No 3.

on, it is prescribed by the negative prescription *non utendo*, no document being taken thereupon during all that space; and though the act 1474 speaks only of obligations, yet the Lords, by their decisions, have extended it to decreets *in foro contradictorio*, as was found 26th July 1637, Laird of Lawers against Dunbar, *infra*, *h. t.* *Answered*, The decreet is opponed, empowering him to possess his teinds for the crop 1634, and in time coming, upon his consigning the price, or retaining it ay till he get a disposition, and paying the annualrent *medio tempore*, which is equivalent to an actual sale, and a consolidation of the stock and teind; so he needed take no other document, but only to possess his own teind, till they should interpel him by offering a disposition, which they never did; see 19th January 1669, Earl of Athol *contra* Strowan, No 34. p. 7804. *Replied*, The decreet at most could amount to no more but like a minute of sale, which could be no title of possession till he had performed his part, which he was so far from doing, that for several years he paid the valued teind duty without ever noticing the decreet of sale, which on all hands was a deserted derelinquished writ. *Duplied*, Whatever payments were made were in his own minority, and so can operate nothing; and whatever might be pretended if he were pursuing on this decreet, that it was prescribed, yet this can never be obtruded against him when he only makes use of it by way of exception, reply, and defence; *nam quæ sunt temporalia quoad agendum eadem sunt perpetua quoad excipiendum*; and exceptions never prescribe. Besides, this decreet bearing mutual prestations, the titular's part of disponing and denuding was *ordine naturæ* first, and he being *primus in obligatione* should have first offered to implement, which he never did, and so the heritor possessing his own teinds hindered the decreet from prescribing. The Lords sustained Buchlivie's defence founded on the decreet of sale, and found it was not lost nor prescribed *non utendo*.

*Fountainhall, v. 2. p. 575.*

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1725. *June* 16.

The Earl of Kelly *against* ——— Duncan and her Husband.

No 4.
A subject, by original rights, had been granted to heirs male; whom failing, to the eldest heirs female without division. Sub-feus were granted to heirs whatsoever. Both kinds of rights came

In the year 1555, the Commendator of the Priory of St Andrews, by a feu-charter, disponed some acres of land to certain persons and their heirs male; which failing, to their eldest heirs female without division, and assignees.

Some of these acres were afterwards purchased from the original feuars, and the conveyances were made to the purchasers and their heirs whatsomever, upon which base infeftment followed.

These rights came at length in the person of Mr Duncan, who dying without heirs of the body, there arose a question amongst his sisters, Whether his succession should be determined by the original feu-charter, or by the after-conveyances?

It was *alleged* for the Earl of Kelly, as assignee to the youngest sister, That by the posterior dispositions upon which Mr Duncan was infeft, and had possessed the lands, the original destination was altered in favours of heirs whatsomever.

No 4. ultimately into the person of one proprietor, who dying without heirs of his own body, it was decided among his sisters, that the after-conveyances were, by prescription, now the rule of succession.

*Answered* for the eldest sister and her husband, That these dispositions being but private conveyances from vassals, upon which only base infeftments had followed, they could not be deemed an alteration of the original destination by the superior, who had done no deed confirming these posterior rights; and since the superior had so anxiously provided against splitting his feu, heirs whatsomever in the latter conveyances were to be understood the heirs of investiture, and such as the superior could have been obliged to receive as vassals in the subject disponed, viz. heirs-female without division.

*Replied* for the Earl, That by heirs whatsomever are always understood heirs at law, and consequently, where the succession devolves on females, heirs-portioners; and since the later dispositions, on which Mr Duncan was infeft, were taken to heirs whatsomever, he showed his intention that his heirs at law should succeed him, as much as if he had disponed his lands to all his sisters equally, in which case, they, as creditors, might have adjudged, and so obliged the superior to receive them. As to what prejudice the superior may sustain from the original destinations being altered, that was *jus tertii* to the defenders.

THE LORDS found it proved by the writs produced, that the destination was altered in favours of heirs and assignees whatsomever.

Act. *Graham*, sen. Alt. *Hay* & *Murray*. Clerk, *Justice*.

*Edgar*, p. 181.

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1728. *November* 26. FRASER *against* M'KENZIE.

No 5.

IN a ranking and sale of the lands of Pitcalzean, the subject in competition was an apprising of these lands, led by Campbell of Boghole 1675, of which there were two conveyances, one voluntary from Boghole to Auchlossin 1680, the other by an adjudication at the instance of Campbell of Calder, against the heir of Boghole, 1700. The voluntary right being evidently preferable, it was objected by the legal disponee, who had done diligence upon Boghole's apprising, whereby it was saved from the negative prescription, That his competitor's right was fallen *non utendo*, no document having been taken upon it since it was granted. It was *answered*, This objection is competent to any real creditor upon the estate of Pitcalzean, whose interest it would be to have Boghole's apprising cut down, but not competent to any one claiming under Boghole's apprising; for if the apprising be extinguished, there is an end of the