

Compearance was also made for the executors of the husband, and the same arguments used for them as for the defender; but it is needless to insert them, because the Lords did not think it necessary to determine the question: For whether she were *fiar*, or *nominati* substitute, she came to have right to the subject by survivancy, and he could not, either by discharge or assignation, or contracting debt, disappoint her of that right, further than his power of disposing extended.

No. 22.

The Lords found, that in competition between the heirs of the husband and the heirs of the wife, who was the longest liver, the heirs of the wife were preferable; and adhered to the Lord Ordinary's interlocutor, repelling the grounds of compensation further than to the extent of 500 merks.

Act. *W. Grant*. Alt. *A. Pringle*. For Nisbet's heirs, *Ferguson*. Clerk, *Forbes*.

D. Falconer, v. 1. No. 206. p. 285.

* * Kilkerran's report of this case is No. 10. p. 4203. *voce* FIAR.

SECT. III.

Succession A TESTATO.

1662. July 22.

MARGARET ANDERSON and JOHN ELPHINSTON *against* MARY WAUCHOP.

Margaret Anderson, and John Elphinston, as heir to _____ Anderson, who were the two daughters of umquhile Mr. David Anderson of Hills, pursue Mary Wauchop, his relict and executrix, to fulfil an article of his contract of marriage, bearing, "That if there were no heirs-male of the marriage, he bound and obliged him, and his heirs-male and successors whatsoever, to pay to the daughters of the marriage 3000 merks;" and craved, that the executrix, as representing their father, might pay the same. The defender alleged, Absolvitor, because it is clear, by the clauses of the contract, that the father did not bind himself simply, or himself and his heirs, but that he bound only himself and his heirs-male; which is the more clear that the narrative of the clause bears, "because his estate is provided to his heirs-male." The pursuer answered, He opposed the clause, by which he did not oblige his heirs-male, but himself and his heirs-male; and so, in obliging himself, he hath obliged all that represent him; and he might have been pursued in his own life-time, if his daughters had come to the age appointed by the provision; *2dly*, He has not only obliged himself and his heirs-male, but his successors whatsoever, and therefore his executors.

No. 23.

A clause obliging a party, and his heir-male and successors, on this narrative, that his heir-male had the benefit of his estate, and the heirs-female were excluded, was found to burden the heir *primo loco*, and that he must be discussed before his executors could be liable.

No. 23. The Lords found, That, by the tenor of the clause, and narrative thereof, the defunct's meaning was chiefly to oblige his heirs-male, and albeit successors whatsoever were added, yet, by the narrative and order of the words, they found the heir-male was first burdened, and behoved first to be discussed; therefore ordained the defender to condescend what the heir-male had to succeed to; and if he was not entered heir-male, and had nothing to succeed to as heir-male, they thought the defender would be liable.

Stair, v. 1. p. 132.

1670. *January 5.* INNES *against* INNES.

No. 24.

A father assigned an heritable bond of 6000 merks to his children, 4000 merks to Robert, and 2000 merks to William and Janet; and, in case of Robert's decease, providing his part amongst the rest equally. Janet having died before Robert, and Robert having also died without children, William, as heir to Robert, claimed the defunct's share, upon this ground, that Janet being substituted to Robert, without mention of her heirs, and having died before him, she never had right, and her substitution became void, and her heirs not being called in the substitution, since they could not have right, but as coming in Janet's place, the substitution was also void as to them. On the other hand, it was argued for Janet's heirs, That Janet being the last person called in the substitution, the same place that she herself would have taken up, if alive, must her heirs take up, now that she is dead: Janet was called preferrably to Robert's heirs, and would have excluded them, so must her heirs, since it is not pretended that any person is interjected betwixt them. The Lords preferred the heirs of Janet, and found, That they had right as heirs of provision to Robert, and that they ought to be served to him, and not to Janet, who never had right herself, having died before she was or could be heir to Robert.

Fol. Dic. v. 2. p. 400. Stair. Gasford.

* * * This case is No. 60. p. 4272. *voce* FIAR.

1677. *February 22.* BRUCE *against* MELVILLE.

No. 25.

No member of a tailzie can be served heir while there is a hope of a nearer.

The late Earl of Leven being infest, as heir to his father, in the estate of Leven, which was then provided to heirs whatsoever, by a bond of tailzie, resigned the said estate and dignity in favours of himself and his heirs of tailzie, and thereupon was infest. The tenor of the bond of tailzie is as follows: "For the weal and standing of his house, honour, and dignity, in his own posterity; which failing, of the persons of his heirs of tailzie after specified, viz. the heirs-male of his body; which failing, the eldest heir-female procreated or to be procreated