assignees. THE LORDS found, there was no such substitution in the right as to deprive any of the daughters of the free disposal of their respective shares, and therefore sustained the assignation. *See* APPENDIX. No 16.

Fol. Dic. v. 1. *p.* 306.

1736. *July* 6. EDGAR *against* JOHNSTON.

No 17.

WHERE one had provided his estate in his contract of marriage to the heir-male of that marriage; which failing, to his heirs-male of any marriage; which failing, to the heirs-female of his present marriage; there being no heirs-male of that marriage, it was FOUND, that the heir-male of his second marriage might gratuitously alter the succession in prejudice of the heir-female of the first marriage.

In a simple substitution, one substitute is not creditor to the other.

Fol. Dic. v. 1. *p.* 306. *Kilkerran*, (FIAR ABSOLUTE AND LIMITED) *No* 1. *p.* 192.

*** Lord Kames reports the same case:

AN estate being settled, in a marriage contract, to the heirs-male of the marriage; which failing, to the heirs-male of any other marriage, which failing, to the heirs-female of the present marriage, the question occurred, If the heir-male of the second marriage, who succeeded to the estate, there being no heirs-male of the first marriage, could gratuitously disappoint the heirs-female of the first marriage, which he did by disponing his estate to a stranger? For the disponee it was *pleaded*, 1*mo*, That, in this case, the granter was under no limitation with regard to the heirs-female of the marriage; for, if he was under no limitation to heirs-male of another marriage, which is clear, far less to those postponed to them. 2*do*, Destinations in contracts of marriage, though they limit the father, onerous *quoad* him, do infer no limitation upon any of the heirs succeeding in virtue of the destination, because the provision is fulfilled, by making over the estate to the heir-male of the marriage, and the more amply it is made over to him, the more amply is the provision fulfilled. THE LORDS found the son of the second marriage could gratuitously alter the destination in the contract of marriage. *See* APPENDIX.

Fol. Dic. v. 1. *p.* 306.

1739. *June* 22. Competition, ANN NAPIER with JEAN CRAICK.

No 18.
Found that a father could not qualify a

BY the post-nuptial contract of marriage between William Craick of Duchrae, and Ann Napier his spouse, among other provisions to children of the

No 18.
provision to a child in a contract of marriage with a subsequent substitution, so as to hinder the child's free disposal of it in minority.

marriage, he obliged himself, in case there should be but one daughter of the marriage, to provide her in L. 300 Sterling due by two different bonds, reserving, nevertheless, full power to himself to intromit with, uplift, and receive the said sum, &c. provided he lend out and re-employ the said principal sum upon sufficient security, for the uses and purposes above-mentioned. Of this marriage there existed an only child, Katharine, to whom her father granted an assignation of the foresaid bonds, as the fund of her provision. The assignation set forth the provision in the contract of marriage, and the bonds, the subject thereof; that Katharine was the only child of the marriage; 'and that it was 'necessary to make up more special titles in her person to the foresaid sums, 'and to determine who should succeed thereto upon the event of her death 'without disposing of the same; therefore, for preventing any difficulty that 'may arise anent the sums foresaid, and that the same may be applied accord-'ing to the design of the contract, in corroboration thereof, he makes, consti-'tutes, and ordains, the said Katharine Craick, and her heirs and bairns law-'fully to be procreate of her body, or her assignees; which failing, Jean Craick, 'his only daughter of his first marriage, her heirs, &c. his cessioners and assig-'nees in and to the foresaid bonds.'

This assignation, by a subsequent clause, likewise provided, 'That the said 'Ann Napier, the granter's spouse, mother to the said Katharine, shall have 'power, &c. after his decease, until the marriage, or majority of the said Ka-'tharine, which of the two shall first happen, to uplift and discharge the an-'nualrents of the said principal sum to be applied for the aliment and mainte-'nance of the said Katharine, until her marriage or majority; and, for that 'effect, nominates and appoints the said Ann Napier sole tutrix and curatrix 'to her, providing always she be bound, by the acceptation thereof, to aliment 'her,' &c.

