

No 105. to the daughter, in favours of the brother, who was his apparent heir of the family; and which substitution, or conditional assignation, could not be prejudged by the daughter in her minority by testament, or otherwise, without a necessary or onerous cause, and so they preferred the uncle who was substitute, to Arnot of Mugdrum, who was the legatar: This, thereafter, being called in presence, the contrary was found.

P. Falconer, v. 2. No. 52. p. 29.

No 106. 1684. *March.* ROBERT BORTHWICK *against* JOHN LIVINGSTON.

A FATHER, who was debtor to his daughter in 1000 merks, which fell to her by her mother's decease, having afterwards, in her contract of marriage, obliged himself to pay a greater sum in tocher;

THE LORDS found, that the father was not obliged to pay both the 1000 merks and the tocher, because *debitor non præsimitur donare*, though the tocher in the contract was accepted only in satisfaction of what the daughter might succeed to by the death of her father, without mention of what she might claim through her mother's decease.

Harcarse, (CONTRACTS OF MARRIAGE.) No 366. p. 94.

No 107. 1687. *December.* WILLIAM KINSMAN *against* JOHN SCOT.

A MAN having obliged himself, in his contract of marriage, to provide his lands to the heirs of the marriage, which failing, to his wife's heirs, executors, and assignees, did, after her decease, commence a declarator, that the cause was exorbitant, and that the wife's heir's being liable, as heirs of provision to him, he as fiar might dispose of his estate.

THE LORDS considering, that this was a provision in a contract of marriage, and not a mere voluntary destination, they did not declare as was desired, reserving the consideration of the particular deeds, when done by the husband, in their proper place, according as they should be found rational or not.

Harcarse, (CONTRACTS OF MARRIAGE.) No 393. p. 103.

* * * Sir P. Home reports this case :

By contract of marriage betwixt William Kinsman and Agnes Scot, the said William having provided all his estate, both heritable and moveable, in favours of himself and his wife, the longest liver of them two, in conjunct fee and life-rent, and the children of the marriage, which failing, to the wife's heirs and assignees; and in case the husband should survive the wife, and marry again, he should have power to provide his wife to the half of his estate, without prejudice to the said Agnes Scot, his first wife's heirs, to succeed to the fee, after the se-