[11*th August* 1840.]

(No. 19.)

BENJAMIN ABERNETHIE, Appellant.[1]

[*Knight Bruce — Macdowall.*]

Lieutenant General BENJAMIN FORBES or GORDON, Respondent.

[*Attorney General* (*Campbell*) — *Lord Advocate* (*Rutherfurd*).]

Tailzie — Irritancy — Investiture. — A. died, leaving a strict entail of his estate, in the form of a procuratory of resignation, unexecuted, in favour of himself, and after his decease, B., and the heirs male of his body; whom failing, C., and the heirs male of his body; whom failing, other substitutes. B. resigned upon the procuratory, and obtained a Crown charter, and took infeftment, but without having served. Some time after (the entail being recorded) B. brought a reduction, in which he obtained a reduction, in absence, of the deed of entail, upon the ground of defective execution, and a reduction of the titles made up as struck at by the Act 1693. c. 35. B. then served in fee simple, obtained a charter, and was infeft. Several years afterwards C. brought a reduction of the decree, and of the titles originally made up under the entail de novo, and of the fee-simple title, coupled with a declarator of the validity and of contravention, and obtained decree in terms of the prior conclusions of the libel, the remaining conclusions being superseded. Meantime B. executed the original procuratory de novo, obtained a charter in terms of the entail, and was infeft. — Held (affirming the judgment of the Court of Session), 1, that the title so made up under the entail was a complete feudal title; 2, that the mere possessing of the estate on

[1] Fac. Coll., 20th June 1837.

this title was not sufficient purgation; but, 3, that on the defender undertaking to find the most ample caution that no debts or deeds of his during his fee-simple possession should affect the estate directly or indirectly, there being no allegation made that any such debts or deeds existed, he was entitled to be assoilzied in hoc statu from the conclusions of forfeiture, and quoad ultra to have the action dismissed.

1st Division.

Lord Ordinary Cockburn.

Statement.

THE late General Gordon, in July 1803, executed a deed of entail of his estate of Balbithan, whereby he called himself as institute, and after his decease the defender, under burden of certain life-rents, and the heirs male of his body; whom failing, the pursuer and the heirs male of his body; whom failing, the pursuer's brother, and the heirs male of his body; whom failing, Sir John Gordon, captain and lieutenant of the Coldstream regiment of Guards, and the heirs male of his body; whom failing, any heirs to be afterwards named; and failing any such nomination, his own nearest heirs whomsoever, and their assignees. There was no nomination, and the name of the last-named substitute had been inserted in a blank after the deed was executed.

The deed contained all the clauses of a strict entail; in particular express provisions by which the heirs were prohibited from possessing the estate under any title different and distinct from the entail; and enjoining that the conditions should be inserted in the after conveyances and infeftments; and likewise declaring that the heirs should use the surname of Gordon allenarly, and the arms and designation of Gordon of Balbithan, all under pain of forfeiture of their right to the next heir; it being declared that the contraveners should ipso facto lose and forfeit their right to the said lands and

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estates, and that the same should devolve to the next heir of entail in like manner as if the contravener were naturally dead, and that free and disburdened of all the debts and deeds of such contravener, and of all adjudications and other diligences deduced thereon.

There was likewise a special clause, declaring that the heir in possession should be bound to redeem any adjudications or other legal diligences, "for payment of "debts which shall be owing by me at my death, or for "payment of any other real or legal burdens, or for "any other debts to which my said lands and others "may be subjected at any time hereafter," within the five years after the date of such adjudications, and to disburden the lands and estate thereof in all time to come; and in case of their failing to redeem as aforesaid, they were to forfeit their right, which was to devolve upon the next heir.

In November 1803 General Gordon died, when the succession under the entail opened to the defender as fiar, subject to a life-rent in favour of his father.

In 1804 the entail was recorded by the defender.

In 1814 a charter of resignation under the great seal, in virtue of the unexecuted procuratory in the entail, but without the procuratory being taken up by service, was expede, in favour of the defender's father in life-rent and himself in fee, of the lands contained in the entail, and under the conditions, provisions, and whole clauses thereof; and in January 1815 infeftment containing these provisions, &c. was taken thereon, and recorded. On this title the defender possessed, under all the conditions of the entail, until 1822.

He then served himself nearest heir of line to the entailer, and, relinquishing the name of Gordon, raised

a reduction of the entail and of the title made up under it in 1814; and on a proof obtained decree, in the absence of the pursuer, reducing in terms of the libel.

He then obtained a precept from chancery, and took an infeftment in fee simple, which was recorded 25th November 1822.

The pursuer, who was then abroad, on his return to this country in 1833, raised the present reduction reductivè of the above decree. The action, besides the reductive conclusions, concluded for declarator that the entail was valid and subsisting; and farther, that it should be found and declared, "that the defender has "committed a contravention of the said entail, and "violation of the conditions, limitations, and restric-"tions therein contained, whereby he has incurred an "irritancy of and amitted, lost, and forfeited his right, "title, and interest to the whole entailed lands and "others specified in the said deed of entail, and that "his right, title, and interest therein is now and shall "in all time coming be void and extinct; and that the "said lands and others, with the rents, maills, and duties "of the same, have fallen, devolved, and accresced and "do now belong to the pursuer, the said Benjamin "Abernethie, as the next heir appointed to succeed by "the said deed of entail, in the same manner, and as "fully and freely, in every respect, as if the said de-"fender had never been in the possession of the said "estate, or had never been called to the succession "under and by virtue of the said deed of entail, or as "if he were naturally dead; and farther, it ought and "should be found and declared that the said Benjamin "Abernethie, the pursuer, has now right to make up "and complete titles in his own person to the foresaid

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"entailed estate, in terms of the foresaid deed of entail; "or, at least, the said defender ought and should be "decerned and ordained to make-up titles in a proper, "legal, and habile form to the said entailed estate, and "to possess the same under the whole conditions, provisions, limitations, and clauses irritant and resolutive, "contained in the said deed of entail, and by no title "whatever which is in any respect disconform to or "inconsistent with the said deed of entail."

Defences were given in, and a record closed on the summons and defences, without any averment being made that the defender during his possession under his fee simple title had contracted any debt or granted any deed which could affect the estate.

The Court, 17th January 1835, reduced the decreet of reduction libelled on, and likewise the title made up on the procuratory in the entail in 1814, and found and declared the entail to be valid and subsisting.[1]

The case having come back to the Lord Ordinary to have the question discussed, whether or not the defender had subjected himself to the further conclusions of the libel, the defender gave in a minute, (2d February 1835,) stating that he had resumed the name, arms, and designation of Gordon of Balbithan, and was served heir of tailzie and provision to the entailer in terms of the entail of 1803, an extract of the retour from chancery being therewith produced.

