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judge that transfers the property to the pursuer, and voids the right formerly vested in the defender; *vide* Bankton, B. 4. Tit. 24. § 6. par. 21; Erskine, B. 2. Tit. 5. § 25. Dict. *voce* Irritancy. Hence it follows, that, notwithstanding this decree, the property of the subjects at the time of the alleged riot, was in Beatt and Dawson, and they only could prosecute for damages done to them.

But, though this decree were supposed to have a restrospect, it cannot be founded on as a title for carrying on an action commenced many months before the decree was obtained. A person's title to carry on an action ought to be produced *in initio litis*; and, if it is not, the action ought to be dismissed. It is not sufficient that the pursuer acquire a title during the dependence of the process, except only in the case of heirs and executors. In all other cases, it is of no avail; *vide voce* Title to Pursue.

"The Court, chiefly moved by the decree of declarator of irritancy, altered, and refused the bill. *See* Title to Pursue.

Act. *Cosmo Gordon, Patrick Murray.* Alt. *Blair. Il. Campbell. Wight, et alii.*

*A. R.* *Fac. Col. No* 67. *p.* 115.

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1770. *November* 14.

Thomas Lockhart, Esq. *against* Archibald Shiells, Portioner of Inveresk.

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

By a feu-contract, dated 24th December 1734, Archibald Shiells, the defender's father, disponed to Thomas Brown, his heirs and assignees, &c. several acres of land near Inveresk, for which Brown became bound to pay the sum of L. 6 : 15 : 10½d. of feu-duty, doubling the same at the entry of every heir or singular successor; and it was also provided, 'That if two terms feu-duty shall 'run into the third unpaid, then, and in that case, the said Thomas Brown and 'his foresaids shall thereby *ipso facto* forfeit their right to the subject above dis-'poned.' This contract contained no precept of sasine; but instead thereof, Shiells became bound to grant a sufficient charter, containing precept and all other clauses.

Brown entered into possession, but fell very much in arrear of the feu-duty. In 1746 there was due L. 19 : 9 : 1d., for which bill was granted; and in 1755, when Brown died, nine years' feu-duty was unpaid. Brown left three daughters, Mary, Margaret, and Jean. The two eldest were married and from home; Jean, the youngest, continued in possession of the feu till the year 1759, when she granted a conveyance of what right she had, to the defender, who entered into possession of the whole subject.

But as his right to possess the whole was evidently defective, he proceeded in the following manner.

Having charged the two eldest sisters and their husbands to enter themselves heirs to their father, he, on the 20th December 1758, took decreet in absence

against them for the following sums, viz. for the sum of L. 81 : 10 : 5d. as the amount of feu-duties due at the term of Lammas 1758; the sum of L. 6 : 15 : 10d. yearly, as the feu duty from the year 1758, in all time coming; the same sum of L. 6 : 15 : 10d. as the duplicate of the feu-duty at the death of Thomas Brown in 1755, the sum of L. 30 as the penalty in the feu-contract, the sum of L. 19 : 1 : 1d. contained in the bill, and another sum of L. 20 in name of damages, the whole amounting to L. 185 : 9 : 4d. No 71.

Upon this decreet the defender raised letters of *special charge* against the three sisters, charging them to enter themselves heirs in special, in the said lands, to their father, said to have died last vest and seased therein, but who never had been infeft; and thereafter, on 19th December 1759, he obtained a decreet of adjudication of the subject.

In the year 1767, a demand was made upon the defender by Alexander Kerr, who had obtained a disposition from Mary and Margaret Browns, the two eldest sisters; and Kerr having thereafter conveyed his right to Mr Lockhart, he brought an action against the defender, concluding for reduction of the foresaid decreet of adjudication, and that he should be decerned to cede the possession to the pursuer, and account to him for his bygone intromissions with the rents and profits of the subjects.

