No 103. contracts of marriage, were sustained, albeit otherwise they were and might be reduced.

THE LORDS did find, that if the sum of 5000 merks contained in the bond was in the obligement of the contract of marriage, that it could not be reduced upon that nullity; but if it did exceed the provision of the contract, it was null by the act of Parliament, and no better than other bonds so subscribed.

Gosford, MS. No 422. p. 212.

1672. *June* 20. GRAY of Haystoun *against* FORBES and LINDSAY.

No 104. WILLIAM GRAY of Haystoun having granted bond to Lindsay, and the said Lindsay having assigned the same to his daughter, the said William Gray suspended upon a double-poinding, against the said assignee and a creditor who had arrested. It was *alleged* for the creditor, That the assignation was made by a father to a daughter, to defraud creditors. It was *answered*, That the father by contract of marriage was obliged, in case there should be no heirs male betwixt him and the assignee's mother, to pay to the heir or bairn female, at her age of 14 years, 4000 merks, and until then to entertain her; and that the assignee being the sole bairn of the marriage, her father had given the assignation foresaid for implement of the said obligement.

THE LORDS having considered, that the provision by the contract of marriage in favour of the daughters is only in case there should be no heirs male of the marriage, and that the father should have other heirs male of his body, so that the daughter should not succeed to the estate, and that both the father and mother are yet living, and of that age that it was not to be expected that the father would have other heirs male of his body by another marriage, and his daughter was his apparent heir whatsomever; therefore they found, that the case of the provisions in favours of the heirs female did not exist, and preferred the creditor.

For Lindsay, *Lockhart and Bannerman.* For Forbes, *Bernie, &c.* Clerk, *Gibson.*

Dirleton, No 169. p. 68.

*** Stair's report of this case (Bannerman against Creditors of Seton and Gray) is No 18. p. 4889. *voce* FRAUD.

1683. *February.* BONAR *against* ARNOT.

No 105. Where one was bound by contract of

A MAN obliged in his contract of marriage to provide the fee of 2000 merks to the heirs of the marriage, which failing, to his own next heirs, having, by a

posterior right in implement, provided, that failing heirs of the marriage, and heirs of their body, the one half should belong to his brother, who was his next heir, and the other half to his wife and his daughter the only child of the marriage; having, after her age of fourteen years, left the sum in legacy to her curators; this was quarrelled by the mother and uncle, as in prejudice of their substitution.

No 105. marriage to provide the fee of a sum to the heirs of a marriage, whom failing, to his own next heirs, the heir was found not entitled to disappoint the substitution by legacy.

Answered; The testator being liar by the conception of the assignation, she might *habili modo* dispose of the sum, which was moveable, although her mother and uncle might have succeeded thereto *ab intestato*, without a service.

Replied; The daughter could only have spent it or disposed on it for onerous causes, and could not evacuate the substitution or conditional assignation, by the gratuitous deed of a legacy.

Duplied; The assignation to the daughter is onerous, being in implement of the contract of marriage; and as the father could not evacuate the obligement, neither could he burden and restrict it by clauses and provisions to hinder the daughter's free disposal.

Triplied; The obligement of the contract being but a destination is not properly an obligation; 2*do*, It is conceived in favours of heirs, who cannot quarrel the father's deed; 3*tio*, It is not a limitation of the fee, nor of the free use, seeing the daughter might have spent or disposed of it for onerous causes, but only the making a substitute succeed after her decease, in case it were extant and not consumed; and it is usual for parents, in bonds of provision to their children, to adject a quality, that the money should return, in case of their decease before such an age, or unmarried; which bonds the Lords have often found, particularly in the case of the Children of Louriston, (see APPENDIX.) could not be assigned without an onerous cause. Now, in this case, the brother is next heir to the daughter, and so may seem to have been substisuted of design to continue the money in the family.

THE LORDS found, that the daughter could not legate the sum in prejudice of the defunct's wife and his brother.

This was first determined in the contrary.

Harcarse, (CONTRACTS OF MARRIAGE.) *No* 354. *p.* 88.

