" ſhall pay or cauſe to be paid to the reſpondent the ſaid ſum of " 50*l.* coſts within ten days; and if he ſhall fail therein, that " then his recognizance to his majeſty in the ſum of 100*l.* for " payment of ſuch coſts as the Houſe ſhould appoint, in caſe the " ſeveral interlocutors from which he appealed ſhould be af- " firmed, ſhall be eſtreated into his majeſty's Court of Exche- " quer, in order to have the ſame ſpeedily put in proceſs " there."

Caſe 132. Edgar, 1 Jan. 1725. Mr. Walter Stirling, Writer in Edinburgh *Appellant*; William Gray, of Invereighty - - *Reſpondent*.

Ex parte (*a*).

13*th Feb.* 1726-7.

Penal Irritancy.—Homologation.—A collector of taxes, during Cromwell's uſurpation, enters into an agreement with a perſon who had a commiſſion to ſue, compound, tranſact, and agree on the part of the Crown: to this commiſſioner the collector granted bonds for certain ſums, and the commiſſioner obliged himſelf to deliver to the collector, *by a day certain*, a releaſe from the Crown, otherwiſe the parties to remain as they were before the bonds were granted: it is found that this is no penal irritancy, and not to be purged after elapſing of that day.

A payment by the collector, after the elapſing of that day, was no homologation, or paſſing from the reſolutive clauſe.

Preſcription.—Though 40 years elapſed after this alleged homologation, and no declarator brought on this reſolutive clauſe, it was ſtill competent to plead it.

Appeal.—5*l.* coſts given againſt the appellant, who deſerted his appeal.

UNDER the Commonwealth, and during Cromwell's uſurpation, William Gray of Hayſtoun, the reſpondent's anceſtor, was employed as collector of the taxations and other public impoſitions in the ſhire of Forfar. After the Reſtoration, in 1662, an act of indemnity and oblivion was paſſed in Scotland, but with a great many exceptions; one of which related to the accounts of perſons who had intrometted with or received any part of the public money from the year 1639 to the year 1660.

In 1670, the then Earl of Dumfermling obtained a grant or commiſſion from the Crown, under the privy ſeal, empowering him to call to an account, in proper proceſſes before all or any of his majeſty's courts, all intrometters with public money during the years abovementioned, and to recover all public monies in their hands unaccounted for. The commiſſion contained a power to the earl of granting diſcharges or acquittances upon payment, and of tranſacting and compounding; and a clauſe, obliging the earl and his heirs to account to the Crown for his receipts.

(*a*) This ſtatement is taken from the reſpondent's caſe only, the appellant not having appeared at the hearing, and, I preſume, having preſented no caſe.

The

The mode of proceeding with ſome of theſe debtors was to give them a charge of horning, and afterwards by compounding privately with them for ſuch ſums as they could afford; the earl, at ſame time, promiſing to procure them pardons and acquittances from his credit at court. Amongſt others, the ſaid William Gray of Hayſtoun was ſerved with a charge of horning for a very large ſum in 1670; but on the 10th of September that year, an agreement was entered into between the earl and him, in purſuance of which Mr. Gray paid to the earl 2000 merks in caſh, and delivered up to his lordſhip a ſecurity from the Earl of Crawfurd for 14,000 merks; and he as principal, and his ſon William Gray of Invereighty as cautioner, alſo executed and delivered to the earl four bonds, blank in the creditor's name, two for 3000 merks, and other two for 4000 merks each; being in all 30,000 merks.

The earl, of ſame date, executed a releaſe of Hayſtoun's intromiſſions, under the powers his lordſhip then had; and the earl alſo then executed a back bond obliging himſelf to procure under his majeſty's hand a ratification of the ſaid diſcharge, with a remiſſion or pardon, *and to deliver the ſame* ratification and pardon to Hayſtoun between and the 10th day of November following, to the effect he might expede the ſame: *or otherwiſe if the earl failed in procuring thereof, he bound and obliged himſelf to pay back to Hayſtoun the ſums received, with the ſecurity granted by the Earl of Crawfurd, ſo that if he ſhould not procure the ſaid ratification and remiſſion, he and the ſaid Hayſtoun were each of them to be in their own places, as if there had been no agreement.*

The earl having aſſigned two of theſe bonds to Sir William Sharp, he in 1671 brought legal diſtreſs againſt Hayſtoun for payment of one of them, which then became due, and which in conſequence thereof Hayſtoun paid. No ratification of the earl's diſcharge, or remiſſion by the Crown, had been granted in the mean time, nor were any ſuch granted during the earl's life; and no farther demand was made on the other three bonds, during the lives of the earl and Hayſtoun.

