ments that are not therein inserted. It was replied for the Pursuer 1o
Altho' the not recording the Intail is not made an Irritancy upon [illegible]
which is a Defect in the Law, the not repeating the Clauses is an [illegible]
Irritancy. And if the Heir contrary to the Design of the Maker of [illegible]
Intail, neglect to record it, that it might be effectual against Creditors he
can reap no Advantage by his own Omission. When Law hath appointed
two Things to be done, one under an express Irritancy, the Heir can[not] [illegible]
the Force of the Irritancy, or justify one Fault viz. his not repeating the
Clauses, by saying he hath been guilty of the other Fault, viz. not recording the
Intail. 2° Where no Infeftment hath passed upon a Tailzie, to make it effectual
against Creditors it must be recorded and the Irritancys repeated in the [illegible]
=sonal Conveyances, and it was never before asserted that a general Service is
not a Conveyance; and the Defender's Father possessed by no other Title than
the general Retour. 'Tis true he might have purged the Irritancy by com-
pleting his Infeftment and inserting the irritant Clauses therein before
he took Possession. But so it is, that he brooked by the Retour only and
continued so to possess. The Lords found that the Defender's Father, retouring
himself Heir of Provision to the Maker of the Tailzie, without repeating
in the Retour the Provisions and Irritant Clauses of the Tailzie, and possess-
ing and enjoying the tailzied Estate by Virtue of the Retour, doth import an
Irritancy of the Heirs Right 1 Feb. 1726 Stewart contra Denholm of
Westshiels and found that the Defender could not purge the Irritancy incurred
by his Father eod. die inter eosdem. Because the Irritancy is not penal, but
ariseth only from the Will of the Maker of the Tailzie, who imposes such
a Condition to the Settlement of his Estate, that upon the not Observance thereof
=of it should go from one Person to another: The Heir had it in his Choice by
inserting the Irritancys in his Titles to preserve the Estate, or by not inserting
them to lose it. Besides, if such an Irritancy were purgeable, that would overturn
overturn the best Tailzies. For no Heir would insert the Irritancys in his In-
=feftments, till he were put to it by a Declarator, which might be delayed long
enough thro the Nonexistence, Ignorance, want of Ability or even the Con-
=nivance of the posterior Heirs of Tailzie; and in the mean Time, the Estate
may be torn to Pieces by Creditors. But such an Ommission to repeat the ir-
=ritant and resolutive Clauses in subsequent Infeftments to any Member of
the Tailzie, hath no Effect against the Creditors and singular Successors contracting
bona fide with the Person, who stood infeft in the Estate without any Irritant or
resolutive Clause in the Body of his Right d. Act 22. Sess. 1. Par. J. 7. At
which Rate an Heir resolving to break the Tailzie, may cause omit to insert
the irritant Clauses in his Retour, and thereafter sell: Quo casu he would get a
Price, and the Buyer would be secure, and the next Heir of Tailzie effectually
defrauded

defrauded. For supplying which obvious Defect Sir George M'Kenzie Treatise
of Tailzies Desiderates a new Statute ordaining the Director of
the Chancery and his Deputies to see all Clauses inserted in the Retours
under the Pain of Deprivation, and repairing the Loss of the subsequent
Heirs: and declaring Creditors not in tuto to contract with any Heir of Tail-
=zie, tho the Clauses irritant or resolutive be omitted in the Conveyance
of the Estate to him: Which would be no great Hardship upon the Credit-
=ors, seeing it obliges them onely for their own Security to look to the
original Infeftments which they are referred to no Otherways [illegible]
searching the Registers. But yet our Law is not yet quite so lame, as
that learned Author imagines. For as a Check to such an incorrect Practice,
there lies a personal Action for Reparation to the Substitutes in a Tailzie,
against a former Heir and his Representatives whatsoever to purge the
tailzied Estate of his Debts and Deeds charged upon it, contrary to the
provision of Intail, 2 Feb. 1728 L. Strathnaver contra L. of Dong[illegible]
Such a general Reference in after Conveyances, as with and under the Reser-
=vations Provisions and Conditions specified in the former Charter and Infeft-
=ment, is not sufficient to put Creditors in mala fide to contract, without looking in
to the original Infeftments where the Irritancys are at full Length. In Re-
=gard a general Reference, which may be easily overlooked by them doth
neither answer the Words nor the Intention of the Statute, which requires the
Limitations and Clauses irritant to be repeated verbatim in all subsequent
Conveyances 20 July 1725 V. of Garnock and his Creditors contra the
Master of Garnock and other Heirs of Intail of Kilbirnie. The Act of
Parliament 1685 (d. Act 22.) doth not regulate the Constitution of Tailzies
made before it 27 December 1726 Cant contra Borthwick of Crooks-
=town. But the Salvo therein in Favour of Creditors and singular Suc-
=cessors, affects posterior Transmissions and Conveyances of intailed Estates
whether the Tailzies were made before, or after that Statute. It being equal-
ly just and necessary for the Security of Creditors and singular Successors,
and no less easie to insert the prohibitory and irritant Clauses in after-
Conveyances of Tailzies made before, as of those made after. Which is
not to say that the Act has a Retrospect, but only that it regulates posterior
Transmissions of anterior Tailzies, by which bona fide Contracters may
be as much insnared, as by posterior Conveyances of subsequent Tailzies,
20 July 1725 V. of Garnock and his Creditors contra Master of Garnock
and others. Albeit Clauses irritant in Tailzies bear, that in such Cases, the
Tailzie shall be void ipso facto without Declarator, it would not be relevant
to propone such an Irritancy by Exception, in a Process of Mails and Dutys
at the Instance of the Heir of Tailzie, but the same will be reserved
to