

No 67.

he, at the same time, reserved his own liferent, and also a power and faculty to alter. He died, therefore, in the full right of the subject, and being the person last infeft, Barbara's service, as heir of provision to him, was perfectly proper and regular.

Observed on the Bench; The conception of the deed being to children 'to be procreated,' the fee was clearly vested in their mother, the liferentrix; and no more than a *spes successionis*, contingent on the number of the children, was conveyed to them; and, as the substitution necessarily implied the condition *si sine liberis*, those who had died before the liferentrix, transmitted their right to their children. THE COURT thought the charge to William Cuthbertson ought to have been as heir to his grand-mother; and it was doubted, whether even his voluntary conveyance carried more than the mails and duties during his life. But, as he did not object, the judgment was,

'Find, That the fee of the subject in question was in Anne Cassils; and that, after her death, the same descended to her daughter, Barbara, and to her grand-son, William Cuthbertson, in right of his father Peter, and to Isaac Thomson in right of his mother, Anne Cuthbertson, equally.'

Barbara reclaimed; but her petition was refused without answers.

Lord Ordinary, *Alva.* Act. *H. Erskine.* Alt. *Nairne.* Clerk, *Tait.*
L. *Fol. Dic. v. 3. p. 210.* *Fac. Col. No 42. p. 76.*

S E C T. VIII.

Provisions to Daughters, to return if they die without Children.

1724. July 23.

Mr JAMES BAILLIE, Writer to the Signet, and INGLIS, *against* NATHANIEL GORDON of Carleton.

No 68.

A man granted a bond to his daughter payable at the first term after his decease, with annualrent from that time, with this proviso, that if she died without children, the

JOHN GORDON of Overbar, with advice and consent of his spouse, granted a bond of provision to his youngest daughter, Janet, for 2500 merks, payable at the first term of Whitsunday or Martinmas after his decease, with annualrent thereafter, and the bond contained the following clause: 'And for eviting all controversies that may arise, in case of the said Janet her dying before she be married, or in case of marriage, decease without having children, or having children, they decease without lawful succession, or she survive them, the said spouses bind and oblige them, &c. to make payment of the said sum,

‘ at the term above specified, to the said Janet ; and, in case of her marriage,
 ‘ to her future husband in liferent and conjunct-fee, and the longest liver of
 ‘ them two, and the heirs and bairns procreated in marriage with the said Janet,
 ‘ or her said husband or husbands in fee ; whilk sum, so to be liferented by
 ‘ the spouses foresaid, in case of no succession of the said Janet’s own body, or
 ‘ she survive them, or they die without succession, then the foresaid principal
 ‘ sum is hereby declared to return after the decease of the said Janet and her
 ‘ husband, and their children, as said is, to our other heirs and assignees what-
 ‘ somever.’

After Overbar’s decease, Janet and Mr Inglis her husband assigned the bond to Mr Baillie, for the behoof of Mr Inglis, who insisted in a process against Carleton, as representing Overbar, for payment of the principal sum.

The *defence* offered was, That by the conception of the foresaid clause, Janet Gordon and her husband were only naked liferenters ; and she having no children, the defender could not be liable for the principal sum, but only for the annualrents during her own or her husband’s lifetime.

It was *answered* ; That by the nature of the clause, Janet was fiar of the bond, and the father’s heirs her substitutes ; wherefore she might, for reasonable causes, dispose of the sum in exclusion of the substitutes ; and, that the assignation was not only *rational*, but *onerous*, since it was conveyed in name of tocher for her husband’s behoof, who had provided her to a suitable liferent : That it never was questioned, but that in the case of a clause of return in a bond, the institute was so far fiar, that he could, for reasonable considerations, dispose of it, January 31. 1679, Drummond against Drummond, *voce* FIAR, ABSOLUTE, LIMITED ; 10th February 1685, The College of Edinburgh against Mortimer, *IBIDEM*, where the *ratio decidendi* was, that the conveyances were fraudulent, which proves, that they would have been sustained, had they been fair and rational. There was another decision insisted upon, January 1705, betwixt Dalgarno and Durham, *IBIDEM*, ‘ where Hamilton of Boghead having acquired an estate in favours of himself, and Thomas Hamilton his son in fee, and the heirs to be procreate of his body ; which failing, in favours of his daughter, and the heirs of her body ; which failing, to his heirs and assignees whatsoever,’ there was an infestment expedite containing expressly the foresaid substitution ; but Thomas evacuated the same by a voluntary and gratuitous disposition in favours of Durham’s Son a stranger. Dalgarno, son of the daughter, and likewise heir of line to the maker of the destination, raised a reduction of the right in favours of Durham, as merely gratuitous, in prejudice of the substitution and destination expressly contained in the infestment. ‘ THE LORDS however sustained the right, in respect Thomas Hamilton was absolute fiar, and assoilzied from the reduction.’ 2do, The pursuer *insisted* upon

No 68.

sum in the bond was to return to the granter’s heirs and assignees whatsoever. The Lords found the daughter was not a liferentrix but a qualified fiar, and though she had no children, sustained action against her father’s representatives for payment of the bond.

No 68.

these words of the narrative of the bond: 'And for better advancement to a fortune suitable to her degree and quality,' &c. and *contended*, That the grant-er having it in his eye to provide his daughter in a good marriage, it was impossible he could propose to attain his end by so small a provision as the annualrents; and therefore must be supposed to have designed her the fee of the principal sum.

It was *replied* for the defender; That the dispute was mistaken, for the deed in question was not to be regulated by the ordinary cases of substitutions, or of returns in bonds, because here the father evidently intended, that neither the daughter nor her husband should have the disposal of the principal sum, but only of the annualrents; for, after the obligation to pay, he says, 'Whilk sum so to be liferented by the spouses foresaid,' &c. which words are so strong, that it is impossible they can bear another interpretation, than that the spouses were not to be heirs, but liferenters. *2do*, As to the arguments from the onerosity and rationality of the deed, and the circumstances brought to show, that the father intended that the daughter should be fiar, it was replied, that these might be of use, if the intention was to be drawn from rules in law, but could be of no avail, where the design appeared to be so clear from the writ. It might indeed seem odd, that after the show the father had made of doing for his daughter, he should have given her only 125 merks yearly, but he intended to give no more, and thought that securing the fee to the children was great enough encouragement to a match.

THE LORDS found, That the wife was not a simple liferentrix, but that she was a qualified fiar.

The cause was afterwards reported upon the effect of the quality, and the LORDS found 'that she could not assign,' because the event of her having a husband was in the father's view, and was provided against.

Reporter, *Lord Dun.* Act. *Alex. Menzies.* Alt. *Ja. Boswell.* Clerk, *Murray.*
Fol. Dic. v. 3. p. 212. Edgar, p. 101.

No 69.

In a competi-
 tion between
 the wife's
 next of kin,
 and her se-
 cond husband,
 claiming, as
 her assignee,
 part of the
 tocher con-
 tracted with
 her first hus-
 band, which,
 in the event

1775. *March 2:*ANDREW JAMIESON, *against* NEAREST OF KIN OF RACHAEL WILSON.

IN the contract of marriage between Rachael Wilson and her former husband, David Russel, she was provided in a liferent annuity of 500 merks; and, on the other part, her father, Walter Wilson, did assign to the said David Russel the sum of 5000 merks Scots, which Rachael accepted of in full satisfaction of bairns part of gear, &c.

By the said contract it is mutually agreed, 'That in case the marriage dis- solves within year and day, without a living child procreated betwixt them,