the right of the contravener, and declaring, "That the person so contravening or failing to follow the conditions above-mentioned shall, for himself alone, immediately upon the contravention and failing to fulfil the said provisions and conditions, or any one of them, amit, lose, and tyne, for the committer's person allenarly, all title or right which he hath, or can pretend to the said lands or estate, and the same shall, in the case foresaid, *ipso facto*, fall, accresce, and pertain to the next heir or member of tailyie appointed to succeed thereto; and sicklike, and in the same manner, as if the contravener were naturally dead, or had not succeeded in the tailyie."

On the 7th June 1722, this entail was registered, and Simon Ross, the institute, having expede a charter thereon, under the great seal, was infeft in the lands.

In 1750, Simon Ross died. His son William, now the defender, entered into possession, and, without making up titles, still continues to possess.

On the 8th December 1747, Colonel John Monro of Newmore executed an entail of his estate, in favour of Mrs Mary Monro, his sister, and the heirs-male of her body; whom failing, to Mrs Ann Monro, also his sister, spouse of Simon Ross of Aldie, and the heirs-male of her body; whom failing, certain other substitutes.

This entail provides, That the heirs succeeding in virtue thereof should assume, and ever thereafter use, the name and arms of *Monro*, and the title and designation of *Newmore*, without joining or bearing any arms, name, or title therewith.

These provisions are fenced with the usual irritant clauses of the contravener's right. Yet every heir is left at full liberty to contract debts upon the estate, or to sell it. On the death of Colonel Monro, his sister Mary expede a charter upon the entail, and was infeft. By her death, in 1761, the succession opened to William Ross of Aldie and Ann Monro. He entered into possession, and, upon different occasions, assumed the surname and designation of Monro of Newmore.

Duncan Ross, the second son of Simon Ross of Aldie, being the immediate substitute in both entails, brought a process of declarator against his brother William, for having it found that he, by deserting the surname of Ross of Aldie, and assuming the name of Monro of Newmore, had, in terms of the entail, forfeited the estate of Aldie, which thereby devolved to the pursuer, as the next substitute in the entail.

The question was taken to report by Lord Strichen, Ordinary, and was enrolled in the Inner-House rolls, when Duncan Ross, the pursuer, died.

Meanwhile an attempt was made by Mary Monro more strongly to rivet the chains of the entail of Newmore than her brother the Colonel had done.

She executed an entail, whereby she laid her nephew William under prohibition to sell or contract debt.

After her death, the remoter substitutes brought an action of declarator against William for forcing him to make up his titles upon Mary's entail, and William brought an action for reducing that entail. The Court reduced it, and found the heir not bound to make up titles upon it.

The remoter substitutes did afterwards insist in an action for having William judicially interdicted on account of his facility.

This process terminated by a contract, in July 1765, whereby, on the one hand, William became bound neither to contract debts nor to sell the estate to the prejudice of the substitutes; and they, on the other hand, became bound not to claim the estate during his life, although he should take the name of Ross of Aldie.

Duncan Ross having died as already said, William George Simon David Ross, did, in December 1764, insist in a declarator against William, the possessor of Newmore and Aldie, containing the same conclusions as in the former summons.

The Lord Auchinleck, Ordinary, took the question to report.

ARGUMENT FOR THE PURSUER:—

In consequence of the arguments used by Duncan Ross, the present pursuer takes it for granted that the irritancy was once incurred by William when he assumed the name of *Monro*. He will therefore proceed to inquire, whether such irritancy can be purged after an action for declaring it had been brought into the Inner-house?

First, A legal irritancy may be purged at the Bar, but a conventional irritancy cannot. This rule is founded in the nature of things. Where the law imposes the penalty, it is natural that the law should give relief when the party is willing to perform, even after he is called before the Judge. But when the irritancy is conventional, it would be unjust for the law to interpose, or to alter the contract of parties. So speaks Sir George M'Kenzie, who having mentioned the difference between an irritancy *ob non solutum canonem*, provided by charter or declared by law, and after observing that the latter may be purged at the Bar, not the former, adds this reason:—"Because the express paction is thought a stronger tie than the mere statute," *B. 2, tit. 5*, § 14; see also Dictionary, title, *Irritancy*, p. 488. The only decision which seems to contradict this doctrine, does in truth confirm it. For *there* the exception was not made without a special reason. The decision is 18*th February* 1680, *Earl of Marr* against *His Vassals*, observed by Stair. *There* the vassal was allowed to purge the irritancy at the Bar, because there was an ambiguity in the feu-charter.

