

1748. December 16. ROBERT RAE *against* ANDREW GILLESPIE.

ANDREW GILLESPIE married Mary daughter of John Rae, and by the contract betwixt them, John Rae ' assigned and transferred from him, in favour of the said Andrew Gillespie and Mary Rae, and longest liver of them two, in conjunct fee and liferent, and the heirs and bairns to be procreated of the marriage betwixt them, whilk failing, to the said Andrew Gillespie, his heirs and assignees, in fee, all and hail certain sums of money due to him by certain persons, to the extent of L. 160 Sterling.' And further, became bound to deliver to the said Andrew Gillespie the half of the insight plenishing of his dwelling-house, and of the horses, mares, black cattle, and sheep pasturing on a farm then in his possession, and that at the next term of Whitsunday; and also to deliver to him the half of the crop upon the said farm, after the separation thereof. ' And on the other part, the said Andrew Gillespie bound and obliged him to provide and secure the said sum of L. 160 Sterling, with the sum of L. 100 Sterling of his own means and effects, upon sufficient security to himself and the said Mary Rae in conjunct fee and liferent, and to the children of the marriage; which failing, to himself, his heirs, in fee; providing always, likeas as it was specially provided and declared. that in case the said marriage should be dissolved within year and day subsequent to the solemnizing thereof, and no living child should be procreated, then the effects of both parties should return to the present proprietors thereof, their heirs; and in case the said marriage should be dissolved by the decease of the said Andrew Gillespie after the said year and day, and there should be no children existing the time of the dissolution thereof, then the property of the sum of L. 100 of the first and readiest of the sums above mentioned should return, pertain and belong to the said Mary Rae her heirs; and in case the said marriage should be dissolved after elapsing of the said year and day, by the decease of the said Mary Rae, and there should be no children existing the time of her decease, then and in that case, the said sum of L. 100 Sterling should return, pertain and belong to the said John Rae, and failing of him by decease, to his nearest heirs, executors or assignees.'

Mary Rae died after year and day without children; and Robert Rae, assignee by John, pursued Andrew Gillespie for the sum of L. 100 contracted to return to the cedent, in the event of her decease; and the Lord Ordinary decerned; to which the LORDS, 7th January 1748, adhered.

*Pleaded* in another bill, The whole fund provided by both the contracting parties was settled upon the spouses in conjunct fee and liferent; so that the defender is entitled to the liferent, and subject to it the return is to take place at his death.

*Answered,* The right given to the husband here is not a liferent, but a fee; so that to burden the sum to be returned therewith, would be to evade return-

No 36.

A sum in a contract of marriage being settled on the spouses in conjunct fee and liferent, to return to the Lady's father in case of her predecease without children, found to return only after the husband's death.

No 36.

ing it altogether; this clause therefore operates a restriction of the husband's right, in the case which has happened; and the contract is very accurately conceived, stipulating a return of the property to the wife, in the event of its falling to her on her survivance, as the liferent was in her already; but in case of her predecease, the expression is, that the said sum shall return to the pursuer's cedent.

' THE LORDS, 6th December 1748, found that in this case the husband had right to the liferent of the sum in question; and refused a bill, and adhered.

Act. *A. Pringle.*

Alt. *Ferguson et J. Erskine.*

Clerk, *Kirkpatrick.*

*Fol. Dic. v. 3. p. 219. D. Falconer, v. 2. No 23. p. 29.*

1749. July 28. NAIRNS *against* The CREDITORS of NAIRN of Greenyards.

No 37.

A person, on condition of succeeding to an estate, was bound to grant a bond of provision, to a younger brother, returnable to the granter, if the creditor died without children. An assignation for rational and onerous causes was sustained in prejudice of this clause.

AGNES NAIRN, Lady Tarsappy, purchased the estate of Drumkilbo to herself in liferent, and to her nephew Alexander Nairn of Greenyards, and to his heirs-male in fee; taking from him an obligation, that on his succeeding thereto, he should dispone his estate of Greenyards under the burden after mentioned, to John Nairn his brother; and failing Alexander and his heirs, took the estate to John and Robert his brothers in like manner successively; prohibiting the whole heirs to alter the succession, or contract debts.

Alexander, upon his aunt's death, disposed his estate to John, with the like prohibition as in that of Drumkilbo to him; and, on the narrative, that when the Lady made her purchase destined as above mentioned, it was agreed that Alexander should dispone to him his said estate, under the burden of 15000 merks to Robert their younger brother, 'with and under the condition and provision after specified;' and that Alexander had accordingly implemented his obligation, therefore he granted to Robert, his heirs and assignees, an heritable bond 25th December 1706, for that sum on the estate of Greenyards, with this provision always, that upon the existence of the condition whereon he was bound to dispone to him the estate of Greenyards, he should discharge or repay the same; as also 'that failing of heirs of the said Mr Robert his body, the said sum should return to him, his heirs and assignees whatsoever.' Robert Nairn 1729, 'for certain onerous causes, and particularly for that he was educated by Alexander Nairn of Drumkilbo his elder brother at schools and college, maintained by him near two years at Leyden in the study of the law, and ever since that time entertained in his family, except about the space of a year and a half that he was abroad; which obliged him in justice as well as gratitude, to leave to him or his children some proportion of the money he had thereby saved; and for the love and favour he bore to Margaret, Anne, and Jean Nairns, daughters to the said Alexander Nairn, assigned and disposed to them the sum of 5000 merks, being part of the 15,000 contained in the above heritable bond.'