In June 1835, the defender obtained a Crown charter of resignation, proceeding on the procuratory in the entail, and expede an infeftment thereon, in which were engrossed all the fetters and conditions of the entail.

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[1] Fac. Coll. x. 156.

The defender then maintained that the irritancy was thus purged, or at least could be purged by such farther steps as should be thought necessary before decreet.

Meantime the defender, by permission of the Court, lodged a minute, stating " that with a view to meet the " ground on which decree of forfeiture of the estate " was sought for against the defender, in respect of " the risk to which the estate is said to have been " exposed during the time the titles were made up in " fee simple, in case the defender had then contracted " debts, that is, prior to the 9th day of June 1835, " being the date of recording the sasine proceeding on " the Crown charter expede on the procuratory con- " tained in the disposition and deed of entail of the said " estate of Balbithan, he, the said defender, distinctly " averring that there were no debts in existence prior " to the period above mentioned, is ready and willing " to find the most ample and sufficient caution and " security, to the effect that he had contracted and " now owes no debts whatever incurred before the said " 9th day of June 1835, and that no debts contracted " by him prior to the period before mentioned should " ever be made available against the said estate of Bal- " bithan; and, of course, that all such debts, and all " adjudications or diligences which might be led there- " for, should be redeemed within five years from the " date of such adjudications, and the said estate of " Balbithan disburdened of the same, in terms of the " condition to that effect contained in the original deed " of entail, or within such other time as the Court may " be pleased to appoint."

" *N. B.*—The defender has thought it right to in-

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" clude in his offer the condition of the caution being " extended to the securing of the estate from debt; but " he is anxious that it should be understood, that he " specially intends that caution shall also be directly " and expressly found to the effect that he contracted " and owes no debts whatever of any kind prior to the " date mentioned in the said minute."

The Lord Ordinary found, that the defender's offer to purge any irritancy that may have been incurred may be regularly entertained, though not stated in the original record; and received the minute as an offer of purgation, and ordered cases upon the question of irritancy and forfeiture, and reported the cause to the Court, who appointed a hearing.

It appeared that at the time the first action of reduction was brought the appellant, who was unmarried, was in South America, his brother, the next substitute, dead without male issue, and that Sir John Gordon, who was also unmarried, was in India; and it was alleged by the appellant that an undue advantage had been taken of this coincidence, and that no attempt had been made to intimate the action. It further appeared, in regard to one of the grounds on which the original decree was rested, (viz. that the deed bore a false date,) that the party who drew the entail, and was also the agent of the respondent, was examined as a witness in support of this allegation; and that, although he was in possession of a letter from the maker of the entail, stating the deed of entail was executed of the date it bore, and instructing him to fill up the testing clause with the necessary particulars, which were accordingly inserted, this letter was not produced. It was alleged by the appellant that this was an act of concealment, and coupled with the above

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circumstances, was an indication of fraud sufficient to invalidate the decree, particularly as the suit was conducted ex parte.

Judgment of Court, 20th June 1837.

After hearing counsel, the Lords of the First Division pronounced the following judgment: — " (20th June " 1837). The Lords, having resumed consideration of " the revised cases, the printed minute for the defender, " and whole cause, and having heard counsel for the " parties, find, that, in respect the defender has made " up and possesses under a feudal title to the estate of " Balbithan completed in terms of the deed of entail, " and has offered, as the aforesaid minute bears, to find " the most ample and sufficient caution and security " that, prior to the period of completing the said title, " there neither were debts nor deeds contracted or " executed by him which could in any way, directly or " indirectly, affect the said estate as settled by the " entail; and that no debts or deed which may have " been contracted, made, or granted prior to the fore- " said period should ever be made available against " said estate, as so settled; they therefore in hoc statu " assoilzie the defender from the conclusion of for- " feiture, and quoad ultra dismiss the action, and " decern: farther, that the defender or his cautioners " shall have right at any time to show, by declarator or " other competent process, that the necessity for the " continuance of such caution no longer exists: find " the pursuer entitled to expenses, subject to modifi- " cation; appoint an account thereof to be lodged, and " remit the same to the auditor to be taxed and " reported."

The pursuer appealed.

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Appellant's Argument.

Appellant. — The statute 1685, c. 22., specially provides for the precise event which has occurred in the present case by a positive enactment, which expressly declares, that if the provisions and irritant clauses shall not be repeated in the rights and conveyances whereby any of the heirs of tailzie shall bruik or enjoy the tailzied estate, the said estate shall ipso facto fall, accresce, and be devolved to the next heir of tailzie.

The enactment in that part of the statute which authorizes entailers to insert irritant and resolutive clauses in deeds of entail is entirely distinct and separate, and differs in totò from the enactment in that part of the statute which provides for the repetition of the said irritant and resolutive clauses by the respective heirs of entail in the rights and conveyances in their favour, following upon the original deed of entail. The foresaid enactments in the said statute differ from each other in particular as well in form and construction as in effect and operation. In the case of contravention of the irritant and resolutive clauses in a deed of entail, the next heir of tailzie is authorized and directed to take advantage thereof by applying to the Court, in the form of an action to annul or avoid a right acquired by or created in favour of some third party dealing or contracting with or receiving the said right from the heir in possession, according to the ordinary effect and operation of irritant clauses in deeds or contracts; and the resolution of the right of the heir of entail so contravening is made to depend on the previous avoidance of the right acquired in contravention of the irritant clauses. Whereas, in the case of an heir of entail acting contrary to the terms of the statute, by bruiking or enjoying the tailzied estate and not repeat-

ing the provisions and irritant clauses of the entail in the rights and conveyances whereby he so bruiks and enjoys the tailzied estate, the said estate passes ipso facto to the next heir, by force of the clause of devolution contained in the statute.[1]

It has been said the statute should have been expressly libelled on. Why? The statute is the law of the land. Is it because the statute is penal? The statute is in no respect penal; on the contrary, as regards creditors (to protect whom was its principal, if not only object,) it is remedial, and as regards the powers of entailers over their donees it merely affirms the common law. Besides, it is not pretended that the statute is libelled on where a breach is committed; and moreover one of the learned Judges states his opinion that the objection was not fatal, but admitted of amendment if necessary.[2] The respondent has waived the objection by not making it in limine of the action.

Clauses of resolution or devolution have been long known, and had effect given to them by the law of Scotland.[3] So completely have these clauses been recognized in the law of Scotland, that in the well-known case of Stormonth[4] in 1662, it was actually held by the Court that a party might place his property extra commercium by the sole operation of these clauses. In 1685 the legislature interfered, and while it was deemed expedient that the lieges should still have the power of placing their estates extra commercium, it was ordained

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[1] Lord Chancellor in Stewart v. Fullerton, 4 Wilson & Shaw, p. 211.