Katharine Craick, after her father's decease, when she was thirteen years of age, transferred the two bonds to her mother, with a proviso, that it should be lawful for her, at any time during her life, or on death-bed, to alter the said deed; and, in the year thereafter, she executed a testament, appointing the said Ann Napier her only executor, sole legatar, and intromitter with her whole goods, gear, debts, and sums of money.

Katharine having died unmarried, there ensued a competition betwixt Jean Craick, the daughter of the first marriage, who claimed a right to the said bonds, in virtue of the substitution contained in the foresaid assignation, and Ann Napier, who insisted that she ought to be preferred thereto as assignee, by the deeds made by her daughter in her favour.

It was *pleaded* for Jean; That there could be no doubt but her father might burden the provision with a substitution in her favour, in case of Katharine's decease before marriage or majority, which, taking the whole deed together, is the only import of the substitution, that being an act of rational administration, and even so as to hinder the child to disappoint the same, before either of these

periods, by gratuitous deeds. In case any other subjects had belonged to her, proceeding from strangers, the father could not perhaps have imposed any substitution thereon in prejudice of the child's free disposal by testament, after its pupillarity; but that cannot apply to the present case, where the father, if there had been more children, had a full power of division among them, whereby he might have made their shares very unequal; and therefore, as there happened to be but one, he might, in virtue of his parental power, secure that child's provision against its being given away gratuitously by her during her minority. And, as to the liberty of destinating or bequeathing this sum, which is, by law, competent to minors after their pupillarity, nothing could hinder the father to disappoint her of that liberty. Might he not have uplifted the bonds, and secured the sum upon land, whereby the power of testing thereon would have been effectually defeated? if so, it is *contended*, the equivalent is done here, as the same is rendered heritable, and Jean created heir of provision therein, failing her sister and the heirs of her body. No 18.

2*dly*, There is here a virtual prohibition of all deeds done in the contrary during minority, or till Katharine's marriage; for the mother is expressly named tutrix and curatrix for the special end of uplifting the annualrents till her daughter's majority or marriage; which imports, that she could not uplift the principal sum, without the curatrix's consent, before either of these periods. In the *next* place, this settlement renders the subject heritable as to Katharine and the heirs of her body; for, by the substitution, it is impossible Jean could take the right otherwise than by a service to her, as she is substituted to her, and the heirs of her body. Now, as minors cannot alter a substitution in heritage, it must follow, of course, that the right to the bonds being heritable by destination, could not be altered during that period; or, at least, till her marriage, if she had been married before majority.

But, supposing Katharine could have altered the substitution in her minority, it was *objected* to the assignation, 1*mo*, That it is null, as being in the form of a deed *inter vivos*, in favour of a mother, who was named sole tutor and curator; consequently could not be *auctor in rem suam*; and it could not subsist without her authority to validate it, as the minor had no power to assign, without being authorised by her. 2*do*, That subject being heritable, could not be bequeathed by testament; and that it was so, is plain from this, that the provision is to Katharine and the heirs of her body, whereby executors are virtually excluded; and therefore it were absurd to suppose she could devise the same to executors, more than in the case of a bond, otherwise moveable, secluding executors.

It was *pleaded* for Ann Napier; That she ought to be preferred, in virtue of the deeds made by her daughter, when she was of age capable to make a testament or disposition of her moveable estate, to take effect in case of her decease, without altering the same; for that these deeds would have been effectual on the footing of the contract of marriage, if the assignation or substitution, under which the other Lady claims, had never been made; and, by that voluntary

