

superseded to give answer whether the invasion would extend to any more than the persons who were actually invaded, till the probation were closed.

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1672. *February 28.* DAME MARGARET FOWLIS *against* GILMOURS.

UMQUHILE Sir Andrew Gilmour, advocate, not having any children for a considerable time after his marriage, disposed his whole means and estate to Dame Margaret Fowlis, his spouse, and her heirs; and, having thereafter one daughter, he disposed of new his estate to his daughter, reserving her mother's life-rent, and providing, that, if his daughter died unmarried, and without lawful children, before her mother, she remaining unmarried, that the fee thereof should belong to her mother; and made a testament to the same effect: And some years thereafter his daughter died. Sir Andrew's means being due by bond, which, having no clause of infestment, belonged to his nearest of kin, and to the nearest of kin of his daughter; and at the time of the daughter's decease, the late President, and the relict of William Baillie, being father-brother and father-sister to the daughter, were nearest of kin. There was no testament confirmed of Sir Andrew's daughter in the President's life;—and now the said Dame Margaret Fowlis pursues a declarator, that Sir Andrew his whole means and estate belongs to her by the disposition and testament; and called Alexander Gilmour of Craigmiller, the President's son, and Margaret Gilmour, relict of the said William Baillie: who alleged Absolvitor; because the terms of the disposition and legacy, in favours of the pursuer, bears expressly—“she remaining unmarried;”—whereby the same is a conditional provision, and cannot be claimed by the pursuer during her life, because she is still capable of marriage; so that it must be understood to be a suspensive condition: And though it should but import a resolute condition, that the pursuer should be fier after her daughter, yet so as if she happened to marry, her right ceaseth, she ought to find caution, that in case she marry, to restore. The pursuer answered, That the clause in the disposition and testament did not import a condition, that the pursuer should remain unmarried all her lifetime,—for it is not put as a provision or clause by itself, but is annexed to the daughter's dying without issue before her mother, and she remaining unmarried: so that remaining unmarried can only be understood the time that her daughter deceased without issue or marriage; which is evident to have been the defunct's mind; because he does not provide to whom the means should belong, if she happened to marry thereafter; which certainly he would have done, being so knowing a man. *2do.* By his former disposition, when he had no child, there is no such limitation, but it is absolute. *3tio.* *In dubio matrimonia non sunt restringenda*: though such a provision might have been valid, if it had been clearly the defunct's mind, yet being at most doubtful, it should be interpret with the greatest freedom to marriage. The Lords found the meaning of the clause to be,—The pursuer's remaining unmarried the time of her daughter's decease, and that it did not import a resolute or suspensive clause, if she happened to marry thereafter.

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