1760. *November* 26.

Ronald Macdonald Younger of Clanronald, *against* John Stewart of Farnese, Esq; Grandson and Heir and Executor of Sir James Mackenzie of Royston, John Mackenzie of Delvin, and Others.

No 98.
A penal irritancy, where the performance of the condition depended upon the father of the donee, found purgeable any time before declarator.

Sir Kenneth Mackenzie, and others, used arrestment in the hands of Ronald Macdonald of Clanronald as debtor in certain considerable sums to the said John Stewart, in right of his grandfather Sir James Mackenzie of Royston.

This obliged Clanronald to bring a process of multiplepoinding; in which process the following question occurred.

The estate of Clanronald was forfeited by the attainder of Ronald Macdonald for his accession to the rebellion 1715. Mrs Penelope Mackenzie, Lady Clanronald, widow of Allan, Ronald's elder brother, got her claim ascertained to a liferent annuity of L. 300 Sterling yearly out of the said estate. The estate was afterwards purchased by Ronald Macdonald, her husband's nephew, the heir-male of the family. The lady did not exact her whole annuity, but allowed a part to lie over; and, in December 1726, Ronald Macdonald granted her a bond for the sum then due to her, being L. 1700 Sterling.

In October 1743, Lady Clanronald made her last settlement, and conveyed the whole debts and sums of money, heritable and moveable, due to her, and particularly Clanronald's bond in the 1726, with several other bonds, in favour of Lord Royston and John Mackenzie writer to the signet; under the burden of certain legacies; and particularly, upon this provision, 'That her assignees 'shall be holden and obliged to pay Ronald Macdonald, now younger of Clan-'ronald, her husband's grand-nephew, the sum of L. 1800 Sterling, and that 'at the term of Whitsunday next after her decease; but under this express 'condition, That the said sum shall remain under the direction of the said Sir 'James and John Mackenzies, and be applied by them, or the surviver, for the 'use and behoof of the said Ronald Macdonald, for his education and other-'wise, as they shall think fit; which sums shall bear interest from the time 'that the foresaid principal sum of L. 1700 Sterling, due by the said Ronald 'Macdonald, now elder of Clanronald, and interest thereof, shall be paid up 'to her disponees.' And it is further provided, That, in case the disponees should not recover the principal sum of L. 1700, but only the bygone interests, then the legacy of L. 1800 should be restricted to the sum of L. 600.

Of the same date she signed another writing, whereby, after confirming and approving of the settlement made of that date, and reciting the legacy left to Ronald Macdonald younger, 'she declared it to be her will, That unless the 'said Ronald Macdonald elder, shall, within the space of five years after her 'death, make full and complete payment to her said disponees and executors, 'of all debts and sums of money which they can lawfully crave and demand 'from him, as deriving right from her in virtue of the foresaid disposition and

No 98.

'settlement; then, and in that event, and upon his failure therein, she declares the foresaid donation or legacy of L. 1800, or L. 600 and interest thereof, conceived in favour of the said Ronald Macdonald younger his son, to be void and null, and her said disponees to be free and exonered of the burden thereof, without the necessity of any declarator for that effect; and she thereby accordingly revokes and recalls the same upon the said Ronald Macdonald elder his failure, as said is.'

Lady Clanronald died in November 1743, when Mr Macdonald younger, the legatee, was under age; and from the confusions which thereafter ensued in the country, and from the situation of the estate of Clanronald, no part of the debts were paid to the Lady's disponees within the five years. Afterwards several payments were made to Mr John Mackenzie; but the share belonging to Lord Royston's heir still remained unpaid; and that being the case, the disponees of the Lady insisted upon the irritancy of the legacy of L. 1800 left to Mr Macdonald younger, and that the same should be found to fall and become void, in respect of his father's having failed to make payment of the debt due to the lady within five years after her decease.

The Lord Auchinleck Ordinary made avisandum to the Lords with the question, 'How far the L. 1800 with which Lord Royston and Mr Mackenzie were 'burdened to young Clanronald, ceases to be a burden by the father's failing 'to make complete payment of what he was due to Lady Clanronald within 'the five years?'