[2] Lord Corehouse, Fac. Coll. 1836–7, p. 1085.

[3] Simpson v. Home, Mor. 15,353; Lockhart v. Gilmour, Mor. 15,404; Bruce Henderson v. Henderson, Mor. 4215, 15,439; Kempt v. Watt, Mor. 15,528; Fleming v. Lord Elphinstone, Mor. 15,559; Lord Meadowbank in Bargeny Cause.

[4] Mor. 13,994.

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that in so far as this was their object it should be effectuated differently, that is to say, that they should for this purpose insert in their taillies irritant as well as resolutive clauses, which irritant clauses were previously known in the law of Scotland as clauses of forfeiture in contracts for value, and they operated on such contracts in this way,—that the party to the contract who wished to take advantage of a breach brought an action against the other, founded on this clause, to have the contract for value set aside, the contract remaining effectual till decree notwithstanding it might otherwise be declared in the contract itself. The statute accordingly provided that these clauses should be enforced against creditors, purchasers, and other third parties dealing with heirs of taillie, by an action of declarator, in the form of a rescissory action, to set aside the rights they had acquired, the operation of the devolving or resolution against the heir being suspended till decree was pronounced irritating or avoiding such rights, but immediately upon that event the resolutive clause had full force, so much so, that the statute simply says the next heir may serve. Hence the distinction so plainly pointed out by the statute. If there are irritant clauses inserted in the rights and conveyances whereby the heir of taillie enjoys the estate, dealings with such heir may be set aside by means of a declarator; if on the other hand such clauses are not so inserted, dealings with such heir cannot be set aside, neither can there be any suspension of the resolutive clause, but the estate does thereby ipso facto devolve to the next heir.

It has been taken for granted, however, that the words of the statute do not authorize the distinction which is here contended for, although, so far as the

appellant has been able to discover, without reason assigned.

There is one expression in the statute which, though not adverted to on the other side, if taken alone, and construed as an entirely isolated sentence, might at first sight give an appearance of plausibility to this view of the statute. The statute says that the omission to insert the irritant clauses shall import a contravention of the irritant as well as of the resolutive clauses; but the statute does not stop there. It immediately goes on to explain what is meant and intended by this expression; and hence it is clear, that except by construing the statute so as to involve within itself a contradiction, the party contravening is not in the situation merely of a party who has committed an act which would authorize a declarator of irritancy, but precisely in the situation of the party against whom a contravention has been already established by decree.

To apply the doctrine of purgation then to a case such as the present, is to give relief against the express provision of the statute, which the established law of Scotland does not and cannot sanction or permit.[1] It has been said, however, by one of the learned Judges[2], that, in a recent case[3], the Court modified the statute. This it is conceived is a mistake. In that case the meaning of the statute appears to have been misunderstood. It was said that the statute meant to exclude the descendants of the body of the contravener, even though they should be the next heirs of entail, but does

[1] Lord President Blair, in Cameron, 12th Dec. 1810, Fac. Coll.; Lord Chancellor in Roxburghe entail cause, Dow's Reports, vol. ii. p. 208, 209.

[2] Fac. Coll. 1836-7, p. 1086.

[3] Bontine, 2d March 1837.

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not the statute expressly declare, in the words immediately following, that the next heir of entail is the party entitled to take advantage of the contravention? What the statute clearly meant was, to deprive the contravener of the estate of inheritance in fee simple which he had acquired, to cut off him and his heirs of line, as distinguished from the next heir of tailzie. If the next heir of tailzie happened to be the eldest son of the contravener, he would not at the time of the contravention be, in the words of the statute, his heir. The contravention is declared during the life-time of the contravener, and nemo est hæres viventis. The Court, therefore, in the case alluded to, instead of modifying, gave effect to the statute. The appellant is not prepared to deny that an entailer might in his deed provide that the statute should not come into operation to its fullest extent in regard to his entail, but that some other and distinct consequence should follow a contravention from that which the statute has provided for the particular case. To give effect, however, to such a provision would clearly not be to modify the statute.

In the present case it is not pretended that the corresponding provision in the entail is otherwise than in perfect consistency with the statute, and the appellant is entitled to found either upon the statute or upon the provision in the entail as confirmed by the statute. It is true that resolutive clauses, in so far as inconsistent with the statute,—that is, in so far as they provide an ipso facto devolution where the statute has provided otherwise,—cannot receive effect, but upon the same principle, and applicando singula singulis, where it is in accordance with the statute, it must receive effect. In questions inter hæredes intra familiam of the

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substitute heirs[1], the irritant clauses do not come into operation; in a question such as the present, which is exclusively a question inter hæredes, the statute has in express words excluded their operation. What the appellant complains of is not, as insinuated, that the respondent has committed a contravention of the irritant clauses by committing an act of alienation which the appellant could by force of such clauses annul and set aside; what he complains of is, that the respondent has so placed the estate that if he should, during his possession, commit an act of alienation, the irritant clauses cannot operate to avoid it. He is not seeking to set aside the rights of onerous third parties; on the contrary, he founds upon their validity, and because of the possibility of the existence of such rights during the respondent's possession, he seeks only to establish the fact of the descent of the estate to the next heir.

It is no part of the appellant's case to deny that in leases, feus, and other onerous contracts where one party contractor seeks to set aside the contract for a breach, the other may, before the irritancy is established, prevent the operation of the irritant clause, by placing matters in such a situation that he may substantially meet the action of declarator by a denial of the act complained of. Neither is it in any degree essential to the case of the appellant that he should deny the application of a similar principle to a breach of the irritant clauses in entails. The distinction contended for by him remains untouched were he to admit this application. Let it therefore be assumed, for the sake of argument, that there is no distinction between irritant and resolutive clauses,

[1] Cases cited ut supra, p. 443, and Lord Brougham in Cathcart v. Cathcart, 5 W. & S. 315.

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— that a clause of devolution in a settlement is one and the same thing with an irritant clause in an onerous contract, — that the statutory clause which devolves the estate to the next heir in case of the non-insertion of irritant clauses, and which comes into operation only when all the irritant clauses in the entail are declared to be ineffectual, is itself one of these very irritant clauses, — let all this be assumed, and even then it is denied that the law, as hitherto administered, will admit of purgation in such a case as the present. The cases chiefly founded on by the respondent to show that purgation is competent in all cases of contravention of the irritant clauses in an entail, without exception, are Maclachlan[1] and Price of Raploch. In these cases, supposing them to have been cases of purgation, the party who had acquired the right as against the entail had not evicted the estate. The right could in each case be discharged by simple renunciation. It did not require a new conveyance from the alienee to revest the contravener. In the case of Maclachlan the question was simply whether the execution of a trust deed to try the title, without infeftment, was an irritancy, and it was found that it was not so. In the case of Price, chiefly if not solely relied upon by the respondent, the fee of the estate was adjudged, but not evicted. The adjudication might have been discharged by simple renunciation; there had been no declarator of expiry of the legal, no investiture in the person of the adjudger. Independently of these considerations the case of Price cannot be adduced as an authority. It is not reported; and why? Because, as observed by the Lord Justice

[1] Mor. 1542.

