

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*

*relatum, et non creditur referenti nisi constet de relato*; and it has been oft found, that narratives are not probative, unless the writ referred to were produced; as 30th November 1671; 21st June 1672; 29th June 1680. (See APPENDIX.) And, 2do, As it was never a delivered evident, so it was alterable and revocable of its own nature; and *de facto* was actually revoked by Mr Walter's acquiring the right of the apprising on the said estate, in 1648, and taking the infestment to the heirs whatsoever; which was a clear changing of the heirs, and former course of succession. *Answered*; It is a certain principle, that a relative or a corroborative writ is sufficiently probative *per se*, without any more; and this tailzie was not alterable, being for onerous causes, no more than a mutual tailzie can be broke; and though it bear not irritant resolutive clauses, yet lawyers are clear, that onerous tailzies cannot be broke. And even where they are but mere destinations, Sir Thomas Hope thinks them obligatory on the granter once to perfect and complete the tailzies, though afterwards they may be infringed; and though the onerous causes be not annexed to this part of the bond of tailzie, but to antecedent obligations, yet they must be understood as repeated through the whole context of the writ; *per l. 134. § 1. D. De verbor. obligat.* 12th July 1631, Huttonhall, *voce* PRESUMPTION. And to the instance given, that it was actually revoked, the heir-male *answered*; That a comprising being only *pignus prætorium*, was a collateral right, and consistent with the property which he possessed as heir-male; and they were extinct by his possession and intromission within the legal. THE LORDS found this tailzie onerous, and so not revocable; and so had no need to determine that other point, if the purchasing the apprisings to heirs whatsoever was an innovation or alteration thereof. The next defence against this bond of tailzie, was prescription; which they urged two ways, both negative, by the 28th act Parl. 1469, and 54th act 1474; that those having interest had taken no document on it, nor done any diligence within the 40 years; and also, that it was prescribed *positive* by the act 1617, because they had possessed the lands 40 years after Mr Walter had taken the rights to heirs whatsoever, in 1648. *Answered*; Neither the privative nor positive prescription can take place; not the privative, because the heirs-male were not *valentes agere* till the succession came to divide, and the case of an heir-female existed, which occurred not till 1692; nor the positive, because whatever alteration happened in 1648, yet the heirs-male always possessed, and so, materially, the tailzie to heirs-male continued. *Replied*; Though the next heir of entail had not the *jus exigendi et succedendi*, yet he had *jus agendi*, and might have pursued a declarator on this bond of tailzie to perfect it in his favours. THE LORDS, by a narrow plurality, found the negative prescription could not cut off this bond, but that the positive did; and that the interruptions condescended on for the heir-male were not sufficient to stop the said positive prescription founded on; and so preferred the heir-female, and found the bond of tailzie extinct by the said prescription. (See TAILZIE.)

*Fol. Dic. v. 2. p. 125. Fountainball, v. 1. p. 669. 694.*