

was found by the first interlocutor to suspend the entry of the first heir nominated during the possibility of the existence of the first heir, that being the present vassal's own fact and deed, and the resignation made accordingly in the superior's hands, it gave a full right during the suspension to the superior and his first donatar to the whole rents of the lands, both by the feudal law and our law.

No. 25.

*Gosford MS. p. 643. No. 967. and 968.*

\* \* Stair's report of the latter part of this case, is No. 37. p. 9321. *vide* NON-ENTRY.

1688. *July.* TENANT *against* TENANT and the LAIRD of DRUM.

No. 26.

William Tenant, skipper, having obtained a gift of *ultimus hæres* of the lands of Ligtonshiells, as falling to the King by the decease of James Tenant without heirs-male, and thereupon having pursued a declarator against the heir of line; alleged for the defender, that the lands did not fall under the gift of *ultimus hæres*, because James Tenant, by a minute of contract of marriage with the Laird of Drum's daughter in the year 1634, was obliged to obtain himself infest in all lands wherein John Tenant his father was infest, and being infest, to infest the heir of the marriage in the same; and albeit, by a posterior contract in the year 1637, wherein John Tenant the father was party contractor, the lands were provided to the heir-male of the marriage, which failing, to the said James Tenant, his son, and his other heirs-male, yet James Tenant, by the first minute of contract, being obliged to provide the lands to the heirs of the marriage in general, he could not by any posterior contract restrict the same to the heirs-male; the heirs of line being by the first minute of contract stated creditors to James the father, he could not make any alteration by the second contract to their prejudice; and albeit, James the father was not infest the time of entering to the first minute of contract, yet John the father having disposed his lands to his son James by the second contract, so soon as the right came in his person, the benefice did accresce to his daughter by virtue of the first contract, especially seeing the contract mentions, that the parties were willing to perform such duties *hinc inde* then as of before the said marriage, and did relate to the first contract; and albeit John Tenant the father was not infest in the lands of Ligtonshiells, yet the clause in the first contract, by which James the son was obliged to provide the heir of the marriage, in favour of the children of the marriage, all lands wherein John the father was infest, and whereunto he had given right, did likewise comprehend the lands of Ligtonshiells, whereof he was then in possession as apparent heir, and albeit the first contract should have no effect, but that the second contract should only be the rule which provides the lands to the heirs-male, yet the daughter ought to succeed, seeing it cannot be supposed to have been the meaning of the parties to have preferred the

Where an entail is in favour of heirs-male, found, that upon failure of heirs-male, the right devolves to the King as *ultimus hæres*, and not to the heirs of line.

No. 26. *ultimus hæres* in prejudice to the heir of line; as also, the wife's tocher, who was mother to the heir of line, being employed for purging of the wadset of 5,000 merks that was upon the lands, it did fall under the clause of the first contract, by which James Tenant the son was obliged to provide the conquest of the heir whatsoever of the marriage. The Lords found, that either in an original feu, or posterior infestment of tailzie, where the provision is in favour of the heirs-male, and not the heirs whatsoever, that the heir of line cannot succeed, but that the right does devolve to the King as *ultimus hæres*; and found, that the minute being in these terms to infest in all lands wherein the father was infest, whereunto he had presently right, were taxative and restrictive, and could not comprehend the lands of Ligtonshiells, wherein the father was not then infest; and also found, that the obligation in the minute being conceived to obtain himself and his wife infest in conjunct fee and life-rent, and the heir of the marriage, imported no more but a destination in favours of the heir, and could not hinder, but his father, who was not a contractor in the minute, having thereafter in a contract of marriage, and containing an addition of 1,000 merks of tocher, with several other alterations, provided the lands to the son and the heir-male of his body, which failing to the heirs-male and assignees whatsoever; and albeit, the son was fiar by the conception, yet he was not obliged to answer the destination in favour of the heir-male, neither were the heirs-male obliged to alter the former, albeit the minute had imported an obligation upon the son, not being obliged to fulfill obligations which were inconsistent with, and do evacutate the tailzie or succession: As also found, that albeit the tocher was applied for purging the wadset of 5,000 merks, which did affect the lands of Ligtonshiells, yet that did not make the lands in the person of the son to be conquest, but being provided by the contract of marriage aforesaid, was *preceptio hæreditatis*, so that albeit the son was obliged to provide the conquest to the heirs of the marriage, the obligation of conquest could not comprehend these lands.

*Fol. Dic. v. 2. p. 401. Sir P. Home MS. v. 3.*

\* \* Fountainhall's report of this case is No. 11. p. 2949. *voce* CONDITION.

---

1698. February 16. DICK of GRANGE against AGNES and JANET DICKS.

No. 27.

Elizabeth Dick, their sister, in her contract of marriage with Mr. Andrew Massie, disposes 8,000 merks, with this quality, that if there be no children of the marriage, he shall life-rent it, but the fee shall appertain to her heirs and executors, and she shall have power to dispose of it by testament, she dying without children, her sisters and brother contend for the fee. Grange alleges it is heritable, because it is to be upon good and sufficient security, which must be understood to be real. The Lords found such inferences not sufficient against the precise con-