Clerk in the Queensberry cases[1], "there was collusion, "which must have had influence on that case; no fixed "rule was laid down in that case." The adjudication, as restricted to the liferent of the adjudger, was either altogether nugatory[2], or it was in itself a contravention. In the present case the estate is clearly evicted from the heirs of taillie by the heir of line; and but for the statutory clause of devolution it would be the inheritance in fee-simple of the respondent; and nothing but a conveyance by the heir of line to the heirs of taillie would place the estate again under fetters in their favour; the estate so fettered, however, would not be an entailed estate flowing from its own author, but a new and distinct entailed estate flowing from an heir of line, whom the original donor had constituted a substitute of entail. The case of Bargeny[3] was a case arising out of a breach of the irritant clauses in the entail of Bargeny, and not, as seems to have been imagined, out of a contravention of the clause of devolution in the North Berwick entail. A breach of the irritant clause in the Bargeny entail was alleged to have been committed with a view to escape the effect of the clause of devolution in the North Berwick entail. When the action of declarator of irritancy was brought, it appeared that matters were de facto precisely in the same situation as if there had been no repudiation, and therefore there was not, in point of fact, any irritancy; and besides, it was the opinion of the Court that Sir Hew could not commit an effectual contravention, he having been, in relation to

[1] Fac. Coll. fol. vol. xx. p. 172.

[2] Graham v. Hunter, 7 Shaw, p. 13; Lord Corehouse, in Bontine v. Graham, Fac. Coll., p. 674.

[3] 1 Wilson & Shaw's Appeal Cases, 410.

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the estate, merely in a state of apparency. The dicta of the Judges in that case, therefore, so far as relied on by the respondent, do not apply to the present; but that case, so far as it is an authority in the present case, is a most valuable one for the appellant, for in that case the late Lord Meadowbank, a very high authority, contrasts such a case as the present with the case which then occurred, and has most learnedly and accurately pointed out, and, as it appears to the appellant, incontestibly established, the distinctions for which he contends.[1]

The respondent has been able to refer to two cases only in which, according to his version of them, the doctrine of purgation is said to have been applied to clauses of devolution as distinguished from irritant clauses. These are the cases of Gordon[2] and Ross v. Munro[3], cases certainly entirely inter heredes, and relating exclusively to clauses of devolution. In both these cases the defender had a defence in point of law which was sustained. The case of Gordon was not a case of forfeiture. The mother of the defender had been required, when married, to bear along with her husband the name and arms of the family, otherwise to denude herself of the estate to her second son, if the eldest should represent his father in a greater estate, which would prevent his taking the name and arms. After the death of the mother, she not having taken the name and arms, the father put his then second son into possession. There were many defences, e. g. that there was no time limited, &c. But the striking part of the case is, that at the very time when, as alleged by the pursuer, the mother

[1] 2 Wilson & Shaw's Appeal Cases, App. No. 1. pp. 12, 13, 14; App. No. 2. p. 5.

[2] Mor. 2336. 7281.

[3] Mor. 7289.

of the defender was bound to denude, the defender was himself the second son. In Ross v. Munro there were two different entails of two different estates, Aldie and Newmore. In the entail of Aldie it was provided that the party taking the estate should bear the name and arms of the entailer upon his succession. By the entail of Newmore it was provided that the name and arms should not be coupled with any other name and arms. The action was founded on the entail of Aldie. The question was, if the heir entitled to succeed to Aldie could claim that estate, although he coupled the name and arms of Newmore with those of Aldie. The Court held that as there was no provision in the entail of Aldie against coupling the name and arms, the heir was not barred from claiming Aldie. Here, again, there was clearly no opportunity to grant equitable relief. It was a pure question of law. How could there be a forfeiture when the question was whether the heir was entitled to claim the estate?

But even if the respondent could have adduced cases in which, in similar circumstances, the Court had ex officio interfered to prevent a decree of declarator of devolution, it is easy to see a principle on which this might be done, without in the slightest degree impairing the efficacy of clauses of devolution in general. The Court might refuse to decern in the declarator where a party is required to do an act, and no time is specified within which it is to be done, because in such case there is in reality no contravention (or at all events the Court would be entitled so to assume) till a judicial requisition is made for performance by the very action then in dependence.

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There is not, therefore, a decision or authority of any kind in the law of Scotland which tends to sanction in the slightest degree the attempt which has now been made by the Court of Session to give relief to the respondent by means of the doctrine of purgation. Every authority in the law of Scotland, on the contrary, directly negatives the possibility of applying purgation to the present case.

Bankton[1] lays down the law thus: "The Lords of "Session, in declarators of irritancy for contracting "debt, allow some time to the contravener to purge "the irritancy by payment of the debts; but where the "irritancy is incurred by the heir not engrossing the "clauses in his right to the estate, they will not allow "it to be purged. (Home, decis, 47. 52. 34.) This "last is a complete deed of contravention, which sub-"jects the estate to the payment of the heir's debts, et "factum infectum fieri nequit. The titles made up in "contravention of the entail cannot be undone, but "the other only becomes such a contravention upon "the estate being adjudged for the debts, and thereby "evicted, which by purging the debts is prevented, for "eviction cannot happen until declarator is obtained."

If the appellant were attempting to set up Lord Bankton in opposition to other authorities in the law of Scotland, there might be plausible ground for disputing it. The appellant relies upon this dictum, not merely because it has the authority of Lord Bankton, but because it is consistent with the statute, because it is consistent with previous authorities on the subject, because

[1] Bankton, b. ii. tit. 3. p. 585.

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it is consistent with the case of Stewart v. Denham[1], on which it is founded, and because it has been hitherto uncontradicted by any subsequent authority.