In support of his action, the pursuer stated several objections to the decreet of constitution and of adjudication: 1*st*, That the decreet of constitution was taken against the three sisters conjunctly, instead of being against each for her third share; 2*dly*, That the adjudication proceeded upon a *special charge* to enter heir, when the father had only a personal right to the subject, having never been infeft; and that a special charge was in these circumstances inept, and could not be the foundation of an adjudication; and 3*dly*, That the adjudication was led for sums that were not due.

The defender, on the other hand, maintained, 1*st*, That at any rate he had a good right to one-third of the lands; 2*dly*, That his decreet of constitution and adjudication were liable to no nullity; and, 3*dly*, Independent of these collateral rights, he was entitled to the absolute property of the subject, the feu-right having been forfeited to his father, and to himself, as representing him, *ob non solutum canonem*.

THE LORD ORDINARY, upon the 4th August 1769, pronounced the following interlocutor: "Sustains the reasons of reduction of the decreet of adjudication, at the instance of the said Archibald Shiells, against Mary, Margaret, and Jean Browns, produced, void and null; and reduces, decerns, and declares accordingly; repels the defences pleaded by the said Archibald Shiells, that the feu-contract is void *ob non solutum canonem*; finds, that Archibald Shiells, defender, is liable to account for the rents of the lands contained in the said feu contract."

The defender gave in a reclaiming petition; and upon the 1*st* point, the objections to the adjudication, pleaded,

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1*mo*, The debt pursued for was the feu-dnties payable to the superior by the feu-right; and as it could not be denied, that as long as the feu remained undivided betwixt the heirs portioners, it would have been competent for the superior to poind any part of the ground for his feu-duty, or to distrain the goods, or any part thereof, so it was competent to adjudge all and every part of the feu for the whole feu-duty; and as the foundation of such adjudication, to take a decreet *in solidum* against each of the heirs portioners. Nor could any objection lie to the adjudication on this account; for whatever might be the terms of the constitution, yet as the defender had attached the whole land for payment of the whole debt, that would necessarily lay the debt proportionally upon the shares of each of the heirs portioners.

2*do*, The objection, that a general special charge, not a special charge, was the proper diligence, when attentively considered, though plausible, was not a solid one in point of law. There was a capital mistake in the pursuer's argument: The adjudication did not proceed on account of the heir's contempt, but because a charge was *fictione juris* held as equivalent to a service; and as it could not be denied that a special service, which included a general one, would carry every right and interest which the predecessor had in the lands, whether vested by infeftment or not; so an adjudication, proceeding upon a special charge, would carry every right and interest which the defunct had in the lands, without distinction, whether it was a personal right or established by infeftment.

Though, in the present case, therefore, a special service was not absolutely necessary, as a general service would have been sufficient, yet it did not from thence follow, that because it was unnecessary it would be null and void. Though it would not have been effectual for infefting the heirs of Thomas Brown, upon a precept to be granted by the superior, in common form, it would certainly have been effectual to carry the feu contract, the only right Thomas Brown had to the subject; and that being the case, there was no reason why an adjudication of that right might not very properly proceed upon a special charge.

The point had been established, Falconer, Feb. 5. 1745, Ramsay against Clapperton's Creditors, *voce* PASSIVE TITLE, where the objection, that as the predecessor had only a personal right, a general special charge should have been used, was repelled. The decision, July 10. 1737, Monro against Creditors of Easterfairn, No 9. p. 2173. and the opinion of Lord Bankton, l. 3. t. 5. § 114. founded on that judgment, had no connection with the present question. The point then decided was, that a *general* charge did not supply the want of a service of any kind, but was solely intended to establish a passive title against the heir; from which it could not be inferred, that a special charge would, in that case, have been ineffectual to support the adjudication challenged.

3*tio*, The objection, that as the adjudication was led for sums not due, the effect thereof should be to vitiate the whole diligence, was neither founded on truth, nor did the conclusion follow. The articles of L.6:15:10d. with the

duplicates of the feu-duty, that of L. 30 as the penalty in the contract, and L. 20 for expenses, were all authorised charges; and although objections did lie to certain articles, the decreet would nevertheless stand good as to the other articles that were well founded; for as each article was adjudged for separately, there were as many accumulated sums and as many adjudications as there were articles. No 71.

