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choice, inserting them to preserve the estate, or neglecting them to lose it. But, in the *next* place, It is not the full and adequate reason why vitious intromission goes not against heirs, that the consequence has something penal in it; but, as our consuetudinary law has established the penalty, so has it the restriction, "That the action shall not be pursued after the death of the intromitter;" because the titles of moveables not remaining upon record, it is next to impossible to know the intromitter's title; whereas, in this case, it is directly otherwise, the record itself proving the incurring of the irritancy.

This makes also an answer to the *second* defence. For, if this irritancy be not penal, then it follows not that it is purgeable; and there is great necessity, beside, that irritancies in tailzies be not purgeable, because it would be a means of overturning the best constituted tailzies; for no heir would insert the irritancies in his infestments, till he were obliged by a declarator, which might be delayed long enough, by the non-existence, ignorance, want of ability, or even connivance of the posterior heirs of tailzie; and, in the meantime, the estate would be liable to be torn to pieces by creditors; and thus tailzies would seldom fail to be evacuated at some time or other. Taking the matter now in this view, that the irritancy is not penal, the favour pleaded for the defender will signify nothing; for, though *error juris* will plead strongly to alleviate a punishment, it applies not where a *condition* has precisely fallen out, whether by accident or design, under which an alienation was made; for the *condition* existing, the *effect* must follow.

"THE LORDS found the defender cannot purge the irritancy."—See TAILZIE,

Fol. Dic. v. 1. p. 490. Rem. Dec. v. 1. No. 79. & 80. p. 155.

. It was afterwards found on appeal, that no irritancy had been incurred, see APPENDIX.

1727. *January 12.*BURNET *against* KER.

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IN a contract betwixt a liferentrix and her son, she sells and disposes her liferent to him, and he becomes bound to pay her a certain sum, less than the liferent, at two terms in the year, with annualrent for each moiety from the terms of payment; and there is this clause, 'That, in case the son should fail in punctual payment of the said annuity, at most within a month after each term, then the liferentrix should have full and free recourse to her former right, above disposed.' THE LORDS found this irritancy not purgeable.—See APPENDIX.

Fol. Dic. v. 1. p. 489.