No. 16. 1752, July 23. MARGARET OLIPHANT, AND HUSBAND'S CLAIM.

See Note of No. 24, *voce* FORFEITURE.

No. 17. 1752, July 14, Nov. 28. DRUMMOND *against* LOGAN.

MARGARET PRINGLE, by a deed in 1743, with consent of Lilias and Mary Weir, her nieces and heirs at law, for love and favour disponed to them equally betwixt them and the heirs of their bodies, and failing any of them by decease without heirs of her body to the survivor and heirs of her body, whom failing to Mr Archibald Murray, advocate, his heirs and assignees whatsoever, all lands, tenements, and other heritable subjects belonging to her, and particularly certain subjects therein mentioned, and assigned to them two-thirds to Lilias and one-third to Mary, and with the same substitution, all her debts, sums of money, and other personal estate, but with the express declaration that it shall not be in the power of the said Lilias and Mary Weir, or any of them to alter or prejudge the order of succession above mentioned, and in case the succession devolve on the said Mr Archibald Murray he is burdened with certain sums to other persons, and the deed contains procuratory of resignation in these terms:—These nieces were then pretty well advanced in years, and both of them had competent provisions of their own,—Mary had 7000 merks. Thereafter Lilias intermarried with Mr George Logan, minister, and Mary with Mr Colin Drummond, professor of Greek and Philosophy in the College of Edinburgh; and by a postnuptial contract of marriage between Mr Drummond and his wife executed sometime after the marriage, he disponed all lands, heritages, and bonds, whether heritable or moveable then pertaining to him or to which he should succeed during the marriage to himself and her in conjunct fee and liferent, for her liferent use only, and to the children of the marriage in fee, whom failing to his own heirs and assignees; and on the other hand she disponed all her lands, heritages, sums of money, heritably or moveably secured, and others pertaining to her, or which she might succeed to during the marriage to Mr Drummond and her in conjunct fee and liferent, and to the children of the marriage in fee, whom failing to her children of any future marriage in fee, whom failing to the said Colin Drummond, his heirs or assignees in fee. Mrs Drummond is dead, and a competition upon a multiplepoinding in name of the tenants arose betwixt Mr Drummond and Mrs Logan, which last claimed preference because of the prohibition to alter. Mr Drummond on the other hand alleged, that notwithstanding the prohibition Mary might convey for onerous causes, and such was a contract of marriage. Answered, That such prohibition could not be evacuated, not even by an ordinary contract of marriage, where the deed proceeded not from the father who is bound to provide his children but from a third party, and where the woman is otherways competently provided, especially where it appears that the donor had the case of the marriage in view by substituting her issue; and quoted the cases of Johnston, and Napier her husband, against Lady Logan, 11th June 1740, Beatson of Kilrie against Mary Beatson, 19th February, 30th June 1747, and 19th December 1740, Duncan Forbes against John Forbes. 2dly, That this was a postnuptial contract long after the marriage and therefore not onerous, so far as it exceeded a

reasonable tocher. A conveyance *omnium bonorum* that the party then has or may succeed to cannot be onerous, and therefore is constructed to be with the burden of all debts. Yet the Lords found the subjects effectually conveyed to Mr Drummond notwithstanding the prohibition, and preferred him, *renit. tantum* Kames, *et me*; and 28th November adhered. (See No. 16, and No. 24, *voce* MUTUAL CONTRACT.)

No. 18. 1742, Dec. 1, 15. GRIZEL, &c. MARJORIBANKS, *against* THEIR BROTHER.

THE Note relative to this case is subjoined to the text.

No. 19. 1753, Feb. 2. CAPTAIN W. DOUGLAS *against* MRS DOUGLAS.

CAPTAIN DOUGLAS, as heir-male of Kirkness, pursues reduction of a settlement in 1722, made by the deceased Sir Robert Douglas in favours of heirs of line, and by the Major-General in 1741 in favours *nominatim* of this defender, founded on the original grant by the Earl of Morton to his second son, and heirs-male of his body, which failing, to return to the family; and another charter in 1638 by the next Earl of Morton, to the grandson of the first granter, and heirs-male of his body, with the like clause of return, and an express prohibition not to do any thing in prejudice of the return, which proceeded on an onerous transaction, and a conveyance by the Earl of certain apprisings acquired by the Earl on Kirkness's predecessors debts. The principal defences were, that the original clause of return was discharged and altered by another charter by the next Earl of Morton to the original granter, his heirs and assignees; and as to the charter 1638, the limitation is only in favours of the family of Morton, not of the intermediate heirs-male, who have not thereby any *jus quæsitum*, and none but the family of Morton, when those heirs-male fail, can quarrel alterations of the succession, as in the common case of contracts of marriage to the heirs-male of the marriage, which failing, the heirs-male of any other marriage, which failing, the heirs-female of the marriage, there is a *jus quæsitum* to those heirs-female, but no *jus quæsitum* to the heirs-male of any other marriage, though preferred before them. 2dly, Prescription both negative and positive upon a charter to heirs and assignees in 1687, and infeftment on it, and quoted the case of M'Kerston and William Gray's case, where the negative prescription was repelled, because the deed contained no limitations, and though only a personal deed, yet not being altered, carried the succession. The Lords sustained both these defences.—We agreed that the charter 1595 was effectually altered, and the clause of return discharged by the charter 1607, and that the limitations 1638 were only in favours of the family of Morton, and not of the intermediate heirs-male. Mr Craigie, who was counsel for the pursuer, admitted that the charter 1607 did effectually discharge the clause of return in the charter 1595, and seemed also to think, that if the charter 1638 had been the only charter that contained a clause of return, the limitations could only have been understood in favours of the family of Morton; but insisted, that in this case the charter 1638 was only a revival of the original clause of return, when the estate was given as an appanage to a second son of the family, and he thought in such returns the implied limitation was not only in