The earl's aſſignee, the appellant, afterwards brought an action before the Court of Seſſion againſt William Gray of Invereighty, the reſpondent's father, the cautioner in the ſaid bonds, and upon his deceaſe againſt the reſpondent himſelf. The reſpondent pleaded in defence, that the bonds were become void upon non-performance of the quality in the back bond to procure and deliver the ratification on or before the 10th of November 1670. The appellant anſwered, that this was a penal irritancy, purgeable at any time, and which was actually purged by the ſon of the ſaid earl, who had procured a ratification and remiſſion ſome time after; and, further, that Hayſtoun, by paying up one of the bonds in 1671, after the irritancy was incurred, had homologated the bargain, and diſpenſed with the irritancy, which the reſpondent could not therefore inſiſt upon.

The

The Court on the 1ſt of January 1725, "Found that the reſolu-
" tive clauſe in the back bond, is no penal irritancy, and therefore
" not purgeable upon performance after elapſing of the day; and
" found that the payment made, after the ſaid day was not a
" paſſing from the reſolutive clauſe; but that Hayſtoun could at
" any time after the ſaid payment inſiſt to be reponed to his own
" place." And on the 5th of February thereafter, the Court
" adhered to their former interlocutor, and refuſed the deſire of
" the petition."

Entered, 3 Feb. 1725-6.

The appeal was brought from "an interlocutor and decree of the
" Lords of Seſſion of the 1ſt of January 1725, and the affirmance
" thereof the 5th of February following".

The appellant, from the reſpondent's caſe, appears to have contended, 1ſt, that this was a penal irritancy, and purgeable; 2d, that Hayſtoun had homologated the tranſaction by payment of one of the bonds, in 1671 after the day of performance on the earl's part was elapſed; 3d, that it was again homologated in 1677, when Hayſtoun ſold his eſtate, ſubject to the payment of the bonds to the Earl of Dumfermline; and 4th, that Hayſtoun's claim to be reponed, after payment of one of the bonds, was cut off by preſcription.

Heads of the Reſpondent's Argument.

Though penal irritances are generally *purgeable* yet a clauſe inferring no penalty, but only *reſolving a bargain*, and putting the parties in the ſame caſe they were in before the bargain was ſtruck, as in the preſent caſe, neither was nor ever can be found penal or purgeable; if on the omiſſion to perform, it had been provided, that beſides the reſolution of the bargain, the party ſhould forfeit a ſum of money, that forfeiture would clearly amount to a penalty, which in ſome caſes might be purgeable; but when no ſuch forfeiture is induced, and when no other hardſhip is ſtipulated, than that either party ſhould be in as good circumſtances as before the bargain was made, it is impoſſible that ſuch a condition can be deemed penal. It is not the damage of the party which comes to be conſidered, where contractors have made it a plain, explicit proviſion, as in this caſe.

Though Hayſtoun, for ſeveral reaſons, and after lapſe of the day, was willing to ſtand to the bargain, as might be inferred from his payment of one of the bonds; yet the bargain he was inclined to ſtand to, was a contract which obliged the earl alſo to performance of his part, and gave to Hayſtoun a ſecurity for repayment of the ſums advanced in caſe the earl did not *ſpecifically* perform. And though it ſhould be concluded that Hayſtoun diſpenſed with the non-performance to that period, yet it cannot be imagined, that he diſpenſed with the non-performance thereafter, nor for one minute longer than the date of the act of approbation Beſides, he undoubtedly believed himſelf liable to be queſtioned for his life, as well as his fortune, when he agreed to give away ſo great a ſum as 30,000 merks for a ratification and remiſ-

ſion;

ſion; and ſo long as theſe were not procured, ſo long in his apprehenſion the danger remained, and knowing himſelf unable to ſtand the attacks of his *purchaſed* friend, as well as of others his foes, he could not in prudence fall out with him, the neceſſary conſequence of his refuſing payment of the bond. If that payment then, were the fruit of fear, and not of choice in Hayſtoun, it would be unreaſonable from that involuntary act, to draw the conſequences which only follow from the free and voluntary conſent of parties.

