party contractor, and taking burden for her, who in her name might have pursued for implement. *Answered*, That it was not provided by the contract that execution should be used at his instance; and though it had been so provided, the father's negligence cannot prejudge her. Likeas, the provision in her favours was not to take effect as to the payment of the annualrent till after the husband's death, so that from that time the prescription should only run, and he died but *in anno* 1652.

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THE LORDS found, that the prescription runs only from the husband's death, albeit the act of Parliament has no exception of this nature in it.

Being further *alleged*, That, by the contract, the sum is only to be employed conditionally, the tocher being first paid. *Answered*, Though the contract carry such a provision, yet her father, and not she, being obliged to pay the tocher, it is not her fault that her father paid it not. Likeas, if he were pursued, he would say, that the obligement as to the tocher is prescribed.

Which the LORDS found accordingly.

Fol. Dic. v. 2. *p.* 124. *Gilmour, No* 159. *p.* 112.

*** Stair reports this case:

1665. *July* 5.—JAMES MACKIE, as assignee by Agnes Schaw, convenes Stewart of Mains as representing his father, who was cautioner for employing a sum of money to her in liferent. It was *answered*, 1*mo*, The contract is prescribed; 2*do*, It bears these words that the tocher being paid, the principal and cautioner obliged them to employ it upon security, so that the obligation is conditional; and if it be not instructed that the tocher was paid, the defender is not liable. The pursuer *answered* to the *first*, *contra non valentem agere non currit præscriptio*; she being a wife clad with a husband, her not pursuing her own husband, or his cautioner, cannot prescribe her right; To the *second*, The prescription is run against the husband, and his cautioner, who were free to have pursued for the tocher, and did not; and after 40 years she cannot be put to instruct that the tocher was paid, albeit she had been debtor therefor herself, much more when another is debtor.

" THE LORDS found both these replies relevant."

Stair, v. 1. *p.* 295.

*** A similar decision was pronounced 26th February 1622, Hamilton against Sinclair, No 27. p. 10717.

1666. *February* 28. EARL of LAUDERDALE *against* VISCOUNT of OXENFORD.

No 379.

IT was objected against a defender pleading upon the positive prescription, that for some time during the 40 years, there was a liferent of the subject in

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question in the person of one of the defender's authors, to which liferent the pursuer was consenter, and therefore during that time he was *non valens agere*, in respect by no action could he obtain posssession; and the Lords never put parties to the necessity of intenting 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, disponed 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 disponed to Buccleuch by his father, in case he had no children, upon prescription, by such an extensive interpretation of the clause. 2*do*, 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.