

1697. February 23.

CHRISTIAN DICKSON, and WILLIAM MAITLAND, now her husband, *against*
 JANET STEVENSON, and JAMES RICHARDSON, her assignee.

By her first contract of marriage with John Stevenson, he provided his lands and heritages, with his other goods and gear, to himself and her in liferent, and the bairns to be procreate of the said marriage in fee; which failing, he disposed his said lands and heritages to the said Christian Dickson, his spouse, to be disposed of at her pleasure. Of the marriage there was a son, who was served heir and infest, and then died. The mother claiming the lands as next substitute, adjudged the same from her husband's heirs, on the foresaid clause contained in her contract of marriage; whereof they now raise a reduction, on this reason, that it was not properly a substitution but a conditional fee, failing of bairns; *ita est* that condition did not exist; for there was not only a child, but he was also served and infest. Answered, There is a difference between the import of these two clauses in law, *liberis non existentibus*, and *liberis deficientibus*; for in the last case, *esto* there were children, yet *quandacunque* they fail without disposing, the next member of the tailzie succeeds; and therefore the existence of a child here, and his being retoured, cannot prejudice the mother's right, seeing he deceased before the mother, and that it was so found in the famous case, the Earl of Dunfermling against the Earl of Callander, No. 7. p. 2941. *voce* CONDITION, and No. 4. p. 4078. *voce* FACULTY; Justice *contra* Stirling, No. 25. p. 4228. *voce* FIAR; and Oswald, No. 9. p. 2948. *voce* CONDITION; and many others; where children surviving, but not to that age at which they could legally dispo, were found to purify the condition, so as the succession devolved to the next substitute. But the Lords having considered these decisions, they found them only in the case of returns of tochers, and substitutions, and not of a conditional disposition, as this here was, otherwise she behoved to enter heir of tailzie, and not summarily adjudge; and therefore they reduced her adjudication *quoad* the fee.

Fol. Dic. v. 2. p. 396. Fountainhall, v. 1. p. 770.

1704. November 24.

MRS. ANNE GILMOUR, *against* SIR ALEXANDER GILMOUR of Craigmiller, her
 Brother.

President Gilmour, by his bond of provision, obliged his heirs to pay Mrs. Anne, his daughter, first 10,000 merks, and then 2000 merks more, at her age of fifteen, but with this quality, that if she died before that term of payment, or before year and day after her marriage, in that case, the principal sum should return to his heirs, and the provision expire and be extinct; but so it is, though she be past fifteen, yet she is not married, and so has no right to uplift the principal sum,

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No. 14.

Land were by contract of marriage to be disposed of at the pleasure of the wife, failing children. A son was served heir and infest, who then died. The mother's attempt to adjudge the fee ineffectual, she being only a conditional institute.

No. 15.

Effect of a conditional clause of return.

No. 15. as Sir Alexander expounded the clause. Alleged, for Mrs. Anne, That this quality of return, in case of her not marrying, was but of the nature of a substitution of his son *eo casu*; whereas in law substitutions do not hinder her, as fiar, to uplift and dispose freely upon it at pleasure; and that the Lords had decided so in a parallel case, Helen Home *contra* the Lord Renton, No. 41. p. 4377. *voce* FIAR ABSOLUTE, LIMITED. Answered, Such clauses barred her from doing any voluntary gratuitous deed to the prejudice of her brother's succession thereto, in case of her dying before marriage; and that she understood it so, appears by a declaration she gave in 1694, obliging herself to do no voluntary deed, nor to make any gratuitous right or assignation thereof. Replied, This annual-rent is not sufficient to maintain me, according to my quality; and therefore I will bargain with some who will buy the stock, and give me an annuity of double annual-rent during my life, to make me subsist more comfortably, upon their getting the stock at my death. Duplied, by her brother, He was willing to settle an annuity upon her as any other; and if 12 *per cent.* were judged too little, he would give more, and take his hazard. The Lords thought her creditors might affect the sum, though she could not gift it away for nothing; and that in such bargains of hazard, her brother offering more ought to be preferred to any stranger; and therefore recommended to the reporter to endeavour to settle them, either by stating an annuity or otherwise.

The Lords at last having advised this case, they found she had right to uplift the sum; but she behoved to re-employ it in the terms and with the qualities of her father's bond, and her own declaration, not to dispose upon it gratuitously. See 28th February, 1683, Barclay, No. 6. p. 4311. *voce* FIAR ABSOLUTE, LIMITED. *Fountainhall, v. 2. p. 251.*

1715. *Februury 3.*

CATHARINE STEVENSON, and MR. JAMES GILLON, Advocate, her Husband,
against The CHILDREN of the Deceased BAILIE FIFE.

No. 16.
Effect of the
consideration,
Whether he-
ritable or
moveable? in a
substitution.

Alexander Stevenson, Merchant in Edinburgh, takes bond from Young of Winterfield, payable to himself and his wife in liferent, and to their daughter Susanna Stevenson in fee; and failing the said Susanna by decease, to the said Alexander, his heirs, executors, or assignees. Susanna having survived her father, Bailie Fife, who had married one of her father's sisters, does, as tutor to the daughter, oblige Winterfield to give a corroborative security out of his lands for the sum; wherein the form of the original bond is altered, being indeed to Susanna and the heirs of her body, but failing them to his own wife and her two sisters, and the portion of the deceasing to accresce to the survivors; so that Margaret having been the only surviving sister after the niece's decease, and by this means claiming right to the whole, dispoined the same to the Bailie's trustee, which is his children's title in the competition.