

1761. June 13.

LORD BELHAVEN *against* MRS. EUPHAN HAMILTON, Sister by the full blood to the Deceased Sir Hugh Hamilton of Rosehall, and CHARLES HAMILTON, Esq; Her Husband, for his Interest.

UPON the 23d of March 1709, Sir Archibald Hamilton executed a disposition and assignation, whereby, "for love, favour, and affection, he disposed and assigned to and in favours of Mr James Hamilton, his eldest son, his heirs and assignees whatsoever, all and sundry the heritable and moveable debts and sums of money, principal, annualrents, and penalties, then resting and owing to him; by whatsoever person or persons, by virtue of heritable bonds and infeftments, and other bonds heritable or moveable, tickets, bills, accompts, decreets, or any other ways, and contained in a particular inventory thereof, subscribed by him of that date, and therein holden as repeated *brevitatis causa*; and also all other debts and sums of money, heritable or moveable, which shall be resting owing, and any ways pertaining to him at the time of his decease, with the annualrents thereof bygone and in time coming, together with the said bonds, bills, decreets, and other writs, whereby the said debts are or shall be due, with all that has followed, or may follow thereupon.

"With this provision always, That the said Mr James Hamilton and his fore-saids, shall, by acceptation hereof, be bound and obliged to employ the first and readiest of the debts and sums of money disposed and assigned as above, and which they shall intromit with and receive by virtue of the above rights, for payment of the provision made or to be made by the said Sir Archibald Hamilton to his other children and grand-children, and of all other just and lawful debts that shall be resting at his death; and likewise, that these presents are granted in implement and in fulfilling of the said Sir Archibald his obligation to his said son, contained in the contract of marriage betwixt him and Mrs Francis Stewart his spouse, for payment to him of the sums of money therein mentioned. And it is hereby declared, That it shall be lawful to Sir Archibald to alter or revoke the said right and disposition, at any time in his life, *etiamsi in articulo mortis*."

Sir Archibald, of the same date, took from his son Mr James a back-bond, whereby the son became bound "to employ the first and readiest of the debts and sums which he should intromit with and receive, by virtue of the said assignation, for payment of the provisions made or to be made by his father to his children or grand-children, and of all his father's just and lawful debts that should be resting at his decease; and to lend out, employ, and bestow the remainder of what he should so uplift and receive, upon land or other sufficient security, and to take the rights and securities thereof as follows: As much thereof as may extend to 4000 merks yearly, which his father became bound to provide by the marriage-contract, to and in favours of himself and the heirs

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Whether the negative prescription runs against remoter heirs of entail during the life of the institute, whose issue-male are the next substitutes? Whether an obligation to provide and secure an estate to the nearest heirs-male whatsoever, is implemented by the nearest heir-male's succeeding to the estate in virtue of a deed containing a different series of heirs?

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specified in the said contract of marriage ; and the remainder of the said hail sums to himself and the heirs-male procreate of his body ; which failing, to his three younger brothers then alive in their order, and to the heirs-male to be procreate of their bodies ; which failing, to the heirs-female to be procreate of his own body, or of the bodies of his three younger brothers in their order, the eldest succeeding without division ; which failing, to the said Sir Archibald, his nearest heirs and assignees whatsoever ; and he thereby bound and obliged him and his foresaids, that they should do no act or deed, directly or indirectly, whereby the order of succession above-mentioned may be any ways altered, changed, or disappointed."

This back-bond, upon the 16th July 1709, was delivered up and cancelled upon James the son's granting a second back-bond to his father, whereby he " obliged himself, that the sums of money he should happen to recover by virtue of the said assignation, are, in the *first* place, to be applied for payment of the sums the said Sir Archibald Hamilton is bound to pay, by virtue of my contract of marriage, to me and my heirs therein mentioned ; and, in the *next* place, for payment of the provisions granted by Sir Archibald to his children and grandchildren, conform to the bonds of provision granted in their favour ; and for payment of any debts and legacies due or left by the said Sir Archibald, if any be ; and as to the remainder of the said sums that I shall happen to recover by virtue of the said assignation, over and above what pays the sums above-mentioned, I oblige me to provide and secure the same to myself and the heirs-male to be procreate of my body ; which failing, to my next heirs-male whatsoever : And I shall do no act or deed to disappoint the succession of my said next heirs-male to the said sums, failing of me and the heirs-male of my body, as said is."

After the death of Sir Archibald, Sir James the son acquired a large fortune besides the estate derived to him from his father.

In March 1738, Sir James executed a deed, by which, " for love and favour to his brother Hugh, in the event of his own death without issue, he made, constituted, and ordained the said Hugh his cessioner and assignee in and to all and whatsoever debts and sums of money that should be due and addebted to him any manner of way at his death, either by bonds, heritable or moveable, bills, tickets, &c. and in general all moveables whatsoever, which should pertain and belong to him at his death, burdened with the payment of his just and lawful debts, and of all provisions granted or to be granted in favour of his lady, or any other person whatsoever."