Upon this point, the pursuer answered:

1*mo*, As to the decreet of constitution—though he did not mean to state any objection to the sum of L. 19: 1: 1 contained in the bill, nor to the bygone feu-duties from 1746 to 1758, yet as to all the other articles, the decreet was groundless and irrelevant. The third article in the decreet of L. 6: 15: 10, as the feu-duty from the year 1758, and in all time coming, was not a debt due at the time, but to arise *a futuro*, and could not therefore with propriety be included in the decreet. The fourth article of the same sum, as the duplicate of the feu-duty on the death of Thomas Brown in 1755, was a manifest *pluris petitio*. A *duplicando* was only claimable upon an entry or renewal of the investiture in favour of the heir. But, in the present case, not only had there been no renewal, but there could be none; for though Archibald Sheills, the granter of the feu, was bound to grant to Mr Brown a charter and precept, yet that never had been done; and of course a composition could no more be demanded from Brown's heirs, than it could have been from Brown himself upon taking infeftment, had the charter been granted. The fifth article of L. 30, said to be the penalty incurred through Brown's neglect in payment of the feu-duty, was an erroneous charge. The penalty stipulated in the contract could have no relation to the termly failzies in payment of the feu-duty, which would have come to be more exorbitant than any penalty that ever was heard of; but as that was not specially declared in the contract, this penalty could only be meant to secure performance of the general feu-contract; and as, in that view, Archibald Shiells had failed to implement what was prestable upon his part, by granting a charter and precept of sasine, neither he nor his heirs, could have action against Brown or his heirs, for implement of what was to be performed on their part. The sixth article, of a penal sum of L. 20, in name of damages and expenses, was an additional *pluris petitio*; it being an established rule, that the other penalties claimed could be intended or admitted only as an indemnification of whatever expenses should be incurred.

2*do*, As the decreet of constitution was taken against the three heirs portioners in *solidum* and not *pro rata*, it was *funditus* null and void. This rule was acknowledged by multiplicity of authorities and decisions. Stair, b. 3. tit 5. § 14. Dict. *voce* SOLIDUM ET PRO RATA, in the Section relative to Heirs Portioners; where, in the case July 1687, Jordanhall *contra* Edmonstone, a decreet in absence against three heirs portioners was suspended, because they were decerned in *solidum* and not *pro rata*. The distinction taken, that as the feu-

No 71. duties were *debitum soli*, and affected the whole subject equally, and consequently the share of all the sisters jointly, could not bear the defender through. For, allowing it to be just, it could apply only to one of the articles concluded for, viz. the feu-duties; and although it might hold with regard to diligence competent in law against the estate itself; yet whenever the creditor betook himself to a personal action against the heirs portioners, he was bound to follow the rule of law, and to take decreet against each only *pro ratu*.

As upon both of these grounds, therefore, the decreet of constitution was *funditus* null and void, the adjudication proceeding thereon was equally ineffectual.

3*tio*, The charge given in the present instance being a special charge, and as Brown, the predecessor of the heirs charged, did not die last vest and seised in the lands, there were not *termini habiles* for a charge against his heirs to enter to him in special. The distinction as to the different kinds of charges rendered this proposition extremely obvious. A general charge answered no purpose but to establish the debt *passive* against the heir, if he did not renounce, or *cognitionis causa* if he did. A special charge, again, as it necessarily supposed an infeftment in the person of the predecessor, so it also required a specification of the particular lands in which the predecessor was supposed to have died seised, and to which the heir was specially charged to enter. A special charge, without such specification, would be *funditus* null and void, and upon which no after diligence could proceed. This kind of charge, therefore, related, and could relate, only to those heritable subjects wherein the predecessor died vest and seised; but as there might be some other heritable estate belonging to the predecessor in which he was not infeft, some other species of charge was requisite to be the foundation of diligence, which was what was called a general special charge. Lord Bankton, v. 2. b. 3. tit. 5. § 114.