When Hayſtoun ſold his eſtate, and referred to a liſt of debts, which the purchaſer ſhould be taken bound to pay, it was neceſſary that the ſaid bonds ſhould be inſerted in the liſt, becauſe by an inhibition uſed by the creditor, they had become real debts on his eſtate. In the diſpoſition made of the eſtate of Hayſtoun, it is provided, "That whatever eaſe by compoſition or compenſa-
"tion beis obtained by the ſaid Mr. Patrick Lyon (the purchaſer)
"by friendly or amicable agreement, or *legal ſentence* from the
"repreſentatives of the ſaid earl of the ſums *given up to be reſting*
"by the ſaid William Grays elder and younger, expreſſed in the
"liſt and inventory of their debts mutually ſubſcribed by them,
"the ſaid Mr. Patrick Lyon obliges himſelf to keep account
"thereof, and apply the ſame to the uſe and behoof of the ſaid
"William Gray younger." From this clauſe, it is obvious, that Hayſtoun intended to quarrel this debt, which he ſtates only to be *given up as reſting*, but does not ſay it was due. This further ſhewed that Hayſtoun at that time had a ſettled reſolution to inſiſt upon the back bond.

The reſpondent's right to be reponed, or the cauſe and foundation of that right, viz. the reſolving of the bargain, gave him two diſtinct claims and intereſts; one, to have the money reſtored which he had paid; the other, to deny payment of the bonds, which by the irritancy incurred became void. It was plain he could not attain the firſt, without a ſuit for repetition, which after a lapſe of 40 years would be barred by preſcription: but the *ſecond* being *a right of exception*, could not periſh by preſcription, but muſt remain perpetual, and endure as long as the bonds could poſſibly laſt.

The reſpondent made it appear by the writings themſelves, that, the earl had no right or patrimonial intereſt in theſe ſums; that his commiſſion was only to tranſact and compound; that he was accountable to the Crown for his receipts; and that he had therefore no authority to take the bonds in an underhand hidden manner to blank perſons, thereby to cover the extent of his receipts. It was plain therefore, that neither in law nor in equity had he a demand for ohe ſhilling.

This day being appointed to hear counſel, counſel appearing for the reſpondent, but no counſel for the appellant; and the reſpondent's counſel being heard, and being withdrawn, the anſwer of the reſpondent was read, and conſideration had of what was offered in this cauſe: *It is ordered and adjudged, that the appeal be diſmiſſed,* Journal, 13 Feb. 1726-7. Judgment.

dismissed, and that the interlocutor and decree, and the affirmance thereof, therein complained of, be affirmed: and it is further ordered, that the appellant do pay or cause to be paid to the respondent the sum of five pounds for his costs in respect of the said appeal.

For Respondent, *Dun. Forbes.*

Case 133. Kaims, 18 Jan. 1726.

William Nisbet of Dirleton, Esq; eldest Son of William Nisbet, Esq; deceased, by his first Wife, and Executor of his said Father, - - - - - *Appellant;*

Janet, Jane, and Willielmina Nisbet, Daughters of the said William Nisbet, deceased, by his second Wife, by Mr. David Erskine of Dun and Others, their Tutors and Curators, - - - - - *Respondents.*

7th *March* 1726-7.

Legitim —Husband and Wife —Provisions to Heirs and Children.—Bonds.— Portions to children in a contract of marriage, if not so expressed, do not exclude their right of legitim.

Upon a wife's renouncing her thirds, by the contract of marriage, the division of the personal estate is bipartite, one half legitim, the other half dead's part.

Provisions to children, in this case, do not come off the whole head of the executry as a debt; but they are first to impute the legitim in payment of these portions, and take the rest as a debt from the deads' part if necessary.

Bonds fall under legitim.

WILLIAM NISBET, late of Dirleton, deceased, had by his first wife the appellant, his eldest son and heir, Walter his second son, and three daughters.

By contract executed in April 1711, previous to Mr. Nisbet's marriage with his second wife, the mother of the respondents, in consideration of the lady's fortune, which was considerable, he settled upon her lands, to the value of 4000 merks per annum, for her jointure, in full satisfaction for her dower, third of moveables, or others which she might claim by law, in case she should survive her said intended husband: and by the same contract he bound himself to lay out the sum of 100,000*l.* Scots in the purchase of lands to be settled upon himself in life-rent, and the heirs male to be procreated of the said intended marriage in fee; but if there should be no heir male of the said marriage, but daughters, Mr. Nisbet bound himself and his heirs to pay the several sums following; if but one daughter, the sum of 36,000 merks; if two daughters, the sum of 50,000 merks; and if three or more daughters, the sum of 60,000 merks, to be divided as the said William