

No 379.

question in the person of one of the defender's authors, to which liferent the pursuer was consented, and therefore during that time he was *non valens agere*, in respect by no action could he obtain possession; and the Lords never put parties to the necessity of intending processes, where these processes can serve to no purpose, but to stop prescription; which was sustained.

Fol. Dic. v. 2. p. 124. Stair.

* * This case is No 7. p. 27., *voce* ACCESSORUM SEQUITUR PRINCIPALE.

* * The principle of this case was followed in the case 25th January 1678, Duke of Lauderdale against Earl of Tweeddale, No 374. p. 11193.

No 380.

A person was bound to denude of an estate if the donor should have heirs of his own body to succeed him. Prescription found not to run against the heir till the donor's death.

1671. July 21. SCOT of Hassendene *against* the DUCHESS of BUCCLEUCH.

UMQUHILE Scot of Hassendene having no children, disposed his estate to Buccleuch his chief, who granted a back-bond of the same date, bearing the disposition to have been granted upon the ground foresaid, and obliging himself and heirs, that in case Hassendene should have heirs of his body to succeed him, that he should denude in favours of these heirs; and now his son and heir born thereafter, pursues the Duchess to denude, who *alleged* absolvitor, because the back-bond being now fourscore years old is long ago expired. It was *answered*, That albeit the date be long since, yet the prescription runs not from the date, but from the death of the pursuer's father, which is within 40 years, for the pursuer could not be his heir before he was dead; and the back-bond bears, if Hassendene had heirs to succeed him. It was *answered*, That heirs oft-times were interpreted bairns that might be heirs; and if this pursuer had pursued in his father's life, he could not have been justly excluded, because his father was not dead, and he actually heir, and so *valebat agere*, in his father's life. It was *answered*, That although in some favourable cases, heirs be interpreted to be bairns that might be heirs, yet *in odiosis*, it is never so to be interpreted, and there is nothing more odious than to take away the pursuer's inheritance, freely disposed to Buccleuch by his father, in case he had no children, upon prescription, by such an extensive interpretation of the clause. *2do*, If he had pursued in his father's life, he might have been justly excluded, because if he had happened to die without issue, before his father, Buccleuch had unquestionable right, and so during his father's life he could not be compelled to denude.

THE LORDS found that the prescription did only run from the death of the father, and that this pursuer could not have effectually pursued in his father's lifetime.

Stair, v. 1. p. 764.