This last charge accordingly was that which should have been given in the present instance; the estate in question was one of that description, to attach which the general special charge was alone applicable. And as the sole foundation of the diligence which the law authorised upon these charges, was the contempt of the heir in not giving obedience; if the charge was either erroneous in point of form, or such as the heir could not possibly comply with, no adjudication could pass thereon, the method chalked out by law not having been followed.

The argument, that as a special charge stood in place of a special service, it must *ex paritate rationis* include a general charge, and of consequence carry every right and interest which the predecessor had in the lands, was fallacious. A special charge, as coming in place of a special service, could only be effectual when the special service could have been expede. As in a special service the claimant was required by the brief, to prove the predecessor's

death, and that he then stood infeft in the lands; the heirs, in the present instance, as they could not have answered these heads, and have shewn that their father was seised at his death, could not of course have made up a title by special service, and hence as there could be no special service, the special charge, as coming in its place, though to a particular effect only, was irregular and inept. As it could not therefore be denied, that the general special charge was the proper diligence in cases of the present nature, and had as such been followed by the universal practice of the country, the adjudication avowedly led upon a different form of procedure, not applicable to the nature of the subjects attached, could not, to any effect whatever, be sustained. No 71.

Upon the second point, the alleged forfeiture of the right *ob non solutum canonem*, the defender pleaded:

*1mo*, As all contracts should be regulated by the agreement of parties, so when a feu-right was granted, under the express condition that it should be forfeited *ipso jure* without declarator, in case two years feu-duty should remain unpaid, there was no reason why that condition should not strictly take place.

The statute 1597, c. 250. which established the legal irritancy of feus, made no distinction, but declared, in express terms, that the right should be lost; and, though a distinction had been received between the effect of legal and conventional irritancies, the first being purgeable at the bar, before decreet of declarator; yet the latter being regulated by the convention and agreement of parties, to which the law gave full effect, operated *ipso jure* without declarator. Erskine, b. 2. t. 8. § 14.

There was no material distinction in the present case from that of a lease for a long endurance, in which a conventional irritancy was not purgeable. The only obligation the vassal came under was to pay a yearly feu-duty, adequate to the annual value of his possession; so that, though equity might interpose in allowing an irritancy to be purged, where it was exorbitantly penal, there was no room for such interposition in the present case; where, by declaring the irritancy, the vassal forfeited nothing, but returned the fee to the superior, upon the same terms he had received it. Lord Stair, b. 4, t. 18. § 3.

*2do*, The pursuer's argument, that though the convention of parties might provide an *ipso jure* irritancy, yet a declarator was necessary, in order to give it effect, proceeded on not duly considering the nature of the right. The necessity of a declarator could not aid that argument, unless it could, at the same time, be maintained, that, whenever a declarator was necessary, it was competent to purge in the course of it; the contrary of which was admitted, with regard to the irritancy of a tack, which was determined upon the convention of parties alone.

The necessity of a declarator, in cases of this nature, was founded on the principle of law, *nemo jus sibi dicere potest*; the superior, or proprietor, was

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not entitled *brevi manu* to turn the vassal out of possession; so that, when a surrender was refused, it became necessary to have recourse to a Court of law. It could not from thence follow, that the right of the superior was only created by the decreet of declarator; on the contrary, the decreet only declared the right that was *ab ante* existing, and obliged the vassal to submit to it.

3*tio*, However necessary a declarator might be, where the vassal continued in possession after the irritancy was incurred, yet, when the vassal after that made a voluntary surrender of his right to the superior, or where he deserted the subjects, and allowed the superior to enter to the peaceable possession, no declarator was necessary. The deserting of the possession was a renunciation of the right *rebus ipsis et factis*; and, after the superior had got full possession of the subject, a declarator of irritancy would be an idle form.

This was precisely what had occurred in the present case; and the principle was supported by the decision, 28th November, 1728, Taylor against Sir William Maxwell, *voce* TACK; and in a still later case,* 1763, Henderson against Purdie, the vassal having deserted, and the superior having assumed the possession, was found sufficient to bar the wife of the vassal's interest, who had a liferent infeftment in the feu, though no declarator had been obtained, voiding her right.

