

No 174.

sequences that may attend the maxim I have been complaining of. At that rate, an estate may be possessed, for centuries, upon a title of property, without bestowing upon the proprietors a power to name their own heirs, or to make any gratuitous settlement whatever. Upon the footing of the present judgment, there can be no prescription while the persons who hold the estate happen to be both heirs of entail and heirs of line; and the prescription does not begin to run till the person who takes the estate is not heir of entail.

This matter being carried by appeal to the House of Lords, the following judgment was given, 11th May 1757: "That the interlocutors complained of in the appeal be, and the same are, hereby Reversed. And it is further ordered, that the defence made by the appellants on prescription be sustained." Here it remains uncertain, whether it was the positive prescription or the negative that moved the House of Lords.

Sel. Dec. No 116. p. 164.

1762. December 9.

DUKE of HAMILTON and TUTORS *against* ARCHIBALD DOUGLAS of Douglas.

No 175.

THE Duke of Hamilton claimed the estate or earldom of Angus, on the ground of a contract of marriage, date 1630, between Archibald Lord Douglas, son of the Earl of Angus, and Lady Anne Stewart; by which that estate was disposed to the heirs-male of the body of Lord Douglas; whom failing, to return to the said Earl of Angus his father, and his heirs-male and of tailzie, under which denomination the Duke now claimed. It was *pleaded* for Archibald Douglas of Douglas, Esq. That the estate had been possessed since 1698, by his predecessors, upon charters under the Great Seal, and other feudal titles, containing no such clause of return or limitation; and being in this manner possessed for more than 40 years, without challenge or molestation on the part of the family of Hamilton, their claim was now cut off, both by the positive and negative prescription. *Answered* for the Duke; The heirs of the contract 1630 had no call or occasion to bring their challenge, so long as no act or deed was done to intercept their right of succession in those events in which the right of return was to operate in their favour; and the estate being all along possessed by those who were heirs-male by the contract 1630, the challenge was never competent till now. *Replied*, That there was a great difference between possessing on titles which could not be altered, and possessing on such as were unlimited, and defeasible at pleasure; and so long a possession on these last certainly bars all challenge.—THE LORDS found, that the Duke's claim was cut off by the positive and negative prescription.

Fol. Dic. v. 4. p. 98. Fac. Col.

. This case is No 40. p. 4358. *voce* FIAR, ABSOLUTE LIMITED.