Pleaded on the part of the disponees; That the legacy was a free-will offering, a mere donation on the part of Lady Clanronald; and therefore it was allowable for her to qualify the same by every lawful condition that she thought proper. The motive too which made her qualify it in the manner she did, was just and reasonable. The bulk of her fortune was locked up in Clanronald's hands, and the whole execution of her will depended upon that money's being made effectual. The quality therefore was thrown in as a powerful incitement both to the father and son, to exert themselves in paying up the debts they were owing to the disponees. Neither did she hamper Clanronald in point of time, but gave him five years after her death to pay up the money; and, in case of his failing so to do, she recalled and annulled her legacy, and declared her executors free and discharged thereof. Words cannot be more express; and, therefore, as the condition was lawful and the motive just, no good reason can be assigned why it ought not to have its full effect; Beatson *contra* Harrower, 17th January 1679, No 44. p. 7208.; Cutler *contra* Malcolm, 4th November 1718, No 50. p. 7215.; Athole *contra* Campbell of Glenlyon, 20th July 1687, No 45. p. 7208.; Lady Cultequhey *contra* Abercairney, 10th December 1672, No 80. p. 7257. In all these cases, an irritancy was found not purgeable, which proceeded upon this plain principle, That they were qualities either of a conventional contract, or of a free donation, and were inherent in

No 98. the right itself. And these qualities are improperly characterized *penal irritancies*. For, if the donee does not chuse to accept of the right in the terms it is granted, he is at liberty to repudiate the same; but if he chuses to accept of it, he must take it as it is granted. He cannot accept of the legacy and repudiate the condition.

Nor does there appear any thing penal in the present case; and if it should be constructed in that manner, it would be impossible to qualify any contract or donation with any condition, suspensive or resolutive, that could be effectual, though the law clearly supposes the contrary.

It does not appear to be a circumstance of any moment, that the legacy was bequeathed to Clanronald the younger; and the performance of the condition depended upon Clanronald the elder, whereby a seeming hardship might arise, that one man should lose his right through the failure or neglect of another. For, supposing the condition had been absolutely casual, which could not depend upon the act of the donee; yet the failure of the condition would have annulled the bequeath; and in this case the connection was so near, viz. that of father and son, that it may be justly considered as one and the same person.

Pleaded for Clanronald younger, That this legacy left by the lady to the heir of the estate, which was burdened with the debt, is truly of the nature of a *legatum liberationis*, which is always presumed to be intended to have full effect in behalf of the debtor.

2*do*, The testatrix in this case left her infant-legatee under the care and tuition of the two gentlemen whom she named her general disponees and executors; and it cannot be believed that she should immediately lay down a plan to forfeit him of his right in favour of those very gentlemen to whom she had entrusted the care of what she left him. It has hardly occurred, that in the same settlement, the very same persons should be tutors to an infant, and also donatars of his forfeiture for their own behoof.

3*tio*, The forfeiture is supposed to arise from the omission of a third party, to which the infant could have no accession. And as they are his trustees, it would have been their business to use their best endeavours to relieve him from the irritancy, if it had been conceived in favour of another. If so, it is not just that they should take advantage of it against him, when it is conceived in their own favour.

4*to*, It is a general rule in the law and practice of this country, that irritancies, which deprive any party of a right established in his favour, may be purged by performance at any time before declarator. The right of this sum was vested in Mr Macdonald at the first term after the lady's death. The effect of the grant was to operate an extinction *pro tanto* of the bond of L. 1700, and interest due out of his estate to the Lady. The disponees want to revive this debt upon the grantee's estate, which had been before extinguished, and that in respect of the omission of a third party. This is highly penal, as much as any irritancy can be; but as, by the law and practice of the Court, such

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. 7206.; Gordon *contra* Lees, 8th January 1663, No 79. p. 7257. No 98.

"The Lords found the irritancy purgeable any time before declarator."

Reporter, *Lord Auchinleck.* Act. *Monro, Ferguson.* Alt. *Lockhart.*
J. M. *Fol. Dic. v. 3. p. 337.* *Fac. Col. No 1. p. 1.*

1766. *November* 18.

William George, &c. Ross *against* William Monro of Newmore.

No 99.
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.

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.'

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