With regard to the case of Stewart v. Denham it has been said, in the first place, that it was reversed on appeal. It is true there was a reversal upon the first branch of the cause, but it is equally true that this reversal in no respect impeaches the unanimous opinion of all the judges of the day as to the second branch. These judges may have been wrong in the data on which they proceeded, but their opinion remains equally valuable at this time, when applied to a case of the same nature as that which they assumed the case of Stewart v. Denham to be. It has been said further that the case of Stewart v. Denham was so decided, not simply because the Court had assumed that the defender there had contravened the statute by omitting the restraining clauses in the entail, but because he had likewise contracted debt. Does the statute say that it is necessary the contravener should contract debt before its provision can come into operation? The object of the statute, on the contrary, in directing the insertion of irritant clauses, is to enable the next heir to set aside all debts contracted, if they should not be purged by previous payment. The object of the statute in providing an ipso facto devolution, where the irritant clauses are not inserted, is to prevent the contraction of debt, which, if once contracted, cannot be set aside. Hence the only legitimate interpretation of this expression is, even if you should pay off the debts you have now contracted, that would be no purgation; you still remain in the

[1] Mor. 7257.

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situation provided for by the statute; you may still contract other debts, which a declarator founded upon the irritant clauses would not reach, because they are not inserted in the rights and conveyances whereby you hold the estate.

The case of Price has in principle been overruled by this House in Mordaunt v. Innes, affirmed 5th July 1822.[1] It was found by the Court of Session (9th March 1819) that the lease of the whole of an entailed estate was an alienation in the sense of the statute, and therefore struck at by the irritant clause. It was proposed to purge the irritancy by restricting the lease as regarded the nature and extent of the lessee's interest. This was rejected on the ground that there was no mode of converting this lease, which was a bad one, into a good one, that the party might renounce the right he had acquired, and take his chance of getting a new one; but unless there was a renunciation in toto there was an end of the matter. An attempt was made to argue in this case, and in a similar case to be immediately mentioned, that as the grantor of the lease was dead it could not be set aside, because it was necessary that the interest of the contravener should be resolved by the resolutive clause in order to annul the right acquired. To have given effect to this argument would just have been going back to the Stormonth case. The answer was clear; the resolutive clause was made by the statute dependent on its operation till the irritant clause should be given effect to. If, however, the declarator is delayed till there is nothing to resolve, in other words, if death had already resolved the interest of the contravener,

[1] 1 Shaw's Appeal Cases, p. 169.

that was no reason why the irritant clause should not operate.

In the Queensberry Executors[1] the Court of Session (7th March 1816) found that a lease for a grassum was not struck at by the fetters of an entail, although it had the effect of diminishing the rent to the next heir; in other words, alienating a part of the heir's interest. This House reversed this judgment; and in their judgment of reversal there is a remarkable expression, viz. that the Duke of Queensberry had not power to grant the lease in question. The Court of Session then proceeded, on the application of one of the tenants, to try the question whether there could be purgation by spreading the grassum over the whole years of the lease. The Court of Session held that they were bound to refuse the application; they could not make that which a party had not power to do into that which he had power to do. The case of Price was ineffectually referred to in this case. The expression in the judgment above noticed points out at once the fallacy of the theory which is alleged to have been adopted in that case; it was a virtual reversal of it.

The two cases last above mentioned, and the case of Stewart v. Denham, are the only cases in which the doctrine of purgation has been proposed to be applied where there was no defence at law, and in each and all of them the Court of Session refused it.

Assuming, however, that purgation may be applied to such a case as the present, it is denied that in the present instance matters have been de facto restored to the position in which they stood before the act of con-

[1] Shaw's Appeal Cases, p. 59.

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travention committed by the respondent, either by means of the attempt made by the respondent to connect himself in point of title with the entailed estate; or by means of the offer of caution or security contained in the paper, writing, or minute of the 2d June 1837, or by both these means combined, or by any other means.

There is no ground for holding that the respondent has completed a feudal title in his person to the entailed estate of Balbithan, by means of the attempt made by him to resign upon the procuratory of the entailer; on the contrary, the entailer not being at the time when the procuratory was so attempted to be used the vassal last infeft in the estate, the said procuratory had then become utterly inept and ineffectual; and hence the pretended charter of resignation and instrument of sasine, alleged to have proceeded on the said procuratory, are altogether nugatory and of no force or effect whatever.

If the consequence of the enactment in the statute 1685, c. 22., which provides for an ipso facto devolution of the estate, or if the consequence of the clause of devolution or conditional limitation in the deed of entail, could have been legally prevented; that is to say, if the estate did not ipso facto pass to the appellant on the completion of the fee simple title of the respondent, the respondent himself would then have been the vassal last infeft in the estate, and so could only have divested himself of his fee simple title by resignation in his own person in the hands of the superior.

It seems to have been imagined that the entail was originally feudalized, or at least it does not appear to have been distinctly kept in view that the titles first made up were not revived along with the entail, but

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were de novo reduced. If the respondent had served heir of line, the estate being feudalized under the entail, in that case his service would have been a mere nullity, it would of course have carried nothing, the procuratory would not be in that case (as it clearly is where the entail had never been feudalized) exhausted or superseded by a prior or paramount title to that of the entail.[1]

It has been contended, however, as the only way of meeting this objection, that the fee-simple title having been reduced by the appellant, a way has been opened to the execution of the procuratory of the entailer. The answers to this are various, and all equally obvious. 1. The reduction is ineffectual to any extent till it is extracted, till it appears upon the records of the Court, and is thereby made known to parties dealing with the respondent (who supposing it would open the way to the procuratory) are entitled, before it is made known to them by the records of the Court, to disregard the subsequent title alleged to have been made up under the entail. It is the appellant's decree which he alone is entitled to extract or not at his pleasure. 2. The fee-simple titles are reduced only in so far as the interest of the appellant is concerned or may require; they are not reduced in toto, or invalid or defective in point of feudal form. They are not reduced because they are an inhabile title of possession, but only because the respondent individually is no longer entitled to possess upon them; they still constitute any effectual title to any party who may

[1] Stair, b. ii. tit. 6. s. 6; b. iii. tit. 2. s. 8; b. iii. tit. 4. s. 23; Erskine, b. ii. tit. 7. ss. 18, 22, 23; Lord Meadowbank, 2 Wilson & Shaw's Appeal Cases, App. ii. p. 3, 4; Lord Kilkerran, voce Minor, No. 2. p. 352; Elchies, vol. ii. p. 424.

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have dealt with the respondent during his possession upon them. 3. A reduction improbation, with consent of the Lord Advocate[1], would have been necessary to cancel or avoid these titles, if such a proceeding had been otherwise competent. Lastly, If they are annulled to any extent, because (as has been insinuated by the respondent, although he has been prudent enough to avoid averring it in so many words) they are struck at by the irritant clauses in the entail, then the appellant has already obtained decree of declarator of irritancy, after which the respondent has not been bold enough to contend that there can be purgation.

