

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-

cond wife's decease; and in case there were children of the second marriage, and that there were no children of the first marriage, then the children of the second marriage were to have the half of the fee of their father's estate; and the wife being deceased, and there being no children of the marriage, Kinsman the husband pursues a declarator against John Scott, for declaring that the clauses in the contract of marriage, in favours of the wife's heirs, did import only a substitution and destination of succession, and that, notwithstanding thereof, he was still fiar, and might dispose of his estate as he pleased. *Answered*; That the termination of the fee being to the wife's heirs, the husband cannot, by any voluntary gratuitous deed, alter or evacuate the same, especially he being limited by the subsequent clause in the contract, by which it is provided, that, in case of his second marriage, he might provide his wife in liferent, to the half of his estate, without prejudice to the first wife's heirs, to succeed to the fee, after the second wife's decease; and that if there were children of the second marriage, they only should have right to the fee, in case there were no children of the first marriage. THE LORDS sustained the allegiance proponed against the declarator, in respect the husband's fee is qualified by the posterior clause of the contract, and therefore assoilzied the defender from the declarator.

Sir P. Home, MS. v. 3.

No 107.

1693. December 20. YORKSTON against SIMPSON.

In a pursuit betwixt Yorkston and Simpson, the LORDS having considered the contract of marriage between Yorkston and Simpson's sister, whereby he was obliged to provide 5000 merks of his own means, with her 5000 merks of tocher, to himself and her in liferent, and to the bairns in fee, and, failing bairns, 5000 merks of it to return to the wife's heirs; they found this more than a naked destination; and seeing he was married again, and had given large provisions in his second contract, they would not oblige him to find caution to secure the 10,000 merks to the child of the first marriage, and his substitute *quoad* the half of it, because he had liberty to trade with it; but they inclined to cause him grant his own personal bond for the said sum, that it might redd marches between his children of the second marriage, and might be forthcoming to the substitute in case the child died, reserving his own liferent of it, and the term of payment being after his decease; for he was not fiar of the sum, (as these conjunct fees and liferents imply, when inserted in bonds,) yet might dispose of it for necessary causes, if he were reduced to necessity and straits. The like was decided, 14th February 1678, Carnegy against Mauld, See APPENDIX.

No 108.

Fountainball, v. 1. p. 581.