

No 15.

1728. November 22. PATON *against* NAIRNE.

JOHN NAIRNE of Seggiden, in the year 1671, resigned his lands to himself in-liferent, and after his decease, to Elizabeth Nairne his eldest daughter, and the heirs of her body; which failing, to Anna Nairne his second daughter, and the heirs of her body; which failing, to Barbara Nairne his third daughter, and the heirs of her body; which failing, to return to himself, and the heirs-male of his body, &c. He reserved a power to alter and to dispose of the lands, &c. Thereafter in his eldest daughter's contract of marriage, the former settlement was repeated, and the foresaid faculty renounced. Herein was also a clause, that the eldest heir female should succeed without division, and her husband should bear the name and arms of the family. The husband of Elizabeth, the eldest daughter, became also bound to restrict his courtesy to the one half in favour of the said heirs of tailzie. The question occurring here, whether this was not so far a limited tailzie, that Elizabeth and her husband could not gratuitously alter the order of succession, and dispone the estate to the third, in prejudice of the second sister? it was FOUND, that Elizabeth was fiar; that she might alter the destination in her contract of marriage; and seeing she had disposed the estate to Barbara, her third sister, that therefore Barbara had right to the same. See APPENDIX.

*Fol. Dic. v. I. p. 305.*

1735. December 19.

STEWARTS *against* SIR THOMAS KIRKPATRICK of Closeburn.

No 16.

STEWART of Revenston, creditor in an heritable bond of 19,500 merks, made a settlement of it upon his four daughters, their cessioners and assignees, equally amongst them, and the respective heirs to be procreated of their bodies; which failing, to Stewart of Castle-Stewart, with power to them and their foresaids; which failing, Castlestewart and his foresaids, to uplift and discharge the same. Helenor the eldest daughter, having made a gratuitous assignation of her share to her husband during the marriage, and, dying without issue, the question occurred betwixt the husband of the defunct and the other sisters, which of them had best right to this share? For the sisters it was *pleaded*, That there was here an implied reciprocal substitution of the four sisters to one another; and failing of them all, to Castlestewart, which no gratuitous deed done by any of them could disappoint. *Answered*, for the husband, The granter, no doubt, intended his daughters to succeed to one another, preferably to Castlestewart; but as he saw the legal succession would have this operation, he left them to succeed to one another as heirs of line, which will never imply any limitation upon any of the sisters, especially where the right is granted to them, their heirs and

assignees. THE LORDS found, there was no such substitution in the right as to deprive any of the daughters of the free disposal of their respective shares, and therefore sustained the assignation. See APPENDIX.

No 16.

*Fol. Dic. v. 1. p. 306.*

1736. July 6.

EDGAR *against* JOHNSTON.

No 17.

WHERE one had provided his estate in his contract of marriage to the heir-male of that marriage; which failing, to his heirs-male of any marriage; which failing, to the heirs-female of his present marriage; there being no heirs-male of that marriage, it was FOUND, that the heir-male of his second marriage might gratuitously alter the succession in prejudice of the heir-female of the first marriage.

In a simple substitution, one substitute is not creditor to the other.

*Fol. Dic. v. 1. p. 306. Kilkerran, (FIAR ABSOLUTE AND LIMITED) No 1. p. 192.*

\* \* \* Lord Kames reports the same case :

AN estate being settled, in a marriage contract, to the heirs-male of the marriage; which failing, to the heirs-male of any other marriage, which failing, to the heirs-female of the present marriage, the question occurred, If the heir-male of the second marriage, who succeeded to the estate, there being no heirs-male of the first marriage, could gratuitously disappoint the heirs-female of the first marriage, which he did by disposing his estate to a stranger? For the donee it was *pleaded, imo*, That, in this case, the granter was under no limitation with regard to the heirs-female of the marriage; for, if he was under no limitation to heirs-male of another marriage, which is clear, far less to those postponed to them. *2do*, Destinations in contracts of marriage, though they limit the father, onerous *quoad* him, do infer no limitation upon any of the heirs succeeding in virtue of the destination, because the provision is fulfilled, by making over the estate to the heir-male of the marriage, and the more amply it is made over to him, the more amply is the provision fulfilled. THE LORDS found the son of the second marriage could gratuitously alter the destination in the contract of marriage. See APPENDIX.

*Fol. Dic. v. 1. p. 306.*

1739. June 22. Competition, ANN NAPIER with JEAN CRAICK.

No 18.

By the post-nuptial contract of marriage between William Craick of Duchrae, and Ann Napier his spouse, among other provisions to children of the

Found that a father could not qualify a)