

*Replied* for the executors; That though (*which failing*) do indeed import so much in substitutions, and cannot there be otherwise explained, yet when such words are insert as the condition of a bond, there they must still be understood, so as if the granter should have children surviving him the bond took no place. Nor can it be otherwise understood in the present case without manifest absurdities; for so, if Sir George's descendents had failed after 500 years, this bond, with its whole annualrents, would have been a burden upon his heirs.

THE LORDS found, that supposing the clause in the lady's declaration, (viz. that the bond was to subsist failing children of her body with Sir George) had been insert in the bond, yet the bond could not be binding in the event which hath happened, by the existing of children in the marriage, who survived Sir George, but died before the Lady without issue.

For Pitcur, *Lord Advocate.*

Alt. *Ro. Dundas.*

Clerk, *Mackenzie.*

*Fol. Dic. v. 1. p. 189. Bruce, No 68. p. 82.*

1740. June 11.

CAPTAIN ALEXANDER NAPIER, and MARIANA JOHNSTON his Spouse *against*  
ANNA JOHNSTON.

CAPTAIN JOHNSTON of Kelton made an entail of his estate of Kelton, in favours of Robert Johnston his only son, and the heirs of his body; which failing, to Anna Johnston, his eldest daughter, and the other heirs therein mentioned; but the entail declared Robert free of all the resolute and irritant clauses to which the other substitutes were liable; likeas the Captain granted a bond of provision to Mariana Johnston, his youngest daughter, for 8000 merks. Upon the Captain's decease Robert ratified the above bond of provision in favour of his sister, and likewise gave her 7000 merks more, payable at the first term, year and day after his decease, and which he therein declared revocable at pleasure, and void, in case of heirs of his body. To this additional provision the following proviso was added, viz. 'That in case the said Mariana Johnston shall decease without any child or children, lawfully procreate of her body, and existing at the time of her decease, in that case the said principal sum of 7000 merks, &c. resting at the time of her decease, shall return and fall due and payable to the said Robert, and his heirs representing him in the lands of Kelton; with and under which burden these presents are granted and accepted by the said Mariana, and no otherways.' Mariana Johnston having, in her contract of marriage with Captain Napier, assigned this 7000 merks to him, they brought a process for payment thereof against Anna Johnston the eldest sister.

*Pleaded*; That no decret could go against the defender unless security were granted, that, in the event of the condition that all the pursuer's children should die before herself, the same should become due and payable to the de-

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A brother made a provision to his sister, under the condition, that it should return to his heirs, if she should die without leaving children. She assigned this provision to her husband, who pursued for payment. *Pleaded* for the brother's heirs; Caution must be found to repeat, in case the condition take effect. *Answered*; A clause of return excludes only gratuitous deeds. Caution was found necessary.

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fender, who was heir to her brother in the lands and estate of Kelton. In support whereof, it was *observed*, That this was not a substitution of whatever kind, which may be disappointed for certain onerous deeds of the institute, unless it is clogged by prohibitory clauses; but that it is a condition imposed upon the right, which can be no more voided by onerous deeds than by gratuitous ones. The condition must have its effect, and suspend or resolve the right, according to the existence or non-existence of it. The very manner in which this provision is conceived, demonstrates it to be a condition. It is provided, that in case Mariana, the creditrix and donatar, shall decease without children existing at the time, the sums shall become due and payable to Robert Johnston of Kelton, his heirs in the lands of Kelton. From which it was plain, that the sum, if paid, must be repeated in the above event; and consequently the bond is granted, and the sum made payable, upon condition that the same shall be repeated upon the existence of the foresaid uncertain event. Further, it is not a return of the sums to Kelton himself and his heirs, but it is an obligation, whereby the sums shall become due and payable to Robert's heirs in that estate by Mariana, in case she received the same.

Again, by the latter part of the clause, it is expressly declared, that the bond was granted by Kelton, and accepted by his sister, under the burden of the above condition; so that this was plainly a gift *sub modo*, subject to the condition therein ingrossed. And as this was altogether a gratuitous grant, it can only be effectual on the terms it was given; neither can Mariana's assigning thereof to her husband void the condition, as that is a quality which must accompany the right; and that the condition refers to the existence of children lawful of her body, the time of her death, which therefore supposes, that it behoved to take place after her marriage.

