

PRESCRIPTION. DIVISION XIII.

SECT. IV.

What Effect, when there can be no Benefit by the Suit for the Purpose of interrupting the Prescription?

1687. November 22.

THOMAS SOMERVEL against INGLESTON and Captain TENNENT.

JAMES TENNENT younger of Carnes, being obliged in a minute of contract, *anno* 2634, with Jean Somervel, to procure himself infeft in his father John's lands, and in the conquest, and then to infeft the heirs of the marriage, whereupon he was inhibited *anno* 1637, the father disposed a part of his lands to his said son James, and to his heirs-male of the marriage; which failing, to other heirs-male; and these in the last termination having failed, there was a gift of *ultimus hæres* obtained, and a declarator pursued at the instance of the donatar.

Alleged for the heir of line female; That she had right by the contract 1634.

Answered; The clause in the contract, being but a destination, might be altered by the father, who was fiar, notwithstanding the inhibition, which fell with the ground thereof.

Replied; The clause, by the conception of it, is an express obligation, not a destination in the terms of 'which failing,' &c. *2do*, Though it were a destination, it cannot be evacuated by another destination to heirs-male, more [than] destinations in first contracts can be altered by destinations in second contracts; and although such clauses did not hinder parents to spend or dispone for onerous causes, or to strangers, yet they may be effectual to prevent any contrary deeds in favours of heirs, in respect of whom the prior clauses are of the nature of obligations; and the tailzie 1637 doth not extinguish the obligation in favours of heirs of the marriage by the first minute, which is prestable by the heirs of tailzie, and by the donatar *quoad valorem*.

2do, It was *alleged* for the donatar; That the minute was prescribed, not being pursued on within 40 years.

Answered; While there were heirs-male living, who were also heirs of tailzie, the female heirs of line were *non valentes agere*.

No 385.
Female heirs of line were held to be *non valentes agere*, while there were heirs-male living, who were also heirs of tailzie.

No 385.

THE LORDS, considering that the provision in the minute of contract 1634 was somewhat more than a destination, ordained the point to be heard in presence; and, in the mean time, recommended a settlement to the parties; but sustained the interruption of the prescription.

1687. *December*.—UPON the new hearing, a point occurred, which made them wave the import of the foresaid clause in the minute, viz. That the tailzie 1637 was not of these lands contained in the minute.

Fol. Dic. v. 2. p. 125. Harcarse, (CONTRACTS OF MARRIAGE) No 388. p. 201.

1695. *February 15.* ARCHIBALD INNES *against* HELEN INNES.

No 386.

An entail was executed in favour of heirs-male, of an estate which had been invested to heirs whatsoever. The heirs continued the same for some time, when they split. During the interval, the heir-male was found *non valens agere*.

ARBUCHEL reported Archibald Innes, the heir-male of Auchluncart, *contra* Helen Innes, heir of line, competing for the estate. The old right tailzed it to the heirs-male; but Walter Innes, in 1649, having acquired some expired apprisings, took the rights thereof to his heirs whatsoever. His son, in his contract-matrimonial, makes provision for daughters, as if they were secluded from the succession; and a precept of *clare constat* taken afterwards mentions the heirs-male. It was *alleged*, None of these was the habile way to innovate the former destination in 1649 *heredibus quibuscunque*, and proceeded on an error and supposition, *quæ nihil ponunt inesse*; and an intention or *enixa voluntas* does not alone constitute a tailzie; and, in many cases, the Lords have found the wrong designing a writ does not prejudice; and by the analogy of law, *referens sequitur relatam, et error in facto non nocet*. THE LORDS found this case behoved to be regulated by the last clear infestment, which was in 1649, to the heirs whatsoever; and preferred the heir of line to the heir of tailzie.

1695. *December 31.*—THIS day the Lords advised the competition for the estate of Auchluncart (mentioned 15th February 1695) between Helen Innes, the only daughter of Walter, the last heritor, and heir of line, and Archibald Innes, her cousin-german, the heir-male. The *cardo controversiæ* lay singly in this point, whether these lands descended to heirs whatsoever, or if they were tailzied to heirs-male. Archibald produced an old bond of tailzie, in 1641, (against which there were many suspicions, never being heard of till now; but writs of that kind need not delivery), bearing, that the said estate had always been granted to heirs-male; therefore, Mr Walter obliged himself, to his father, to provide the same, in like manner, to his heirs male, &c. Against this tailzie, it was *alleged* for the heir-female, That it was a relative writ, bearing to be conform to a disposition of that date; which disposition not being produced, it might have restricted or qualified the said tailzie; *nam referens sequitur*