1767. *July.*

LORD ELIBANK, and Others, *against* MR WILLIAM BAILLIE, Advocate, and Others.

No 70.
An assignation to a lease and moveables, which was declared to be void *ipso facto*, if any of the termly payments should run in arrear, was found voidable only by declarator.

THE pursuers having right to a lease of the concert-hall in the Canongate, Edinburgh, and to the scenery, wardrobe, and furniture belonging to it, by contract 'assigned and transferred' these subjects to David Beatt and John Dawson for L. 1,000, whereof L. 200 was paid in hand, the remaining L. 800 was to be paid in sums of L. 200 at different periods; and the contract contained this provision, 'That, if any of the said termly payments shall run into another unpaid, that then the foresaid assignation of the said lease, and others foresaid, shall be void, and the same, and whole benefit thereof, shall revert and return to the said Patrick Lord Elibank, and others foresaid, and their foresaids, to whom the same is in that case hereby conveyed, and who are hereby declared then to have full power, *brevi manu*, without any process of law, to dispose of the premises of new, equally, and in the same manner as if these presents had never been entered into by the saids parties: It being however hereby understood, that it shall be optional to the said Patrick Lord Elibank, and others foresaid, to take the benefit of the said irritancy and conveyance, or tack, and to pursue for the payments due, or that may fall due, in consequence of these presents, as they may see proper.' The assignees became likewise bound not to remove the clothes, &c. without consent of the pursuers, and to show them annually to the pursuers, safe and in good condition.

Upon the 24th January 1767, when Beatt and Dawson were in possession in virtue of the contract, a riot having happened in the concert-hall, and considerable damage having been done to the scenery and furniture, the pursuers, with concourse of the procurator-fiscal, preferred a complaint to the sheriff, charging the defenders with accession to this riot, and concluding for damages, and a fine to the public.

The Sheriff having sustained the title of the pursuers, the defenders preferred a bill of advocation to the Lord Auchinleck Ordinary, who pronounced this interlocutor: "Having considered this bill, with the contract between the proprietors of the concert-hall and Beatt and Dawson, from which it appears, that the said proprietors, when making over the subjects to Beatt and Dawson, reserved to themselves a right of security on the subjects, which gives them a right to insist, that the subjects shall not be destroyed, and, if destroyed, shall be replaced; finds the proceedings of the Sheriff produced with the bill, agreeable to law; and therefore refuses the bill."

Another bill having been presented to Lord Barjarg, it was by him reported to the Court.

Pleaded for the pursuers; That they had a right to insist in this action as

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proprietors of the subjects; for, *1st*, The assignment to Beatt and Dawson was made under a suspensive condition, viz. that the price should be paid at certain terms; and this condition not having been fulfilled, there being more than two of the termly payments unpaid, the property still remained with the pursuers. *2dly*, Supposing the property to have been transferred, it had returned to the pursuers, in consequence of the irritancy, which, by the contract, was to take place *ipso jure*, and therefore required no declarator, and, being conventional, was not purgeable. *3dly*, If the pursuers were not proprietors, they had at least reserved a right of security over the subjects. To entitle a person to insist in such an action as the present, it is not necessary he should have the property of the subjects destroyed. It is sufficient that he has such an interest in them, that he is in danger of suffering a patrimonial loss by the destruction of them. Many authorities from the civil law might be quoted to this purpose; *vide L.* 17. *L.* 30. § 1. *D. ad l. Aquil.* where it is expressly laid down, that the *actio ex L. Aquilia*, was competent to a *bona fide possessor*, and to a *creditor pignoratitius*, and in the first case even against the true proprietor. From the several clauses of the contract above recited it seems clear, that the pursuers had at least a right of hypothec, a real security over the subjects destroyed, which they apprehend entitled them to insist that they should not be destroyed, or, if destroyed, replaced, or the damage done to them repaired.

Answered for the defenders; To the *first*, The property of the subjects was transferred to Beatt and Dawson. If it had not, the irritant clause would have been unnecessary.

To the *second*, It is a mistake that the clause importing an *ipso facto* voidance of the deed, could have any other effect than to make it voidable. The irritancy is clearly of a penal nature, and it is an undoubted rule in law, that penal irritancies, whether legal or conventional, cannot take effect without being declared, and that they may be defeated by an offer of payment any time before the decree is extracted, even where the irritancies are stipulated to take place *ipso facto*, *vide* Stair's Instit. B. 4. T. 18. § 3. Dict. v. Irrit. And so it was found lately, Lord Rothes *contra* Shepherd,* where it was expressly provided, by the tack, that it should become *ipso facto* void, if a second term's rent should fall due, while the first should be unpaid.

Besides, a declarator was necessary in this case, that it might appear how accounts stood between the pursuers and the assignees, and whether the pursuers were to make choice of the alternative, of taking hold of the irritancy.

To the *third*, No right, except that of property, or at least, such as produces a real action, affords a title to prosecute such actions as the present. The action here insisted on, is precisely the same with that founded upon the third head of the *L. Aquilia*, which, by the words of that law, was only given to the proprietor. This was indeed extended to a *bona fide possessor*, and *creditor ex pignore*; but their case was extremely different from that of the prosecutors. A *bona fide possessor* was in all respects considered as proprietor, and had

* Examine General List of Names.

an *utilis rei vindicatio.* A creditor *ex pignore* had the *actio quasi serviana* which, with regard to him, had the same effect as a *rei vindicatio.* But there is no instance of this action being indulged to any who were not either proprietors, or had a real and actual hold of the goods damaged. No 70.