No 18. substitution of his own daughter of a former marriage, it neither was in the power, nor in the will or intention of Duchrae to limit or restrain the interest of his daughter, in the disposal of her own portion, or to put her in a worse condition than she would have been on the footing of her mother's contract; which is plain from the terms of the provision itself, to wit, that these two bonds should be provided and secured, and belong, of right, to the only daughter of the marriage, in all time after the decease of Duchrae, whereby she came to be creditor or assignee thereto; and, by surviving her father, could have taken the full property of them, and, being moveable sums, could no doubt have disposed of the same by testament, at any time after her pupillarity. Now, if such was the interest of the only daughter in her portion, on the footing of her father's obligation by the contract, it is *contended*, That it was not in his power, the debtor, by any gratuitous deed or substitution, to lessen that right, or to disable the child from the liberty and power of testing, in case of her decease before majority; for, whatever may be said in support of the father's power over the estate of his family, provided to the heir of a marriage, whereof he remains the absolute fiar during his own life, to make a tailzie thereof, it is believed there can be no question that the provision of a special and moderate sum of money, as the portion of an only daughter of a marriage, was always understood to be given and taken free and absolute from any fetters or limitations, other than should be consented to in the contract itself. But, in fact, it does not appear that Duchrae had any intention to impair, in the least degree, this provision; for he makes the assignation not in lieu or satisfaction of the contract, but in corroboration thereof, and *accumulando jura juribus*, he gives her a special title to save the expenses of making up titles to the bonds after his death; and substitutes his other daughter Jean to her, not with an intent to restrain Katharine's free disposal, but on the contrary, with this express declaration, that the substitution is made to determine who shall succeed in the event of her death, without her disposing upon the same, or without issue. Nor is there any foundation for limiting the words in the assignation to Katharine and her assignees to onerous assignees; for, supposing it had been a gratuitous deed, there are no words, nor any reason for inferring this construction, and it ought not to be presumed. *2dly*, Whatever might be the effect of this substitution, had the assignation been properly gratuitous, the case must be taken as it truly stands, and the deed interpreted accordingly. The assignation to Katharine was in satisfaction of an anterior debt; and, if that was given to her and her assignees at large, the debt was satisfied; but, if otherwise, the obligation was not fulfilled; in these circumstances, therefore, the assignation ought to be taken in its full extent, *scil.* to her assignees, gratuitous as well as onerous.

With respect to the objection to the form of the assignation by Katharine in favour of her mother, it was *answered*, That Ann Napier was not constituted curatrix to her daughter properly or universally, but only for the special purpose and effect therein expressed, namely, to give her power to uplift the an-

nualrents, which she was to be allowed as a fund for the maintenance of her daughter; consequently she had no power concerning the principal sum, or any other power of a curator, as to the separate estate, if any had been, of her daughter; therefore, so far as concerned these, the daughter had no curator, and the assignation which she made to her mother alone was equally valid with the act of any other minor who has no curator at all. 2*do*, It was valid in this other respect, That, though it was an assignation *inter vivos*, it was, in effect, a settlement of her succession, being so far of a testamentary nature, that it reserves a power to alter at any time. No 18.

As to the objection against the effect of Katharine's testament, that the two sums were rendered heritable *destinatione* by the substitution, it was *answered*, That, supposing Jean must have been served to cognosce the failure of issue of her sister, it is another question, whether the bond, being personal in Katharine, might not be carried by her testament; for which Sir James Stewart, in his Answers to Dirleton's Doubts, p. 17. gives his opinion in the affirmative, where he says, 'That where a particular subject is transmitted, from which executors 'are excluded by the destination, the transmission may be by way of service, 'and yet the subject, if moveable, is still testable.' But, in this case, though there is no mention of executors of Katharine, there is mention of her assignees, and it is failing these, as well as her issue, that Jean is substituted; and therefore, as these have not failed, there is no place for Jean to claim, either by service, or as *nominatim* substitute in this assignation. *Lastly*, It is observable, that both these objects are founded merely upon the voluntary and gratuitous substitution of Jean, which could work no prejudice to her sister, who was creditor, by an anterior obligation, for the two bonds assigned to her.

THE LORDS found, that the assignation by William Craick, to Katharine his daughter, of the sums provided by her mother's contract to the said Katharine, and her heirs, and bairns, or her assignees; which failing, to Jean Craick, his daughter of a former marriage, did not limit or prejudge the power of Katharine to dispose of the subjects at her pleasure, even by voluntary or gratuitous deeds; and found, that she had effectually disposed of the same to Ann Napier her mother, by her assignation, reserving liberty to herself to alter at any time of her life; and also by her testament, whereby she nominated the said Ann Napier her executor and universal legatar; and therefore preferred the said Ann Napier.

C. Home, No 121. *p.* 193.

1791. GRÆME'S TRUSTEES *against* STEWART MONCRIEF'S TRUSTEES.

No 19.
A power of redeeming an estate in favour of a

BARON STEWART MONCRIEF'S Trustees had purchased from the Trustees of General Græme the lands of Gorthy, for L. 26,000. It appeared General