

nuary 1674; though the word in that case was *issue*, and is of a more general signification than the word *children*; for it extends *etiam ad nepotes aliosque posteros*.

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Fountainball, v. I. p. 102.

1681. November 29.

The LADY KINCARDINE *against* The EARL'S REAL CREDITORS by infestment.

THE Earl of Kincardine having granted a bond for implement of his contract of marriage, for securing of 80,000 gilders on land in favours of his Lady, in case of no children of the marriage, or of their dying before the age of 20, so as they might and did dispose of the same; with a resolute clause making void the infestment, in case of the children's attaining to that age.

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'THE LORDS found, That the provision irritating the infestment was to be strictly interpreted, and that it took effect by any of the children's attaining to the age of twenty, though they did not dispose of the sum;' and would not supply the words, *so as they may and do dispose*, as an omission, although they were mentioned in the narrative and procuratory and requisition, and the charter; 'and found, That the infestment was not a fiduciary security to the children, but only a security to the Lady of her right in the foresaid event.'

Fol. Dic. v. I. p. 188. Harcarse, (INFESTMENT.) No 583. p. 162.

1686. December 7.

DEACON THOMAS SOMERVILLE *against* CAPTAIN WILLIAM TENANT.

IN the action pursued by Deacon Thomas Somerville taylor in Edinburgh, for the behoof of Somerville of Drum, against Captain William Tenant, skipper in Kirkcaldy, for declaring the disposition granted to him by Tenant of Cairns was altered and revoked by him on death-bed, conform to his faculty, and a new one ordained to be drawn, and he died before that was got done and subscribed; and it being *answered*, That he made no alteration as to Captain Tenant's succeeding him, but only ordained the tailzie to be rectified, that it should only belong to the heirs-male of the substitutes; the LORDS, before answer, allowed a mutual probation on the matter of fact alleged *hinc inde*; and Captain Tenant adducing John Paterson the writer whom Cairns entrusted with the renewing the disposition, Drum gave in sundry objections against him, viz. that he had voluntarily given up the disposition to the Captain, and had instigated him to this plea, and joined with him at consultations, and carried himself

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Lands were tailzied to heirs-male, with a clause in favour of daughters, *in case there be no heirs-male*. There was an heir-male, but he died before the daughters, and the King succeeded as *ultimus hæres*. The provision to the daughters found to have failed.

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partial. THE LORDS, on report, ordained him to purge himself upon oath, and received him.

1687. *December 9.*—THE case of Somerville of Drum, and the heirs of line of Tenant of Cairns, against Captain William Tenant, mentioned 7th December 1686, is decided. By contract of marriage in 1637, the lands of Listonshiells were provided to the heir-male of the marriage; which failing, to James Tenant of Cairns his other heirs-male: The heirs-male all failing, Hugh Wallace of Inghlistown, takes the gift of *ultimus hæres*, and assigns it to Captain Tenant, who pursues a declarator, wherein Cairns' sisters, as heirs of line, repeat a reduction of the gift, and contract whereupon it proceeds, upon this reason, that by a minute of contract in 1634, prior to that contract, these lands were provided to the heirs whatsoever, and inhibition was served on it; and so the heirs of line of that marriage could not be prejudged by the subsequent contract. *Answered, 1mo*, That was only a destination, and so could not hinder James Tenant to alter it, by taking his lands afterwards to his heirs-male. *2do*, John the father, who was fiar, entered not into that first minute, and was not inhibited, (though the inhibition be also prescribed,) and in the second contract he disposes the lands to James, his son and apparent heir, and would give them no otherwise than to the heirs-male. *Replied*, There was an obligation, so soon as James the son came to the fee of the lands, to take them to his heirs whatsoever, conform to the first minute; and *jus superveniens jure accrescendi* belonged to the heirs of line; and if such provisions were mere destinations, not obligatory, it would evacuate all contracts matrimonial. *Quæritur*, If Captain Tenant may be reached, as having received a disposition from the son of that James who was obliged in the minute, and which son entered heir by a precept of *clare constat*?

THE LORDS found the donatar to the *ultimus hæres* had right, and that the heirs of line had none; and therefore declared the gift; and also assoilzied Captain Tenant from Drum's reduction. Upon a bill, Drum procured a new hearing which was not till the Summer Session.

1688. *January 25.*—THE reduction at the instance of Somerville of Drum, and the heirs of line of Cairns, of a disposition granted by Cairns to Captain Tenant, as mentioned 7th December 1686, is advised. The reason of reduction was, that it was blank in the name; and though he subscribed a warrant to Walter Johnston, the writer of it, or any other, to fill up the Captain's name in it, yet that warrant was null, Walter being one of the two witnesses in it himself; and *non constat* when Mr John Carmonth filled it up: it might have been *in lecto*, or after Cairns' death; and it is proven by the witnesses, that he was going to rive it, and ordered a new one to be drawn, which was never perfected; and so this was revoked. *Answered*, It appears by the testimonies,

Captain Tenant's name was filled up a year before Cairns' sickness, and Mr Carmonth can depone on it: And, as to the alteration of his mind, it is evident he never designed to take it from Captain Tenant, but only to alter it in the substitution and tailzie from his heirs whatsomever to his heirs-male; and from § 7. *Institut. quib. modis testamenta infirmant.* it is clear, this is not a sufficient revocation, unless the posterior testament or disposition were perfected: And the LORDS have decided so, 23d July 1669, Elies against Inglistoun, *voce WRIT*; and that *l. 30. C. de testament.* though cited by Drum, yet makes against him. THE LORDS sustained the disposition, assoilzied from the reduction, and preferred Captain Tenant to the mails and duties.