2*dly*, A feu-contract is no other than a perpetual assedation. The same distinction, therefore, is observed with respect to tacks, as Lord Bankton says, Vol. II. *B. 2, tit.* 9, § 23; and this is confirmed by many decisions in the Dictionary, title, *Irritancy*.

3*dly*, So also, in all bargains and contracts, conventional irritancies are not purgeable at the Bar, unless in very special cases. See Dictionary, Vol. I. p. 489.

Such being the general rule, it remains to inquire, Whether there be any reason for an exception in the present case?

And, 1*mo*, With respect to entails in general, when he who confers his es-

tate on another by gift, and to such gift adjects a condition under a nullity, it is reasonable that his will should take place, and that he who willingly transgresses the condition should forfeit, and not, by a late repentance, be permitted to deprive the next grantee of his right: for, as Lord Stair observes, *B.* 4, *tit.* 18, § 6, " These clauses in tailyies are not properly penal; for it was in the power of the constituent to assume, or not to assume these heirs of tailyie to be his heirs, and therefore they are effectual. This distinguishes the case between entails and *pacta legis commissoriæ in pignoribus*, or conditions in wadsets; for wadsets are contracts, whereas an entail is a donation. See Dictionary, title, *Irritancy*, p. 486. And, accordingly, in the case of *Westsheil*, 1*st February* 1726, it was found that an irritancy in an entail could not be purged.

This was indeed altered in the House of Peers, but upon a separate *medium*, namely, that the irritancy had never been incurred at all.

The present case is stronger than that of Westshiel; for here the irritancy was plainly conventional, and incurred by the defender himself. It was not an act of omission, but of commission; nor is it a question *de damno evitando*, as was pleaded in the case of Westshiel, but *de lucro captando*, being a device to join two estates which the entailers meant should be kept separate. There is no distinction between the case of feus and of entails. Both are grants of lands under conditions. The condition of paying a feu-duty is not always easy,—that of bearing a name and arms is. Why then should a failure of performance be purgeable in the last case, and not in the former? The only decisions which seem to make for the defender, are two: the one 23*d March* 1686, *Drummond of Riccarton* against *Hamilton of Grange;* the other, 15*th December* 1693, *Baillie of Jerviswood* against *The Town of Lanark*. In the former decision, the Court would not sustain the irritancy of a feu-duty not being paid, against creditors who had adjudged the feu-lands, " although it was alleged that the irritancy had been incurred during the debtor's own life." This only proves what is certain, that no irritancy, unless declared against the person who has incurred it, will invalidate the right of a singular successor. In the other case, it appears that Jerviswood offered to perform before any declarator of irritancy was brought, and this is given for the *ratio decidendi*, which shows that, if a declarator had been brought, he could not have been received to purge the irritancy. It is true that no estate can be evicted for irritancy, without declarator, because the feudal right vested in the heir cannot be annulled without process. But this does not prove that whenever a declarator is raised the heir may purge.

As to another case wich is mentioned for the defender, *Hamilton* against *Pryce*, it does not apply; for *there* no deed implying irritancy was done. The heir of entail contracted debt which was no irritancy. The creditor adjudged not only the liferent but the fee. The creditor was allowed to correct this adjudication, and to restrict it to the liferent, so that here it was not the heir who was restored, but rather the erring creditor.

In the case *Sir John Gordon* against *Mr Charles Hamilton Gordon*, Sir John was not in possession of Hallcraig. He complained that the possession was detained from him; and therefore, until he had made his right good, he might be excused from assuming the name of Hamilton of Hallcraig. But *here* the defender was in possession, and laid aside his own name and took another.

Neither will it vary the case, that the defender is in a state of apparency, for this is his own fault, as he ought long ago to have made up feudal titles.

ARGUMENT FOR THE DEFENDER :—

The heir of Aldie is required to bear the surname of Ross of Aldie, "without *diminution* or *alteration*." Now, supposing that the defender has borne the name of Monro of Newmore, this is no *diminution* or *alteration*.

But further, the condition is imprestable. "To bear the name, &c. of Balnagowan" is *one* condition. It is impossible for him to perform that part of it, as to *arms*, for he has no right to assume the arms of another family. Thus, suppose that *Aldie* were a small part of the estate, giving the title to the family, and that it should be evicted, the defender could not carry it after eviction.

