

cured to the son, without any quality, and that the mother had renewed the bond with it.

No 30.

Fol. Dic. v. 1. p. 307. Harcarse, (BONDS.) No 200. p. 45.

* * P. Falconer reports the same case :

THERE being a bond granted by Scot of Langhame of 2000 merks, bearing the receipt of money from ——— Mortimer, relict of Bailie Calderwood, and payable to the said Mortimer, for her liferent use, and to ——— Calderwood her son in fee, with this provision : ' That in case the son should die without heirs of his body, the sum should return to ——— Mortimer his mother, and her heirs ;' the son before his decease, upon death-bed, assigns to the College of Edinburgh the said sum, and he died without heirs of his body. The College having pursued the debtor for payment of this sum contained in the bond ; there is compearance for one Wilson executrix to the said Mortimer the mother ; and *alleged*, That she ought to be preferred, in regard, by the tenor of the bond it appeared, that the money was received from her mother, and albeit her brother was fiar, yet the fee was qualified with the foresaid provision, That failing of heirs of his body, the sum should return to his mother ; which provision, he could not evacuate by the foresaid mortification, which was a voluntary deed without an onerous cause. THE LORDS having examined witnesses *ex officio*, if the money was originally the son's, and not the mother's ; and that not being proven by the depositions of the witnessess, but the contrary, That the money belonged to the mother, they found, that the foresaid provision was not of the nature of a simple substitution, but was of the nature of a provision or condition, and so could not be frustrated by any voluntary deed, without an onerous or necessary cause, and therefore preferred the Executors of the mother to the College. *P. Falconer, No 97. p. 67.*

1717. February 18. DUKE of DOUGLAS *against* LOCKHART of Lee.

PART of the family estate of Douglas being given away to the heir of a second marriage, and the heirs of his body ; which failing, to return to the right heir of the family of Douglas ; it was found, that this estate could not be gratuitously alienated in prejudice of the clause of return, it being argued, That here the proprietor was giving away an estate from his successors for a special use, in which this reasonable condition is implied, that when the use is at an end, himself or his heirs should have back the estate. See APPENDIX. *Fol. Dic. v. 1. p. 308.*

No 31.

1726. January 26. MARQUIS of CLIDESDALE *against* EARL of DUNDONAED.

A proprietor having settled his estate upon his son and heir, and the heirs-male of his body ; whom failing, to return to himself ; this was found to be a

No 32.

No 32. simple destination, alterable at pleasure of any of the substitutes; for here the settlement being in favour of the man's own heirs, nothing further was understood to be intended than to establish a line of succession.

Fol. Dic. v. 1. p. 308. Rem. Dec.

* * * See This case, No 3. p. 1262.

1738. November 21. ELIZABETH SINCLAIR *against* SINCLAIR.

No 33.

A CLAUSE of return, in a common bond of provision to a child, was found to import no more than a simple substitution.

Kilkerran, (FIAR, ABSOLUTE AND LIMITED) No 2. p. 192.

1740. June 11.

No 34.

NAPIER and ANNA JOHNSTON his Spouse *against* MARY JOHNSTON.

Clause of return, when effectual against alienation for an onerous cause; and when caution must be found to repeat.

ROBERT JOHNSTON of Kelton, having given a gratuitous additional bond of provision of 7000 merks to Anna Johnston his sister, payable at the first term of Whitsunday or Martinmas after expiration of year and day after his decease, but with this provision, 'That in case she should decease without any child or children lawfully procreated of her body, and existing at the time of her decease, in that case the said sum, with the annualrents resting at her death, should return and be payable to the said Robert Johnston and his heirs, representing him in his estate of Kelton;' and Anna having, in her contract of marriage with Alexander Napier, assigned the said bond; in an action at the instance of the said Anna and her husband, against the heir of Kelton for payment, the LORDS found, 'That the clause of return of the 7000 merks contained in the said additional bond of provision is effectual in case the condition expressed in the clause of return shall exist, notwithstanding the assignation by the said Anna in her contract of marriage; and that the pursuers, upon payment of the said sum, must find caution to repeat the same, in the event of the existence of the condition mentioned in the said clause of return.'

Though clauses of return, in children's bonds of provision, are understood to operate no further than to exclude gratuitous deeds in prejudice thereof, yet this case fell to be governed by another rule, viz. That conditions annexed to a gift are to have their full effect; and though it be also true, and has been often found, that where a sum affected with a clause of return is made payable at a day certain, the creditor is not bound to find caution to repeat, because of the presumed will of the granter, by making the sum payable at a day certain, yet, the case is different, where an assignee pursues, who may happen to be a bankrupt.

Fol. Dic. v. 3. p. 217. Kilkerran, (FIAR, ABSOLUTE AND LIMITED) No 3. p. 192.