The Court have further erred, in holding that the rights and interest of the appellant, as the next heir entitled to succeed to the entailed estate of Balbithan, can be effectually secured to him by means of caution or security. There is no possibility of preserving the estate by means of caution or security, to whatever extent, in the same way and manner as before the act of contravention committed by the respondent. No caution or security of any description is or can be, in any respect whatever, equivalent to the actual subsistence of the ipsum corpus of the entailed estate of Balbithan in the line of succession pointed out by the destination in the deed of entail, uninterrupted and unaffected by any act or deed of the respondent. There can be no caution, for it is impossible to fix the amount of it. Who can tell what may be the value of the estate five years hence? Who can tell the amount at which it was valued by the entailer? General Gordon left this estate unaffectable by the debts and deeds of

[1] Stair, b. 4. tit 18.

the respondent. Is caution or security that debts will be paid off when they attach upon the estate (supposing it should turn out at the time to be equal to the value of these debts,) one and the same thing with the estate not being attachable for debt at all? The mere supposition that an entailed estate has been placed in such a position, by the act and deed of the heir in possession, as to render caution or security necessary against the consequences thereof, is completely subversive of the existence of an entail.

The application of caution or security to cases of contravention of entails has been hitherto altogether unknown and unheard of in the law of Scotland. If the doctrines maintained by the learned judges, one and all of them, establish any thing, they establish this, that this caution, when found, may be purged by caution the moment an attempt is made to enforce it. The vouchee in a recovery is not one iota less a man of straw than would be this cautioner for the cautioner. Here, then, are the judges of the Court of Session going far beyond the judges in England at a very early period of their legal history. The judges in England only connived at recoveries. The judges of the Court of Session have themselves invented and attempted to put in force a mode of defeating the statute of entails in Scotland equally fictitious, equally illegal, and equally efficacious with these very recoveries. Such attempts have been uniformly condemned by the highest authorities in modern times.[1]

[1] Lord Chancellor in Queensberry cases, Bligh's Rep. vol. i. pp. 435—460; Lord Redesdale in ditto, ditto, p. 497; Lord Wynford in Stewart v. Fullerton, 4 Wilson & Shaw, p. 231; Lord Chancellor in Roxburgh cause, Dow's Rep. vol. ii. p. 208.

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The Court have further erred in holding that the said entailed estate of Balbithan is only liable to be attached or affected by debts or deeds of the respondent contracted or committed by him prior to the 9th day of June 1835, being the date of recording the said pretended instrument of sasine; whereas, by the proviso adjected to the enactment in the said statute, creating, as aforesaid, an ipso facto devolution, it is in terminis declared that every bonâ fide contractor with the respondent is entitled to take advantage of his fee-simple title, (which still remains on the records unextinguished and in subsistence,) during the whole course of the respondent's possession of the said estate of Balbithan.

The clause in the deed of entail as to purging adjudications, &c. has no application whatever to the present case; it applies to entailers debts, statutory burdens, and such others as would not be affected by the entail if perfect in all respects; and there is no other clause in the said deed of entail in the slightest degree inconsistent with or tending in any respect to impede the operation either of the foresaid enactment in the said statute or of the said clause of devolution or conditional limitation contained in the said deed of entail.

It was an error to dismiss the action and decern against the appellant, for (contrary to the expressed opinions of the Court on the subject) the respondent has not found caution and security, but has, in terms of his said minute, merely offered to find the same.

The Court ought not to have overlooked and disregarded the inequitable, unjust, and improper conduct of the respondent, in obtaining the decree in absence, which he made the basis of the proceedings subsequently adopted by him in contravention of the entail; whereas

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that conduct ought necessarily to have formed a most material element in judging of the propriety of extending towards the respondent the benefit of equitable relief, if such relief could otherwise competently have been granted.

The established rules of pleading have been contravened, in allowing the minute of the defender, which contains various new statements of fact and pleas in law, to be adjected to the steps of procedure after the record had been finally closed, and in sanctioning, recognizing, and adopting as the basis of the judgment proceedings begun and carried through by the respondent after the record had been closed and the pleadings between the parties to the whole action finally settled and adjusted.

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Respondent.—Most of the points which have been discussed have really nothing to do with the question at issue, which is simply this, whether this irritancy can be purged? What has been said about devolving clauses, clauses passing over the estate, is the result of English notions entirely. In Scotland it is all effected by penalties and forfeitures. The appellant himself when he raised his action, never dreamt of any thing but proceeding as for a penalty. There is not a word in the summons about conditional devises or shifting or devolving clauses. His claim is put entirely upon the ground that there was a forfeiture. He rests his case upon the fact that there has been an irritancy incurred. Irritancies are always understood to imply penalties and forfeitures, and it is remarkable enough that it is only the irritant clause which the statute requires to be inserted in the rights

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and conveyances by which the estate is held. The clause in the entail as to redeeming adjudications is of itself sufficient to meet the present case. Irritant clauses are always used in settlements and other gratuitous rights. Entails are regulated by statute, and a statutory irritancy has no greater force than a conventional one. It never has been adopted as a doctrine in the law of Scotland that statutory irritancies any more than other irritancies can be enforced without a previous declarator. This is proved by Erskine, b. iii. t. 8. s. 32.

It has been said that purgation is a defence, and should have been pleaded as such; but it is no defence; it assumes that the pursuer may succeed in his action. The cases of Gordon and Ross were decidedly cases of purgation, and have been always so understood. In the case of Maclachlan[1] an irritancy had been incurred by executing a disposition of the estate; the conveyance would have stood good but for purgation. In the case of Price[1] there was a decided act of contravention. There was an adjudication of the absolute fee of the estate, which was clearly an irritancy, and yet when the creditors came forward, and offered to restrict their adjudications, they were allowed to do so by means of purgation. The Bargeny case is one of the strongest instances that can be put. This matter of purgation was there anxiously and deliberately discussed, both in the Court of Session and in this House, and Mrs. Fullerton lost her cause on the grouud that it required declarator to enforce an irritancy.

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[1] Supra, p. 448.

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It has been said that the respondent could not renounce the fee-simple title; he had no occasion to renounce it; it was merely kept alive by the decree. The appellant reduced it, and set it aside by the conclusions of his own summons. Knowing that the effect of his summons could be no other than that of opening the way for the respondent to connect himself with the entail, there is actually a conclusion in his summons calling upon the respondent to make up effectual titles under the entail. If, as he says, these fee-simple titles cannot be removed out of the way because what has been done cannot be undone, how does the appellant himself propose to make up titles if the succession should open to him?

