

1752. *November 28.* LILIAS WEIR *against* COLIN DRUMMOND.

No 9.

A mutual substitution in a settlement made by an aunt to her two nieces, failing issue of their bodies, containing an express prohibition not to alter or prejudice the order of succession, does not bar alienation in a contract of marriage.

MARGARET PRINGLE made a settlement, whereby she disposed to Lilies and Mary Weirs, her nieces and heirs at law, equally betwixt them, and the heirs of their bodies; and failing of any of them by decease, without heirs of her body, to the survivor of them two, and the heirs of her body; whom failing to Mr Archibald Murray advocate, and to his heirs and assigns whatsoever, heritably and irredeemably, all and sundry lands, tenements, and hereditaments, &c. belonging to her. By the same deed she assigned her personal estate; two thirds to Lilies, and one third to Mary, with like substitution. The deed contained this express declaration, That it should not be in the power of the said Lilies and Mary Weirs, or any of them, to alter or prejudice the order of succession to the subjects disposed. The two sisters signed this deed as consenters.

Mary married Colin Drummond; and, by postnuptial articles of marriage, Colin Drummond became bound, in contemplation of the marriage, to dispose to himself and the said Mary Weir, in conjunct fee and liferent, all lands and sums of money, &c. pertaining to him, or to which he should succeed during the standing of the marriage, and to the children of the marriage in fee; whom failing to the said Colin Drummond, his heirs or assigns whatsoever. Upon the other part, Mary Weir obliged herself to dispose all her lands, sums of money, &c. which she had, or might succeed to, during the standing of the marriage, to herself and her said husband, in conjunct fee and liferent, and to the children of the marriage in fee; whom failing to her children of any future marriage; whom failing, to the said Colin Drummond, his heirs or assigns whatsoever in fee. Mary Weir died without issue.

The question came to be, Whether Mary Weir's proportion of Margaret Pringle's estate should belong to Lilies Weir in virtue of the substitution, or to Colin Drummond in virtue of the marriage articles?

*Argued* for Lilies Weir; The granter was under no natural obligation to provide; her intention to convey the subjects to the survivor of the two sisters in the event of the other's dying without issue, and to Mr Murray failing issue of both, is clear; and this is enforced by an express prohibition, not to alter the order of succession; therefore Mary could not gratuitously alienate. *2do*, The contract of marriage was post-nuptial, and was at least gratuitous, so far as to Mr Drummond's present claim. The conveyance in the marriage-contract is general; and all general conveyances are with burden of the granter's debts and obligations; therefore this conveyance must be burdened with the substitution, which was a debt on Mary Weir, and to which she had expressly concurred.

*Lastly*, The Court, in similar cases, hath determined for the substitution, viz. these of Napier and Johnston against Lady Logan 1740, Sec. 5. *b. t.*;

Beatson of Kelry against Lumsdain and Beatson, July 1747, *IBIDEM*; and Houston against Grossets of Logie, 11th July 1732. *See APPENDIX.*

No 9.

*Argued* for Colin Drummond; Tailzies are not such favourites of the law as to be created by implication. By this substitution, the only restraint upon the sisters is not to alter the order of succession; there is no restraint whatever upon them from alienating *actu inter vivos*. The restraint from altering the succession, and the restraint from alienating, are distinct and different restraints; the one is not to be extended to the other. Mary might therefore gift; much more might she alien in a contract of marriage, which, though post-nuptial, was equal and onerous. Neither does it make any difference, that the alienation should consequentially alter the order of succession, as the Court has determined in many cases. *2do*, The intention of taking the two sisters bound as consenters in the deed of settlement, was no other than to bar reduction *ex capite lecti*, the granter being then on death-bed. At any rate, that consent could never have barred any of them from settling their estates in a contract of marriage.

*Lastly*, As to precedents, the Court hath not always been uniform in this point; yet the course at present is, in similar cases, entirely against limitations; as witness, among others, that of the heirs of Provost Wightman against the Representatives of Anderson, 1746, *voce* TAILZIE. As to the cases quoted for Lilius Weir, they do not seem to be similar; for in the two first there was a clause of return to the granter, in case the granter should die without issue; this made the grant conditional; but here the grant is simple. In the third case, the alienation was made in a testament, which is a deed gratuitous; but here the alienation is made in a marriage contract, which is, in every case, an onerous deed.

'THE LORDS found the subjects in question were properly conveyed by Mary Weir to Colin Drummond by the contract of marriage betwixt them.'

Act. Ro. Craigie.

Alt. Alex. Lockhart &amp; Advocatus.

Clerk, Gibson.

S.

*Fol. Dic. v. 3. p. 213. Fac. Col. No 37. p. 58.*

1756. July 17.

MARY URE *against* The EARL of CRAWFURD and HUGH CRAWFURD.

JAMES URE received a disposition of the estate of Shirgartoun, in which a certain line of substitutes was settled, and he granted, of the same date, a separate obligation, whereby he bound himself not to sell nor contract debt, nor to do any other deed whereby the lands of Shirgartoun may be any ways affected.

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No 10.

A prohibition upon a first institute to sell or contract debts, or to do any other deed whereby the lands might