In December 1744, by another deed, " he nominated and appointed his said brother to be his sole executor and universal legatar, and assigned, bequeathed, and made over to him, all goods, gear, debts, and sums of money belonging to him."

In April 1749, Sir James also executed a deed of settlement of his whole unentailed lands, whereby he grants procuratory for resigning his whole lands

therein recited in favour of "himself and the heirs whatsoever lawfully to be procreated of his body; whom failing, to his brother Hugh, and the heirs whatsoever of his body; whom failing, to Charles Hamilton, (Sir James's nephew by the full blood), and the heirs whatsoever of his body; whom failing, to the other heirs therein mentioned."

Sir James died in 1750 without issue, and thereby the succession opened to his brother Sir Hugh, who possessed the estate as long as he lived, upon titles made up in terms of the above-mentioned deeds granted by his brother Sir James in his favour; and upon his death without issue-male, he was succeeded by his daughter an infant, who also, not long thereafter, died.

Lord Belhaven having come to the knowledge of the above disposition by Sir Archibald Hamilton, and of the back-bond relative thereto granted by Sir James, expedite a service, as nearest and lawful heir-male in general to Sir James Hamilton, and thereupon brought an action against Mrs Eupham Hamilton, sister to Sir Hugh, Charles Hamilton, Esq; her husband, and Captain Charles Hamilton of Wishaw, as representing the said Sir James upon the passive titles, for implementing and fulfilling the foresaid back-bond to the pursuer, as nearest heir-male whatsoever to the said Sir James.

The first point *pleaded* for the defenders was, Action is cut off by the negative prescription, as no process has been pursued, no document taken, nor any demand made upon the back-bond, for more than the space of 40 years.

Answered for the pursuers; *1mo*, That Sir James Hamilton himself was fier in the obligation. His own issue-male were the first substitutes, and had an undoubted power to alter the destination whenever the right became vested in them; and therefore the collateral heir-male substitute to Sir James Hamilton and the issue-male of his body could have brought no action against him during his life which could have been useful and available in any shape; and therefore the prescription could only run after Sir James's death, when, by the failure of his issue-male, the next heir-male substitute could have insisted for implement of the back-bond *cum effectu*.

Answered, 2do, That supposing Sir James had had issue-male of his own body, it could not be maintained, that prescription would have begun to run in his favour against such issue, from the date of the back-bond; for such plea would imply this manifest absurdity, that prescription may commence before the creditor's existence, and may continue to run during his minority. But if the prescription could not run against the heirs-male of Sir James's body, it could not commence, and far less be completed, against the remoter heirs-male during the life and possibility of issue of Sir James Hamilton.

Answered, 3tio, That as Sir James Hamilton himself was the institute in the succession provided by his own back-bond, and all the other heirs-male were only substitutes to him, it seemed to be inconsistent with all the principles of law, that during his own possession prescription could commence and run in his favour against his own heirs-substitute. It never was heard, that the insti-

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Answered, 4to, That the negative prescription of obligations by the law of Scotland commences only at the term on which the obligation is payable or prestable; or, as the law expresses it, *quando dies et cedit et venit*. Therefore it is incumbent upon the defenders to point out and prove the period of time when there was a reversion of the sums uplifted by Sir James after payment of his own debt, and the other provisions and debts of his father; because it was at that period only that the obligation accrued and became effectual to the heirs-male.

Replied for the defenders, That there are no words in the obligation, suspending the effect thereof during Sir James' life; and therefore it is undeniably evident, that action was directly competent at the instance of any of the heirs-male against Sir James himself, to have compelled him to perform the obligation contained in the back-bond; and it would have been no good defence to Sir James against such action, that he might have an heir-male of his own body, who would have been preferable to those collateral heirs-male; the remoter, as well as the nearer heirs, had the same *jus quæsitum*, the same right of action, to compel Sir James to settle and provide the money in terms of the back-bond.

It was on this principle, that, in many late cases, such as Mackerston, Kin-naldie, and others, the negative as well as the positive prescription has been judged to run against latent deeds of tailzie. It was in those cases pleaded, upon the same principles that are pleaded for the pursuer, that as a right did not accrue to the remoter heirs of tailzie, but upon a failure of the nearer heirs, the prescription could not run against them before that right had accrued; and that the law did not oblige such remote heirs to intent actions, whilst they had but a right in expectancy, which possibly might never take place.—
See TAILZIE.

It was in those cases judged to be a sufficient answer, that even the remotest heirs had such a *jus quæsitum* as entitled them to maintain the proper action to render the entail effectual, which, if they neglected, and allowed the negative prescription to run, *sibi imputent*; and therefore, as action was competent on this obligation against Sir James himself, at the instance of the remoter heirs, and as they neglected to bring it, the action is now lost by the negative prescription.

Replied, 2do, It is unnecessary to enquire, whether the prescription could have been obtruded against the heirs-male of Sir James' body? or whether it could have run during their minorities? because, whatever plea they might have had, that could not be competent to the remoter heirs, who were majors at the time; the prescription *quoad* them would not have been interrupted by the minority of these nearer heirs.