The only real difficulty in this case was as to the effect of debts which might have been contracted during the respondent's possession in fee simple. By the completion of the entail title the estate is effectually protected against all the debts and deeds of the respondent of a posterior date. With regard, again, to debts and deeds of date prior to the date of the title under the entail, the appellant has not even alleged that any such debts or deeds exist. In addition to this, the respondent has positively averred that none do exist; and to afford absolute socurity against all possibility of risk, the respondent (although he holds it to be unnecessary, both because the risk is purely imaginary, and because he does, with all deference, consider it not essential in point of law to his absolvitor,) has offered the most ample caution that no debt or deed contracted, made, or granted by him while he possessed on the fee-simple title shall come against the estate.

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No special plea can be successfully raised upon the terms of the entail act, and so far the case is to be dealt with in the same way as any other case of irritancy. It should be particularly observed, that, in terms of the entail of Balbithan, there are various irritancies which may be incurred by the heirs of entail. Irritancies may be incurred by acts of commission or acts of omission. Of the former there are several irritancies provided for; such as, an irritancy by selling or alienating the estate or a part of it, an irritancy by executing a deed altering the order of succession, or an irritancy by contracting debt; —an irritancy by making up a title in fee simple, instead of a title under the entail, containing all its conditions, provisions, and limitations. These are all separate and distinct acts of contravention, and each involves a separate and distinct irritancy; the sanction of forfeiture applies to all and each separately. The action for enforcing the irritancy must declare upon each separately; and to each, as a separate and distinct case against him, the contravening heir has his separate and distinct answer. Among other answers to the action, the heir has the equitable answer of the irritancy being purgeable, which the law admits of, in order to save him from the penalty of forfeiture; and as the acts of contravention and relative irritancies are separate and distinct, so is the purgation, as to each, a separate and distinct purgation.

Now it is to be particularly observed, that the precise act of contravention committed in the present case, and through which the particular irritancy founded on was incurred, was the specific act of making up a fee-simple title. To the action for declaring the forfeiture of the

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respondent's right to the estate in respect of the irritancy thus incurred, the respondent pleads that he is ready to purge the irritancy, and that he has done so; and the purgation which he founds on is the annulling the fee-simple title,—the deed or act done in contravention of the provisions of the entail, and the having made up in room and place of it a title in terms of the entail, in virtue of which he is now possessing. This (assuming what has been elsewhere proved, that purgation is generally admissible of irritancies in entails,) the respondent maintains is of itself, and without any thing farther, complete purgation in the particular case.

According to the view of the appellant the respondent is to be deprived of the estate, not for what he has done in contravention of the restraints imposed by the entailer, but for what he has not done, or for not being able to prove that he has not done what he has not done. He has undone what he had done; he has fully purged the irritancy, if no more was done; but still the penalty of forfeiture is to be inflicted, not because he has done any other act in contravention of the entail, but because he cannot prove the negative. The respondent's right is not to be forfeited for making up a fee-simple title; for, if the case is confined strictly to that, if no other element is brought into it, the pain of forfeiture has clearly been saved by the completing an entail title. His right is to be forfeited, because there are other irritancies provided by the entail for the cases of contracting debt and alienating the estate in whole or in part. It is to be forfeited in respect of the provisions in regard to these irritancies. Now the effect

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and result of this are, that upon a conjectural possibility that deeds of alienation may have been granted, or debts may have been contracted, and irritancies thereby incurred, the respondent's right is to be forfeited without his being allowed an opportunity of purging the irritancies, (for it is clear that in the state of the case purgation is excluded,) and consequently the respondent is to be forfeited under circumstances in which he could not be placed if there were distinct evidence that the irritancies had certainly been incurred, and the present were an action of declarator of contravention founded on them. Thus, then, the respondent is to be in a worse situation in the hypothesis of the possible existence of that which is improbable, than he would be in had he positively contravened the prohibitions of the entail by alienating the estate or contracting debt, on which adjudication had been led against it. If the respondent had granted a deed of alienation, the resolutive clause applicable to that act could not operate so as to infer forfeiture till he had had an opportunity and had failed to purge the irritancy so incurred. In the same way, if debt had been made the ground of diligence against the estate, purgation would have been competent before decree of declarator could have been obtained.

There is no principle or authority for thus forfeiting the right of a party who has incurred an irritancy under an entail, on the ground that he may by possibility have incurred another and different irritancy. The singular and extremely penal effect of such a proceeding affords the strongest argument against it, and for the necessity of viewing each irritancy separately in the question of

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purgation, and not permitting the one to be mixed up with the other. The opposite course is not more unjust to the contravening heir of entail than it is irreconcileable with what must be assumed to be the view of the entailer, as well as unnecessary for securing the estate to the heirs agreeably to his will.

Judgment deferred.

Ld. Chancellor's Speech.

LORD CHANCELLOR. — My Lords. In this case of Abernethie v. Forbes considerable difficulty was felt by the learned Judges below, and although the judgment below was unanimous, yet several of the learned Judges expressed considerable doubt as to the conclusions to which they ought to come.

The defender (the respondent) was heir of line of General Gordon; he was also entitled to him and the heirs male of his body, subject to the life-rent of his father, William Forbes, under a disposition and deed of entail of 1803 of the same General Gordon; failing heirs of the body of the respondent, the appellant was next entitled under this entail. William Forbes and the respondent made up their titles under this entail; but after the death of William Forbes, in 1815, the respondent raised an action of reduction of the deed of entail, and of the charter of resignation and instrument of seisin, under which he held the lands, alleging that the deed of entail was void, and claiming the estate as heir of line. This suit proceeded in the absence of the appellant, and the respondent obtained a decree of reduction; finding that there was a blank in the deed of taillie at the time it was executed, and that an important

clause was afterwards inserted in the blank space, and that the said deed was false in its date, and therefore reducing, decerning, and declaring in the terms of the libel. Upon this the respondent, in 1822, caused himself to be infeft, as nearest and lawful heir of line of General Gordon.

The summons in the present suit, after stating these proceedings, alleges that such proceedings and other acts of the respondent, namely, his omitting to bear the arms and name of the entailer, were in contravention of the deed of entail, and ought to reduce the decree in absence and all the subsequent instruments, and to establish the entail; and that it might be declared that the respondent had committed a contravention of the provisions of the entail, and had incurred an irritancy, and had thereby forfeited his interest in the estate, and that the pursuer had become entitled; the having subjected the estate to debts, however, was not alleged as an irritancy founded on.

The respondent (the defender) endeavoured to support the decree and the objections to the entail; but, by an interlocutor of the 4th of July 1834, the Lord Ordinary held, that the objections to the entail were not valid, and therefore reduced, and decerned in the reductive conclusions of the libel; but superseded the consideration of the other conclusions of the libel, as to the defender having incurred an irritancy, and the pursuer being entitled to enter into the possession of the estate, till that interlocutor and the decreet of reduction should be final.

