

of in Ingliston's hands: and yet they allowed the parties presently to dispute whether, albeit these writs were in the charter-chest, Ingliston or his tutrix should have them up, or if they should remain sequestrated.

No. 257.

Stair, v. 1. p. 590.

1669. July 23.

MR. JOHN ELEIS *against* INGLISTOUN.

Crichtoun of Crawfordstoun having only one daughter, disposed his estate to John Brown of Inglistoun, in contemplation of the marriage betwixt him and Crawfordstoun's daughter, and to the heirs-male of the marriage, which failzieing, to certain other heirs substitute, bearing a power to burden the estate with 5000 merks to whom he pleased, and containing a clause that the disposition should be valid though not delivered in his lifetime; and after Inglistoun's marriage Crawfordstoun grants a bond relating to his former promise of £20,000, to Inglistoun and the heirs of the marriage, (which failzieing,) after which words there follows a blank of a line and a half, and the sum is payable at the first term after Crawfordstoun's death; the intent of which bonds seem to have been, that thereupon apprizing might proceed to denude the heirs of line, and to compel the superior to receive Inglistoun. Thereafter Crawfordstoun made a second tailzie, wherein Inglistoun's son, with his daughter being then born, is fiar, and several members of the tailzie altered; and after that he made a third, wherein his daughter (Inglistoun's wife) is fiar, and the substitutions much like the former. After his death these papers being exhibited, at the instance of two of his daughters, heirs of line, married to Mr. John Eleis, and Alexander Tran, upon a process *ad deliberandum*, and being craved up again from the clerks, by the tutor of Inglistoun's son, it was alleged for the heirs of line, that the said writs could not be delivered up, because they not having been delivered by the defunct in his *leige houstie*, could not prejugé his heirs of line; and albeit his first disposition contained a dispensation for not delivery, which ordinarily is accounted sufficient, yet where it appears the defunct altered his purpose, both by the posterior dispositions of a different tenor, and several missive letters showing a resolution after all to alter the same, the said clause cannot be effectual, and there is no presence for delivering the bond, and the two other dispositions, seeing they want that clause. It was answered, that the dispensation with delivery is in all cases equiparate with the delivery itself, and that the remanent writs ought also to be delivered, though they bear not that clause, because the heirs of line being absolutely excluded by the first disposition, they have no interest to quarrel the other dispositions; and albeit if the posterior dispositions were to different effects, the want of dispensation therein might make them ineffectual, yet where they are but qualifications of the first tailzie, they are accessory thereto, and must be delivered therewith, seeing the defunct so long as he kept the writ in his own hand, might still alter the same at his pleasure. It was answered, that the posterior dispositions wanted the clause, reserving power to the defunct to

No. 258.

Effect of a clause dispensing with the not delivery.

No. 258.

leave to whom he pleased the 5000 merks, and it is like he hath left it to his other daughters, and the bond may be made use of to overturn his whole intent, and alter the tailzie.

The Lords found, that seeing the first disposition contained a dispensation with delivery, and the rest being accessory thereto, and only altering in some things the tailzie, but still to the first heir of tailzie, being the son of Inglistoun's marriage, they ordained them all to be delivered up, and the bond also, but with this declaration, that the provision anent the 5000 merks in the first disposition, should be holden as repeated in the rest, that the heirs of line might be in no worse case than by the first, and that the bond should only be made use of according to the substitutions, and clausés of the tailzies.

Stair, v. 1. p. 643.

1675. June 23.

BRUCE *against* BRUCE.

No. 259.

An heritable bond by one to his nephew found effectual, though never delivered, sasine having been given thereupon, which was in the public register, whereby there was *jus quasitum* to the nephew.

Stair. Dirleton.

* * * This case is No. 365. p. 11185. *voce* PRESCRIPTION.

1677. July 26.

STEVENSON *against* STEVENSON and her HUSBAND.

No. 260.

A disposition of tailzie latent and incomplete, lying by the maker at his death, was found effectual, though neither delivered, nor containing a clause dispensing with the not-delivery.

Umquhile John Stevenson of that ilk, by his contract of a marriage, provided his estate to his heirs-male of the marriage, and failzieing heirs-male, provides 5000 merks to the heirs-female; but there being no heirs-male of the marriage, he disposed his estate to his eldest daughter Margaret Stevenson, she always marrying one of the name of Stevenson, or who would assume the name of Stevenson, wherein if she failzied, that she should lose her right, to belong to Janet the second daughter; and if she failzied, to the third daughter. Margaret the eldest daughter marries George Moorhead. Janet the second daughter pursues Margaret and her husband, for declaring that Margaret had lost her right, her husband having not assumed the name of Stevenson, and that therefore Janet had right to the estate in the terms of tailzie. The defender alleged, that this disposition of tailzie was a latent and incomplete right, that took no effect, and that it was never delivered, nor did it contain a clause dispensing with delivery, and so was passed from by the father, who lived three or four years thereafter. *2do*, This disposition can have no effect against Margaret, because she neither did, nor was