*** Sir P. Home reports this case:

1683. *January.*—By contract of marriage betwixt Alexander Bonar, brother to Mr James Bonar of Groobston, and Rachel Arnot, daughter to ——— Arnot of Woodmilne, the said Rachel having assigned to the said Mr James Bonar, her future spouse, to a bond of 3000 merks upon land annualrent, and to take the securities thereof to himself and the said Rachel in conjunct fee, and after his decease, to the said Mr James's nearest heir whatsomever; and there being but only one daughter of the marriage, the said Alexander, for implement of the contract of marriage, does assign that bond of 3000 merks due by

No. 105. Woodmilne, and several other heritable sums to the said Rachel in liferent, and to his daughter, the only child of the marriage, and the heirs to be procreated of her body, in fee; which failing, to the said Rachel, and Mr James Bonar of Groobston and brother, equally betwixt them; and the daughter having died without children, and having, by her testament, left the sum to William Arnot of Magdrum for payment of the 3000 merks due by him; and there being compearance made by Groobston, it was *alleged* for him, That he had right to the half of the sum, by virtue of the substitution in the disposition made by the daughter, and the daughter could not dispose of that sum by her testament, albeit it was a moveable debt, because it was heritable *quoad creditorem*, by the destination in the disposition. *Answered*, That the sum being provided by the contract of marriage to the said Alexander's heirs, and the daughter being the only child of the marriage, she, as heir to him, had right to the sum, without respect to the disposition; so that it was her option to carry the right of the sum by the disposition or contract of marriage as she thought fit; and albeit her interest were founded upon the disposition, yet the sum, of its own nature, being a moveable debt, and she being fiar of the sum, she may dispose of it as she pleased; and the substitution and destination of the disposition cannot import more, but that if she had not disposed of the sum in her own lifetime, Mr James should have right to the one half thereof; but she having lefft he said William Arnot her executor and universal legatar, and the testament being confirmed, the destination and substitution is altogether evacuated. *Replied*, That Alexander Bonar the father being assigned to the sums by his wife, he being absolute fiar, may dispose thereof as he pleased, and on what terms and qualifications he thought fit; and albeit the sum of its own nature was a moveable debt, yet it was made heritable *quoad creditorem*, by the destination; for albeit a sum may be moveable as to the debtor, being due by bond bearing annualrent and excluding executors, or bearing any obligement to infeft, yet the same may be rendered heritable *quoad creditorem*, by assigning or disponing the same by way of tailzie or heritable destination, as was done in this case; and the sum by the contract of marriage being provided to the husband's heirs, and not to the bairns of the marriage, the daughter had no right to the sum by virtue of the contract, but by virtue of the disposition; and albeit the disposition in the contract had been conceived in favours of bairns of the marriage, yet the father in that case being fiar of the sum, he might dispose of it with what qualification he pleased, and there being *jus quæsitum* to the person substituted by the disposition, the daughter could not alter or evacuate the same by testament; and albeit by the disposition she was fiar of the sum, and might dispose thereof for onerous causes in her *liege poustie*, in prejudice of the persons substituted, yet she could not alter the substitution and destination by any gratuitous deed; and not only the disposition contains an heritable security and destination, but likewise a conditional fee, in so far as it is provided, that in case the daughter shall die without heirs of her body, in that case, *per verba de præ-*

senti, he assigns and dispones these sums, with others therein mentioned, to Rachel and Mr James Bonar, equally betwixt them. THE LORDS found, that the assignation granted by Alexander Bonar is of the nature of a substitution only, and not a conditional assignation, and that Christian Bonar may dispose of the money by testament; and therefore preferred Arnot of Mugdrum, who is executor and universal legatar to the said Christian. No 105.

Sir P. Home, MS. v. 1. No 352.