Upon this point the pursuer *answered*,

1*mo*, Forfeitures and irritancies were not now the favourites of the law; conventional penalties of every kind were subject to modification and restriction, to answer merely the end proposed, an indemnification or security to the party, for performance of those articles to which the penalties were annexed. It was upon this principle that penalties in bonds of borrowed money, however strongly secured by the convention of parties, were restricted to the real expenses debursed. Irritancies in tailzies were also allowed to be purged, before decreet of declarator was obtained. The same principle operated as to irritancies or forfeitures of feu-rights; it being an universal rule, that a declarator was necessary to close the right, and that, before such action was obtained, the contravention might be purified.

This was admitted by Lord Stair in the passage referred to, b. 4. t. 18. § 3. and the distinction he made betwixt rights merely gratuitous, and onerous contracts, might safely be admitted, as it could never apply to the present question. The irritancy incurred here was said, indeed, not to be of a penal nature; but the very reverse was the fact. For, allowing it to be a moot point, whether any, or what price was paid for the original purchase, the agreement, at any rate, was not gratuitous, but an onerous mutual contract: The subject had also been greatly improved; so that the forfeiture of that right, for a neglect to pay two terms feu-duty, must, to the feeling of every impartial mind, appear highly penal. Bankton, b. 2. tit. 11. § 48.

* Not reported.

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2*do*, The distinction maintained between legal and conventional irritancies was neither solid nor applicable to the present question. The statute 1597, c. 250. admitted no such distinction, but made the case, by the provision of law, equivalent to the express provision in the charter. Lord Stair, b. 1. t. 13. § 14. and b. 4. t. 20. § 36. laid it down as fixed law, that, though the convention of parties might provide an *ipso jure* irritancy, a declarator was still necessary; because that, being matter of fact, must be proved. That it was optional to the party, in whose favour the irritancy was provided, to take advantage of it, was undoubted; but, if he was to do so, it must be by declarator; which, operating only from the time of the decreet, of course admitted the failure to be purged by actual payment. The passage in Erskine, b. 2. t. 8. § 14. which seemed to favour that distinction, supposed the case of a declarator actually brought into Court, for declaring the irritancy already incurred, and time demanded for purging; which was perfectly different from the present question, where no such declarator had ever been attempted: And though, in the more early periods of the law, such a distinction, in one or two cases, had been allowed, it had afterwards been departed from, and the privilege of purging allowed, even after declarator had been brought into Court, sometimes by payment at the bar, at other times by indulging a reasonable delay.

3*tio*, The plea stated, that, by deserting the possession, there was a renunciation of the right *rebus ipsis et factis*, which superseded the necessity of a declarator; and the case referred to in support of that doctrine, Taylor against Sir William Maxwell, had no analogy to the point in dispute. Though the heritor should be entitled, upon the possession's being deserted by his tenant, to enter *brevi manu*, no other mode being left of recovering the stipulated rent, it did not follow, that the same rule would hold in the case of a superior and his vassal. The feu-right stood on a very different footing. The lands were the property of the vassal, not of the superior; so that his deserting the possession of his own property could never return the same to the superior; and whatever claims he might have against the lands, could only be recovered by prosecution in the due course of law. The other case, founded on in 1763, Henderson against Purdie, * as an authority in the present instance, was still less applicable. The irritancy in that case had not only taken place in the husband's lifetime, but the forfeiture of the right had been fully ascertained by a proper decreet and declarator.

THE LORDS adhered to the Lord Ordinary's interlocutor; and, on advising another reclaiming petition, with answers, the same judgment was pronounced.

Lord Ordinary, *Elliock*. For Lockhart, *Lockhart*.
For Sheills, *Macqueen, Crosbie*. Clerk, *Ross*.

*R. H.* *Fac. Coll. No.* 43. *p.* 121.



* Examine General List of Names.