The defender, while in a state of apparency, could not irritate, by not bearing the name of the lands. While the lands are *in hæreditate jacente*, how can any one bear the name?

As to the distinction between irritancies legal and conventional, the practice, in later days, has been moderated, and this distinction has been often departed from, especially upon any probable excuse for delay or neglect.

This case is confirmed by what Lord Stair says, b. 4, tit. 8, § 7.

But, whatever doubts may have been of old, the decisions *Sir John Gordon* against *Hamilton Gordon* and *Hamilton* against *Pryce* are in point. In the last case, the debts were not only contracted by the heir, but the creditors were in possession.

The case of Westshiel, as determined by this Court, was circumstantiate, and every *ratio decidendi* was conjoined in the judgment. The judgment was reversed upon a ground which left no opportunity of trying the question now in issue; and, at any rate, the decisions *Sir John Gordon* and *Pryce* are to be preferred, as more recent.

It is *jus tertii* for the pursuer to plead that the two estates of Aldie and Newmore were meant to be kept separate. The entailer of Aldie never meant that his heir should not enjoy any other estate whatever, providing the conditions in his own entail were fulfilled. The substitutes in the estate of Newmore might make that plea which the pursuer makes; but, on the contrary, they have become bound not to make it.

On the 18th November 1766, the Lords "sustained the defences and assoilyied."

Act. J. Burnet. *Alt.* A. Lockhart, R. Affleck.

OPINIONS.

PITFOUR. William has no good excuse for not complying with the entail. He must take the arms of Balnagowan as far as he can take them. I am not clear as to the defence of not being entered. Heirs of entail ought to make up titles. As to the other defence, supposing me to have been in a mistake, may I not purge? Every irritancy that is purgeable may be purged. If the defender should insist that he is still entitled to take the name and arms of Monro of Newmore, then judgment might go against him. The provision made would have been effectual, had not the substitutes of Newmore granted a dispensation; at present there is no question with respect to the irritancy of Newmore. The

permission to purge is agreeable to decisions. The case of Pryce is a strong one. The only decision to the contrary is that of Westshiel. I have seen many settlements where there have been blunders that would have occasioned irritancies. My constant advice was to make up a new, clear title.

JUSTICE CLERK. As the defender has done no prejudice to the estate, and is willing to submit to the entail, his plea ought to be received. The plea of the pursuer cannot be good, unless in so far as the presumed will of the donor is considered; and it cannot be conceived that, in a case so circumstanced, he would have required such an irritancy. The donor finding the *prædilecta persona* in his present situation would not carry over the succession to a person less favoured.

PRESIDENT. Of the same opinion. I do not love penal irritancies in entails. These are different from conventional irritancies.

AUCHINLECK. The only difficulty is, that there is no proper excuse for the neglect on the part of the defender. If this defence is good, then there is an end put to every process of this nature. For, if a man was never to be precluded, to what purpose bring the action? He may change backwards and forwards as often as he pleases.

COALSTON. There are two questions here. *First*, Whether an irritancy has been incurred? *Secondly*, Whether the heir can be reponed against it? As to the *first*, I doubt whether an apparent heir of entail can commit an irritancy, and how far he can be bound to an impossibility, that of bearing the arms of Balnagowan. We cannot explain this condition to imply arms with a mark of cadency, for this were to create an irritancy. *2dly*, As to purging, there is indeed an old act of sederunt, of which I never could see the reason. I am never for extending irritancies.

KAIMES. The first thing to be considered is the tenor of the entail. There are no words in it implying that it was the intention of the entailer to declare the irritancy not purgeable. At present there is *bona fides* on the part of the defender, but there can be no *bona fides* after the judgment of the Court.

1766. *November* 19. The MERCHANT COMPANY and TRADES of EDINBURGH *against* the GOVERNORS of HERIOT'S HOSPITAL.

HOSPITAL.

Who entitled to call the Governors of an Hospital to account? Whether the Governors have power to feu out the Hospital lands? Whether the Court of Session may establish rules for the future administration of the affairs of an Hospital?

[*Faculty Collection, IV.* 46; *Dictionary*, 5750.]

IN 1623, George Heriot, jeweller to King James the VI. executed a deed of settlement, whereby he gave certain subjects to the Magistrates and Town