*** P. Falconer also reports this case:

1683. *February* 22.—IN the competition betwixt Bonar and Arnot, the deceased Bonar of Greigstoun, in his contract of marriage with Arnot, being obliged to employ for himself and his wife in liferent, and the children to be procreated betwixt them, which failing in favour of himself, his heirs and assignees, the sum of 30,000 merks due by to the said Arnot, his spouse, by bond, which she had assigned to him by the said contract, in name of tocher, as also the sum of 6000 merks of his own money; Bonar having only a daughter of the marriage, in implement of the said contract, dispones, amongst other debts, the foresaid bond assigned to him by his wife, as said is, in favour of his daughter, and failing of her by decease, the one half to his brother Greigstoun, and the other half to the said Arnot, his relict; and in his disposition there is a clause in these terms "and it is hereby provided, in case the said daughter shall die without heirs of her body," he, *per verba de præsenti*, assigned the said bond in favours of his brother and relict aforesaid. The debtor of the said bond having raised a suspension of a double poinding against the now Greigstoun, who is the person substituted in the said assignation, the daughter being deceased without heirs, and against Arnot of Mugdrum, who claimed right to the said bond, as executor and legatar by the daughter, who lived until she was fourteen years of age, and legated the said bond to him, it being moveable; it was *alleged* for the uncle Greigstoun, That he ought to be preferred, in regard she died in her minority, and could not by a testament, or otherwise gratuitously, or without any onerous cause, prejudge him, who was substituted by the father to her, in case of her decease, and to whom the father, in the terms foresaid, had made a conditional assignation. It was *answered* for Arnot of Mugdrum, That this sum being moveable, the daughter, in her minority, might dispose thereupon by testament, notwithstanding of the substitution, especially seeing by the mother's contract of marriage his daughter was creditor to the father, he being obliged to provide the same to the children of the marriage, and, failing of them, to his heirs, and so could nor limit his daughter, who was the only child of the marriage, by granting to his brother and relict a conditional assignation, in the terms foresaid. THE LORDS found, That, notwithstanding of the antecedent obligement in the contract of marriage, yet the father might fulfil the contract to the daughter, and grant a substitution and conditional assignation

No 105. to the daughter, in favours of the brother, who was his apparent heir of the family, and which substitution, or conditional assignation, could not be prejudged by the daughter in her minority by testament, or otherwise, without a necessary or onerous cause, and so they preferred the uncle who was substitute, to Arnot of Mugdrum, who was the legatar: This, thereafter, being called in presence, the contrary was found.

P. Falconer, v. 2. No. 52. p. 29.

1684. *March.* ROBERT BORTHWICK *against* JOHN LIVINGSTON.

No 106.

A FATHER, who was debtor to his daughter in 1000 merks, which fell to her by her mother's decease, having afterwards, in her contract of marriage, obliged himself to pay a greater sum in tocher;

THE LORDS found, that the father was not obliged to pay both the 1000 merks and the tocher, because *debitor non præsumitur donare*, though the tocher in the contract was accepted only in satisfaction of what the daughter might succeed to by the death of her father, without mention of what she might claim through her mother's decease.

Harcarse, (CONTRACTS OF MARRIAGE.) *No* 366. *p.* 94.

1687. *December.* WILLIAM KINSMAN *against* JOHN SCOT.

No 107.

A MAN having obliged himself, in his contract of marriage, to provide his lands to the heirs of the marriage, which failing, to his wife's heirs, executors, and assignees, did, after her decease, commence a declarator, that the cause was exorbitant, and that the wife's heir's being liable, as heirs of provision to him, he as fiar might dispose of his estate.

THE LORDS considering, that this was a provision in a contract of marriage, and not a mere voluntary destination, they did not declare as was desired, reserving the consideration of the particular deeds, when done by the husband, in their proper place, according as they should be found rational or not.

Harcarse, (CONTRACTS OF MARRIAGE.) *No* 393. *p.* 103.

*** Sir P. Home reports this case:

BY contract of marriage betwixt William Kinsman and Agnes Scot, the said William having provided all his estate, both heritable and moveable, in favours of himself and his wife, the longest liver of them two, in conjunct fee and liferent, and the children of the marriage, which failing, to the wife's heirs and assignees; and in case the husband should survive the wife, and marry again, he should have power to provide his wife to the half of his estate, without prejudice to the said Agnes Scot, his first wife's heirs, to succeed to the fee, after the se-