This interlocutor having been adhered to by the Inner House, the respondent obtained leave to lodge a minute,

in which he stated that he had revived the name of the entailer, and that he had been served heir of taillie and provision under the entail, and that he intended to procure a Crown charter, on the procuratory of resignation contained in the said deed of entail, which was afterwards done. Various proceedings took place, the result of which was, that the Court held it to be competent for the defender, in that stage of the cause, to offer to purge the irritancy; and, by an interlocutor of the 20th of June 1837, in respect that the defender had made up and completed his titles under the deed of entail, and had offered to find security that there were no debts contracted by him which could affect the estate, and that no such debt should ever be made available against the estate, dismissed the action, but found the pursuer entitled to expenses.

Against these several interlocutors, permitting the defender so to meet the pursuer's claim to the estate by an offer of purgation, and adjudging the purgation to be sufficient, the present appeal was brought.

Upon the merits, that is, whether the acts done by the defender are capable of purgation, it must be observed, that if the rule of the law of Scotland admit of it, there cannot be a more favourable case for the application of the rule. What he did was under the sanction of a declarator of the Court of Session, by which the defender was informed that the entail was void; and although this was obtained in absence, there does not appear to be any ground for impeaching that transaction as fraudulent. The appellant was at that time out of the kingdom, and could not have been made a party to it.

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Some confusion seems to exist as to the cases in which purgation is allowed, from the same courts exercising the jurisdiction of law and equity. In this country there is no such difficulty; our courts of equity exercising the jurisdiction in certain cases in relieving against forfeitures, but not to the same extent as is practised in Scotland. In Scotland, as in this country, questions arise as to whether the provisions in question operate as (to use English terms) conditions or limitations. If as conditions, that is, if they be penal, then no title accrues to the party claiming, without a declarator; and the question is, whether the party may not escape from the consequences of the act complained of at any time before the irritancy is declared, by doing what has been omitted, or undoing what has been done amiss, so as to secure all parties claiming under the entail in the enjoyment of what the entailer intended for them.

In Mr. Sandford's Treatise on Entail Law, page 294, several cases are quoted in which purgation is allowed before irritancy is declared, although the act be a direct infringement of the provisions of the entail; such as, an actual disposition to a purchaser, granting leases or feus and contracting debts.

The case of Raploch (6th July 1760), quoted in the cases between the Duke of Buccleuch and the Queensberry executors, strongly illustrates the length to which this doctrine of purgation has been carried. A tenant for life had permitted adjudication against the estate by creditors of his own and of the entailer, contrary to the prohibition in the entail. The irritancy was not disputed, but the creditors undertaking to con-

fine their claims to the life estate, the claim of the next heir under the entail claiming under the forfeiture was rejected.

In the Bargeny case, (Morrison, 11,171,) the Lord Justice Clerk and Lord Meadowbank put the question upon this, whether the effect of the contravention can be done away with? Lord Armadale is made to say, "All contraventions which de facto can be purged may "be so before declarator."

After a careful examination of the cases relied upon by the appellant, I do not find any which ought to induce your Lordships to abstain from adopting the doctrine so laid down. The ground taken upon the construction of the act of 1685, cap. 22, has, I think, met with a sufficient answer; the irritancy relied upon is, I think, capable of purgation. The question, therefore, comes to this: whether what has been done by the contravener has the effect of placing the title of the pursuer and those who claim under the entail in as good a situation as they would have been in if the contravention had not taken place? The possible claim of creditors, if created whilst the defender held under the improper title, is the only plausible ground for this objection. It is answered to this, that the pursuer has not only not proved, but that he has not alleged, the existence of any such debts; and as the negative cannot be proved, the yielding to this suggestion would, in all cases in which such claim of creditors is possible, create an impossibility of purgation.

Under these circumstances, and to guard against this non-apparent and unalleged danger, the Court has required security from the defender. If the existence

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of any such debts had been proved, or if there appeared to be any probability of their existence, and if the pursuer had founded upon their existence, it might be said that the course adopted by the Court did not afford an adequate protection; but under the circumstances I cannot but think that it was quite as much, if not more than what the pursuer was entitled to require. If the contravention relied upon and proved had been the permitting debts to become a charge upon the estate, it cannot be disputed that removing such debts before a declarator of irritancy upon that account would have been a purgation, and yet in such case there would remain a possibility of other debts. Yielding to this objection would be giving to the supposed possibility of the existence of debts greater weight and more effect than to the actual proof of debts, because the effect of the latter might be removed by relieving the estate from them, which would be impossible so long as their existence was unknown.

As to the form in which the defender was let in to show the purgation of the irritancy which had been declared, it is purely a question of practice of the Court, not provided for by the judicature act; and if the case was one in which purgation was admissible, it does not appear in what better manner the title to purge could have been admitted. It was not treated as an answer to the action, but as a sufficient reason for not permitting the action to proceed; and the mode adopted was within the competency of the Court. It was alleged that the Court of Session, although they required security, had not taken proper means to obtain

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that security: it was assumed that the action had been absolutely disposed of. I apprehend that that, however, was not the case. The security was directed to be given; I apprehend that the Court of Session intended the security should be given; in the result they adopted the course of providing for that security which had been suggested by the respondent's minute, but it would not have made any difference in the finding of the Court, even if security had been provided for otherwise, because, though it was proper that the Court should require that security, there was no allegation of the existence of any such debts. I think it was a larger benefit than the pursuer was entitled to ask; and although there was very considerable doubt expressed by the learned Judges in the Court below, yet, it being an unanimous opinion of the judges that purgation ought to be admitted, and that the defender ought to be protected in the enjoyment of his estate, I think your Lordships cannot adopt a more wholesome rule than that where a party gets an affirmance of the judgment of the Court below, — the party who succeeds should be, as far as costs are concerned, indemnified; and, therefore, I should propose to your Lordships to affirm the interlocutors, with costs.

The House of Lords ordered and adjudged, That the said petition and appeal be and is hereby dismissed this House, and that the said interlocutors therein complained of be and the same are hereby affirmed: And it is further ordered, That the appellant do pay or cause to be paid to the said respondent the costs incurred in respect of the said appeal, the amount thereof to be certified by the clerk assistant: And it is also further ordered, That unless the said costs, certified as aforesaid, shall be paid to the party entitled to

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Judgment.

the same within one calendar month from the date of the certificate thereof, the cause shall be and is hereby remitted back to the Court of Session in Scotland, or to the Lord Ordinary officiating on the bills during the vacation, to issue such summary process or diligence for the recovery of such costs as shall be lawful and necessary.

Deans and Dunlop—Spottiswoode and Robertson, Solicitors.