Replied, 3tio, That it is not incumbent upon the defenders to point out when there was a reversion of the sums uplifted by Sir James, after payment of his

own debt and the other provisions and debts of his father; because any reasonable time that could have been allowed to call in the money, and pay off the debts, and to vest the residue on proper securities for behoof of the heirs *in destinatione*, would have been so short as to have no influence in the present question; and it is rather incumbent upon the pursuer to say and prove, that the debts and effects were outstanding at such a period as would bring it within the 40 years.

¶ In short, the action was competent at Sir Archibald's death. From that period the prescription was begun; and 40 years having elapsed before this action was brought, it is not now competent.

The second point *pleaded* for the defenders was, That Sir Hugh, who was the first creditor in the obligation, received ample satisfaction and full implement thereof, when, by the deeds of settlement executed in his favour, he succeeded to Sir James' whole estate, heritable and moveable; and that thereby the obligation is become extinct, and cannot be revived by any after heir.

Answered for the pursuer, *1mo*, That none of the deeds granted by Sir James, in favour of Sir Hugh, can be deemed to have been granted in implement of that obligation; because, by the settlements contained in those deeds, they are limited to a quite different series of heirs. The assignment to the moveables and nomination of executry, is simple and absolute in favour of Sir Hugh, without mentioning heirs of any kind. And the tailzie or settlement of the land-estate by the deed 1749, is conceived in favour of the heirs whatsoever of Sir James' body; and, failing of these only, in favour of Sir Hugh, and the heirs whatsoever of his body; whereby the daughters either of Sir James or Sir Hugh would have succeeded preferably to the other collateral heirs-male: Whereas, by the obligation contained in the back-bond, Sir James was obliged to secure and employ that money, failing heirs-male of his body, in favour of his other heirs-male; and therefore the settlements made by Sir James were not intended, nor could they be considered as implement or satisfaction to the heirs-male of their claim.

Answered, *2do*, That the deed of tailzie most certainly was not implement, because it was of a different subject, and to quite a different series of heirs; and no man can discharge himself of an obligation to provide a certain estate or sum of money in favour of his heir-male, by settling another estate upon a different series of heirs.

If, therefore, there was any foundation for the defence of implement, it must be upon the general disposition and testament executed by Sir James in favour of his brother Sir Hugh, whereby Sir Hugh succeeded to Sir James' whole personal estate. But it is an established rule in the law of Scotland, that a special provision is not understood to be vacated or altered by a general disposition or testament. This has many times been decided, particularly 24th November 1710, Johnston *contra* Callender, *voce* PRESUMPTION; and 17th of July 1732, Strachan *contra* Farquharson, *IBIDEM*: And therefore, in the present

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case, as Sir James had become bound to provide and secure a certain fund to his nearest heirs-male whatsoever, the general disposition and testament executed by him cannot imply an alteration of that special provision in favour of his heirs-male; and therefore his back-bond remained in full force, notwithstanding these settlements.

Answered, 3tio, If Sir James had executed a security for the residue of his father's estate in terms of the back-bond, it certainly would have subsisted, until it was duly altered by an heir-male succeeding in the right. Sir Hugh made no such alteration; and therefore the obligation contained in the back-bond must still be entire, otherwise this absurdity would follow, that a succession properly established to heirs-male may be vacated or altered in favour of the heirs whatsoever of the first heir-male, without any deed of alteration executed by such heir-male.

Replied for the defenders, *imo,* Sir Hugh was the creditor in the obligation; and therefore, as he took Sir James' whole estate, real and personal, under the deeds of settlement made by him, and with the burden of his debts, he thereby received full implement and satisfaction for the claim competent to him as creditor in the aforesaid obligation, which thereby became extinct, and cannot be revived by any after heir.

If such action had been brought against Sir Hugh himself by the collateral heirs-male, to have compelled him, as representing Sir James, to have settled and secured this money in terms of the back-bond, it certainly would have been a good answer on the part of Sir Hugh, that, as he himself was the creditor in that obligation, and had received implement and satisfaction thereof from Sir James, and was not bound to transmit the succession to the remoter heirs-male, no action was competent at their instance; and if this would have been the case with regard to Sir Hugh himself, it will be matter of difficulty to point out any principle of law or justice upon which action can be sustained against Sir Hugh's heirs. Implement and satisfaction once received, must, in the nature of things, operate a perpetual extinction of the claims.

“THE LORDS repelled the defence of prescription; but found, that Sir James Hamilton had fully implemented his back-bond by the settlements which he had made in favour of Sir Hugh, his nearest heir-male, and therefore assoilzied.”

Reporter, *Lgrd Coalston.*

Act. *Miller.*

Alt. *Lockbart.*

Clerk, *Hume.*

J. M.

Fol. Dic. v. 4. p. 90. Fdc. Col. No. 34. p. 64.