The connection between the pursuers and assignees, cannot be considered in a more favourable light than that between master and tenant. The master has an hypothec over his tenants' effects to a certain extent, and, if he has actually secured them in virtue of the hypothec, may have a good title to sue for damage done to them. But the case is different, where the master has only an option to attach. He has not then established any connection with the goods; they are not in his possession, nor at his risque. This principle is remarkably illustrated by a decision in the case of a spuilzie of steelbow goods, which, it was found, might be prosecuted by the tenant only; 19th February 1549, Lord Durie against Duddingston, *voce* SPUILZIE.

But the pursuers had not even a right of hypothec over the goods said to have been damaged, in this case; no such right is expressly reserved by the contract, nor is it necessarily implied in any of the clauses of it. Indeed though it had been expressed, it would not have beeen effectual, it being an established principle in our law, *Quod mobilia non habent sequelam.*

Many inconveniencies might follow from allowing such actions as the present to be brought at the instance of those, whose interest in the goods is only remote or consequential. If, on the one hand, an absolvitor in such action should afford to the defenders a *res judicata* against all the world, occasion might be given to collusive prosecutions, to the prejudice of the person who has the direct interest. If, on the other hand, such absolvitor should not afford a *res judicata,* a handle might be given for oppression, by harrassing the defender with endless law-suits.

"THE LORDS remitted the cause to the Sheriff, with this instruction, That he should sustain the objection to the pursuer's title."

The pursuers having, in the mean time, obtained a decree of declarator of irritancy against Beatt and Dawson, preferred a reclaiming petition, wherein they contended, that as, by this decree, it was found, that the irritancy had taken effect, and that of course the property had returned to the pursuers, so there could not now be any objection to their title.

Answered for the defenders; As the effect of this irritancy was only to make the deed voidable, as was virtually found by the former interlocutor; so the irritancy can only be understood to take place from the date of the decree, or, at least, from that of the summons of declarator, which was posterior both to the riot and the commencement of this process. There are indeed some decrees of declarator, as declarators of property, astriction, immunity, and others, which, from their nature, have a retrospect, because they confer no new right, but only confirm one which was formerly debateable. But, in declarators of irritancy, and many others, the case is different. There it is the decree of the

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judge that transfers the property to the pursuer, and voids the right formerly vested in the defender; *vide* Bankton, B. 4. Tit. 24. § 6. par. 21; Erskine, B. 2. Tit. 5. § 25. Dict. *voce* Irritancy. Hence it follows, that, notwithstanding this decree, the property of the subjects at the time of the alleged riot, was in Beatt and Dawson, and they only could prosecute for damages done to them.

But, though this decree were supposed to have a restrospect, it cannot be founded on as a title for carrying on an action commenced many months before the decree was obtained. A person's title to carry on an action ought to be produced *in initio litis*; and, if it is not, the action ought to be dismissed. It is not sufficient that the pursuer acquire a title during the dependence of the process, except only in the case of heirs and executors. In all other cases, it is of no avail; *vide voce* Title to Pursue.

"The Court, chiefly moved by the decree of declarator of irritancy, altered, and refused the bill. *See* Title to Pursue.

Act. *Cosmo Gordon, Patrick Murray.* Alt. *Blair. Il. Campbell. Wight, et alii.*

A. R. *Fac. Col. No* 67. *p.* 115.

1770. *November* 14.

Thomas Lockhart, Esq. *against* Archibald Shiells, Portioner of Inveresk.

No 71.
The irritancy in a feu-contract *ob non solutum canonem*, not incurred *ipso jure*, and capable of being purged before declarator.

By a feu-contract, dated 24th December 1734, Archibald Shiells, the defender's father, disponed to Thomas Brown, his heirs and assignees, &c. several acres of land near Inveresk, for which Brown became bound to pay the sum of L. 6 : 15 : 10½d. of feu-duty, doubling the same at the entry of every heir or singular successor; and it was also provided, 'That if two terms feu-duty shall 'run into the third unpaid, then, and in that case, the said Thomas Brown and 'his foresaids shall thereby *ipso facto* forfeit their right to the subject above dis-'poned.' This contract contained no precept of sasine; but instead thereof, Shiells became bound to grant a sufficient charter, containing precept and all other clauses.

Brown entered into possession, but fell very much in arrear of the feu-duty. In 1746 there was due L. 19 : 9 : 1d., for which bill was granted; and in 1755, when Brown died, nine years' feu-duty was unpaid. Brown left three daughters, Mary, Margaret, and Jean. The two eldest were married and from home; Jean, the youngest, continued in possession of the feu till the year 1759, when she granted a conveyance of what right she had, to the defender, who entered into possession of the whole subject.

But as his right to possess the whole was evidently defective, he proceeded in the following manner.

Having charged the two eldest sisters and their husbands to enter themselves heirs to their father, he, on the 20th December 1758, took decreet in absence