

ALEXANDER DENHAM, Esq.	-	-	<i>Appellant</i> ;	1739.
ARCHIBALD STEWART, Esq. ( <i>alias</i> )	}	-	<i>Respondent.</i>	DENHAM
DENHAM,)				u.
				STEWART.

17th February, 1737.\*

TAILZIE.—ACT 1685, c. 22.—The conditions and irritant clauses not being inserted in a general retour, found not to infer an irritancy.

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[Fol. Dict. I. p. 490. Rem. Dec. I. p. 155, No. 79 and 80. Mor. p. 7275.]

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SIR WILLIAM DENHAM, in 1711, executed an No. 46. entail of his estate of Westshiells, whereby he resigns the lands, under strict prohibitory and irritant clauses of the usual nature, “in favours of, “and for new infestments to himself and the heirs “male of his body; which failing, to Robert “Baillie and the heirs male of his body; which “failing, to Mr. Archibald Stewart, &c.” Sir William died in 1712, without having executed the procuratory; and, upon his death, without heirs male, Robert Baillie, (thereafter Sir Robert Denham,) was served and retoured heir in general and of provision, in which general retour the conditions, prohibitions, and irritancies of the entail were not inserted. He possessed the estate till his death, whereupon a declarator of irritancy was raised

\* This case is inserted here, having been accidentally omitted in the proper order of its date.

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against his son, (the appellant,) by Mr. Archibald Stewart, the next substitute, on the ground that the general retour of Sir Robert Denham did not contain the conditions and clauses irritant of the entail; which omission, by the act 1685, c. 22, infers an irritancy.

*Answered* :—The clause of the act founded on applies only to titles actually made up in the lands, and not to general retours, which are no more than personal titles.

It was found, (15th July, 1725,) ‘ that Sir Robert Denham, retouring himself heir of provision to Sir William Denham, maker of the tailyie, without repeating in the retour the provisions and irritant clauses of the tailyie, and brooking and enjoying the tailyied estate by virtue of the retour, does import an irritancy of the heir’s right.’ This interlocutor was adhered to.

In a second reclaiming petition, it was pleaded, that even if the irritancy were incurred it was purgeable, seeing that no damage had thereby occurred to the estate. The Court, (1st February, 1726,) on advising this petition with answers, found in terms of their first interlocutor, with the addition of these words, viz. ‘ and having contracted debts after the said service, found that the defender cannot now purge these irritancies, and therefore refused the desire of the petition.’ This interlocutor was adhered to.

Upon this judgment, the pursuer (the respondent) entered into possession of the estate; whereupon the creditors of Sir Robert Denham, (the appellant’s father,) raised an action against him, (the pursuer,) to have it found that their debts were chargeable on the estate, notwithstanding the

entail, the prohibitory clauses not having been inserted in the retour. The Court of Session found that the estate was chargeable with these debts, but upon an appeal to the House of Lords, that judgment was reversed.\*

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An appeal was thereafter brought from the above interlocutors of the 15th July and 18th Nov. 1725, and the 1st and — February, 1726, &c.

Entered  
Jan. 26, 1736.

*Pleaded for the Appellant*:—The act compels insertion of the conditions of the entail “in the rights and conveyances” whereby the estate is possessed. These words mean only *real* rights, viz. charters and infeftments, which appear on record as the complete titles to the lands, and on the faith of which contracting creditors may rely. A general retour is not such a conveyance or real right; and has no other effect than as evidence that the person retoured has an undoubted right to make up a title to the entailed estate.

2. Such general retours are not uncommon, but are never considered to be a contravention of the entail.

3. By the judgment in the House of Lords, the estate was not exposed to Sir Robert’s creditors, and therefore this reason for holding possession on a general retour to be an irritancy, no longer exists.

*Pleaded for the Respondent*:—The only title by which Sir Robert Denham possessed the estate was this general retour; and therefore the omission in it of the conditions of the entail, is, by the express terms of the act, a contravention, incurring forfeiture.

2. Although in some instances, the irritant

\* 5th June, 1733. Vide supra, No. 25.

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clauses of the entail may not have been inserted in the general retour, yet in all these the retour has borne a reference to the entail itself, but in the present case the retour is absolute, without mention of, or reference to, any entail containing irritancies. Further, whenever heirs of entail have expedite only general services, they have been careful not to possess in virtue of such retours, until they are completed by infestment.

3. Sir Robert's possession in virtue of his general retour, has left the estate exposed to his creditors. If this is sanctioned, there must be an end of all entails, because the heir of entail not only would never complete by infestment an entail which he wished to defeat, but would possess on a personal title, in order that he might charge the estate at pleasure.

Judgment,  
Feb. 17, 1737.

After hearing counsel, "it is ordered and adjudged, &c. that the said interlocutors complained of in the said appeal be, and the same are hereby reversed; but that the respondent be at liberty to proceed before the said Lords of Session, in this cause, according to law, and the course of the said Court, for any irritancies founded upon in his libel, other than the irritancy alleged to arise from not repeating the provisions and irritant clauses of the tailie in the retour mentioned in the interlocutor hereby reversed."

For Appellant, *Duncan Forbes, W. Murray.*

For Respondent, *James Erskine, Robert Dundas, William Hamilton.*