1688. July 25.—THE LORDS having of new advised Captain Tenant's case with Somerville of Drum, mentioned 9th December 1697, they adhered and explained their interlocutor in these terms. THE LORDS having advised the debate, and writs produced for either party, they find that, either in an original feu, or posterior infestment of tailzie, where the provision is in favours of the heirs-male and assignees whatsomever, that the heirs of line cannot succeed, but that the right does devolve to the King as *ultimus hæres*: And find, 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 would not comprehend the lands of Listonshiells, wherein the father was not then infest; And also find, that the obligation in the minute being conceived to obtain himself, and his wife, infest in conjunct fee and liferent, and the heirs of the marriage, imported no more than a destination in favours of the heirs, and would not hinder; but his father, who was not a party-contractor in the minute, having thereafter, in a contract of marriage (which was afterwards extended, bearing no relation to the minute, but only to the preceding marriage, and containing an addition of 1000 merks of tocher, and several alterations,) provided the lands to the son, and to the heirs-male of his body; which failing to his heirs-male and assignees whatsoever, albeit the son was fiar by the conception, yet he was not obliged to alter the destination in favours of the heirs-male, neither were the heirs-male obliged to alter the same, albeit the minute had imported an obligation upon the son, not being obliged to fulfil obligations which are inconsistent with, and do evacuate the tailzie; and besides, that the minute did import no obligation upon the son, but only a destination of tailzie or succession: As also find, that albeit the tocher was applied for purging the wadset of 5000 merks, which did affect the lands of Listonshiells, yet that did not make the lands to be conquest in the person of the son; but being provided by the contract of marriage as aforesaid, was *præceptio hæreditatis*; so that, albeit the son was obliged to provide the conquest to the heirs of marriage, yet the obligation of conquest could not comprehend these lands.

Drum having lost his point, he then insisted for 6000 merks, upon this ground, that, by the contract of marriage, it was provided, in case there were

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no heirs-male of the marriage, and the estate went to Cairns' other heir-male, then they should pay to the daughter 6000 merks; and subsumed that the heir-male of that marriage having now failzied, that therefore the donatar, who was liable for all debts, may pay that 6000 merks to the daughters. *Answered, 1mo*, This was not a substitution, but a condition, in case there were no heirs-male of the marriage, which did not exist; for there was a son, who was not only *hæres potestative, et in sanguine per jus apparentiæ*, but also *actu*, by entering on a precept of *clare constat*. *2do*, The daughters had got portions, and renounced. *3tio*, They were not excluded by any deed of their father or good-sire, as the clause runs, but by a deed of their brother's, which is not provided against. THE LORDS having advised this debate, upon the 27th July, they found, he having existed and being served heir, the provision to the daughters evanished. The words were, Found that the clause in the contract, in favours of the daughters, being, that in case there be no heirs-male of the marriage, and that the said daughters be secluded from the lands and lairdship of Cairns, by a tailzie made, or to be made, by the said John, or James his son, or either of them; then, and in that case, the heirs-male, and of tailzie, succeeding thereto, shall be holden to content and pay to the daughters of the said marriage, the sum of 6000 merks; and there being an heir-male of the marriage who was served and retoured, and lived many years, that the condition of the daughter's provision did fail; and therefore assoilzie.

Fol. Dic. v. 1. p. 188. Fountainhall, v. 1. p. 434. 488. 493. 513.

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There being a provision in a contract, that in case the husband died before his wife, leaving children, one or more, unprovided, and unforisfamiliate, then she should restrict her jointure to the half; and one child having survived the father, and died within a few months after, the relict was pursued to restrict. Alleged for the defender, The clause of the contract was calculat-

1687. November 22. WILLIAM ROBERTSON against ELISABETH BINNING.

THERE being a provision in a contract, that in case the husband died before his wife, leaving children, one or more, unprovided, and unforisfamiliate, then she should restrict her jointure to the half; and one child having survived the father, and died within a few months after, the relict was pursued to restrict.

Alleged for the defender; That the deceased surviving child being heir, and having both the fee and some tenements uniferented, cannot be said unprovided. 2. The clause of the contract was calculated for a subsistence of the children, who now are dead, and so need none.

Answered: By children unprovided we are not to understand such as have no legal provision, but such as have no bonds of provision.

'THE LORDS found the wife ought to restrict to the half.'

Fol. Dic. v. 1. p. 188. Harcarse, (CONTRACT OF MARRIAGE.) No 389. p. 102.

* * * Fountainhall reports the same case :

SHE had a liferent of some houses in Cupar of Fife from her husband, his brother, with this quality, that if there were children at the time of his death,