*Answered* for the pursuers; That such clause of return or substitution of the granter himself and his heirs, has never been understood to operate further than to exclude voluntary or purely gratuitous deeds in prejudice thereof; and it has always been held, that such return might be defeated by assignations for onerous causes. See 28th February 1683\*; January 1679, Drummond †; 10th February 1685, Mortimer ‡. More particularly, there was no reason to insist upon caution for repayment in case Mrs Napier's children should predecease her; because, by the bond, the money is payable at the first term after year and day from the granter's death, which is long since elapsed; and it is not denied that the money is now exigible, and the import of the condition is plainly no more, than that the same might afford an exception or defence to the granter's heirs against the executors of his sister; so that the granter or his heirs could not be compelled to pay what should be resting at the death of Mariana: But if she should live till after the term of payment, and should uplift the same, there are no words in this clause providing that the heir of her brother might have recourse against her representatives, by way of action, for repetition of the like

\* Strachan against Barclay. † Drummond against Drummond. ‡ College of Edinburgh against Mortimer.—These three cases will be found, *voce* F1AR, Absolute, Limited.

sum. But the pursuer, Captain Napier, who has right to this bond as an onerous assignee in his marriage articles, insists, that the clause can have no effect whatever against him; more especially, considering the tenor thereof, as it concerns only such part of the money as should be resting at the death of Mariana; and that therefore he is entitled to a decret for the sums libelled, without any quality or reservation whatever.

THE LORDS found, that the clause of return of the 7000 merks, contained in Robert Johnston of Kelton his additional bond of provision, was effectual, in case the condition expressed in the clause of return should exist, notwithstanding of the assignation in the contract of marriage between Captain Alexander Napier and Mariana Johnston the pursuers; and that the said pursuers, upon payment of the said sum, must find caution to repeat the same in the event of the existence of the condition mentioned in the said clause of return.

*Fol. Dic. v. 3. p. 157. C. Home, No 150. p. 255.*

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1761. June 19.

THOMAS and AGNES SOMERVILLES *against* JOHN SCOT of Whitehaugh.

IN the 1666, by contract of marriage entered into betwixt Walter Scot, father to Isabel Scot, with consent of Walter Scot of St Leonard's his uncle, and Bessy Scot, daughter of William Scot of Horseleyhill, the lands of Westerhead, Whitehaugh, and others therein mentioned, are conveyed by Walter Scot of St Leonard's to Walter Scot his nephew, and the heirs-male to be procreate betwixt him and his said spouse; whom failing, to the said Walter Scot his nearest heirs-male and assignees whatsoever.

This contract has the following clause: ' And because the foresaid lands are tailzied and provided to the heirs-male of the said Walter Scot the younger; so that, by the aforesaid provision and tailzie, the daughters and bairns-female to be procreated between him and the said Bessy Scot, failing heirs-male, as said is, will be altogether debarred and secluded from succeeding to their said father in said lands; therefore, it is conditioned and agreed on betwixt the said parties, that, in case it shall happen that there be no heirs-male procreated betwixt the said Walter Scot younger and the said Bessy Scot, in their said marriage, but only daughters or female children; or being sons or male children, if they shall happen to depart this mortal life before the daughters and female children (if any shall happen to be) ane or mae of the aforesaid marriage, shall be provided and married; in that case, the said Walter Scot, the younger, binds and obliges him, and his heirs-male and of tailzie, and other heirs and successors whatsoever succeeding to him in his said lands, to make good and thankful payment, to the said daughters and female children, of the sums of money under-written, in manner, and at the terms *respective* after

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A clause in a contract of marriage, settling provisions on daughters in case of no sons of the marriage, or in case the sons should die before the daughters were provided and married, found only to take effect in the event of there being no heirs-male of the marriage, who should take the estate in virtue of the contract of marriage.