

the effects disposed were estimated, should fall and pertain to Janet and Mary Walkers, and others therein named, in certain proportions.

No. 19.

It happened, that Mary and Janet died before William; and, after William's death, without issue, a process was brought at the instance of the representatives of Mary and Janet, against the representatives of William, the disponent, for the said Mary and Janet's proportions of the said sum. To whose claim it was objected, That the provision to Mary and Janet was conditional, in case they survived William; and as they, not having survived him, could not take, neither could their heirs, because they were not at all called.

But the Lords found, "That Mary and Janet were substitutes to William, and found, that their heirs, although not expressly called, had right to the subject, upon their making up proper titles."

Fol. Dic. v. 4. p. 303. Kilkerran, (SUBSTITUTION) No. 2. p. 522.

* * D. Falconer's report of this case is No. 13. p. 10328. *voce* PERSONAL AND TRANSMISSIBLE.

1756. August 3. GEORGE FORBES against JOHN FORBES.

Janet and Isobel Gordons were infeft in a tenement lying in the town of Aberdeen, as heirs to their father John, the proprietor. Janet, at this time, was married to Alexander Forbes, who having in his hands 6000 merks, belonging to his sister-in-law Isobel, became bound, in her contract of marriage with Alexander Crombie, to pay the same to him, in name of tocher. In this contract, Isobel Gordon disposes her half of the tenement "to herself and the said Alexander Crombie, and the longest liver, in life-rent, for their life-rent uses allenary, and to the heirs that should be procreated of the marriage; which failing, to Isobel's heirs of any other marriage; which failing, to Janet and the heirs of her body in fee."

No. 20.
A. disposed to herself in life-rent, and her children *nascituri* in fee, whom failing to B. A. died without children. A.'s heir at law was preferred to the gratuitous disponent of B.

Isobel having died without heirs of her body, the succession opened to Janet, who, without making up any titles as heir of provision, disposed this half of the tenement to her second son John. After Janet's death, her eldest son George, disregarding the disposition in favour of his brother, made up his titles as heir of provision to his aunt Isobel, and was infeft. He commenced a process of mails and duties against the tenants before the Bailies of Aberdeen. The tenants raised a multiplepoinding, calling John, who was in possession, and George, who was claiming the rents from them. The process was advocated to the Court of Session.

George claimed preference, upon this footing, That his mother Janet was an heir of provision only; and, as she died in apparency, that her gratuitous disposition in favour of her son John was *a non habente potestatem*.

No. 20. John, on the other hand, contended, That, in the case which happened, Janet their mother was not an heir of provision, but a conditional institute; and that the institution was purified by Isobel's predecease without issue. To make out this point, he took it for granted, in terms of the disposition, that Isobel had not disposed the fee to herself more than to her husband, but only a life-rent; and that the institutes in that disposition were not Isobel nor her husband, but their issue. Upon this foundation, he admitted, that if Isobel had left children, they must have been the institutes; and if they afterward failed, Janet could not take the subject otherwise than by a service as heir of provision to them. But as Janet is called to the succession, failing issue of her sister Isobel, Janet's right, in the event of no children, must be an institution, or nothing; for she could not serve, in the personal right, as heir to her sister Isobel, because Isobel was made a liferentrix only. Nor could she serve to Isobel's children, who never existed; and, therefore, if she had any right at all, it must be an institution.

George had nothing to reply to this reasoning, but that a fee cannot be *in pendente*; and, therefore, that, notwithstanding the words of the settlement, the fee must be understood to have been in Isobel; that her issue, had they existed, must have served to her; and that Janet also ought to have served, when the succession opened to her. The case of Frogg, No. 55. p. 4262. *voce* FIAR, was quoted for George, where a disposition of houses, for love and favour, to Robert Frogg in life-rent, and the heirs to be procreated of his body in fee, was found to be a fee in Robert so as to be affectable by his creditors.

It was urged separately for George, That, from the circumstances of the settlement under consideration, no cause can be assigned why Isobel, the maker, should have confined herself to a life-rent; and thence inferring, that she was imposed upon by Alexander Forbes, her brother-in-law, in confining her to a life-rent, when she intended a fee.

“ The Lords preferred George, some upon the principle that a fee cannot be *in pendente*; others, upon presuming that Isobel was imposed upon by her brother-in-law, and that she intended to dispoise the fee to herself.”

I observed, that the decision of Frogg is not applicable to the present case. The dispute there was purely *questio voluntatis*, viz. What was meant, in that settlement, by the term “ life-rent,” whether strictly a life-rent, or, in a larger sense, the property for life? This cannot be a question in the present case, where Isobel's right is, by herself, restricted, in express terms, to a life-rent. And, therefore, that the pursuer, to succeed in his argument, must attempt a bold proposition; which is, that it is impossible, in law, to dispoise any subject to a person in life-rent for his or her life-rent use allenary, and to his or her children *nascituri* in fee.

As to this proposition, admitting that land and every subject must have a proprietor, or belong to one person or other, it is very consistent, that land or any subject may be disposed by the proprietor under a suspensive condition.

In this situation, before the condition exists, the property of the subject disposed is indeed not *in pendente*, because it is in the disponer; but as to the disponee, the fee or property is undoubtedly *in pendente*. If the condition exist, the property is transferred to the disponee; if it never exist, the property remains with the disponer. That a fee cannot be *in pendente*, applies more especially to land-rights; for the superior must have a vassal. But there is nothing in law to bar a vassal from disposing his property under a condition. He, in the *interim*, continues vassal; and when the condition exists, the disponee becomes vassal. Now, disposing to children *nascituri*, is similar to disposing under a condition; the legal effects of both are the same. And, in the present case, Isobel's disposition to herself in life-rent, and to her children *nascituri* in fee, is the same with disposing to her children *nascituri*, reserving her own life-rent. Janet, therefore, was by this deed made a conditional institute, and her institution was purified by Isobel's death without issue.

The argument, that Isobel was imposed upon, and intended to take the fee to herself, might operate in a reduction of the settlement upon the head of imposition; but, taking the deed as it stands, the words are not susceptible of a double meaning.

Sel. Dec. No. 117. p. 167.

1770. *March 1.* FOUKE *against* DUNCANS.

A man, by his will, bequeathed to his two nephews, David and Patrick, the one half of his personal estate, to be disposed of between them in manner following, viz. two thirds to David, and one third to Patrick. The legacies were to be paid at the death of the testator's wife; and it was declared, that if either of the legatees should die before the term of payment, without male issue, then his share was to go to the survivor and his male issue. Both legatees survived the testator; but predeceased the term of payment. David predeceased Patrick, without issue; and Patrick also died without issue, but left a will in favour of his wife. Here the question occurred, Whether this devise was to be considered as a substitution, or only a conditional institution? or, in other words, whether, on David's decease, his share of the legacy vested in Patrick, in virtue of the destination in their uncle's testament, so as to make the whole legacy descend to the representatives of Patrick, exclusive of David's next of kin? The Lords found, That the substitution in favour of Patrick did take place, and therefore preferred his representatives to the whole legacy bequeathed to David and Patrick.

* * * This case is No. 38. p. 8092. *voce* LEGACY.