

1679. *January 31.*DRUMMOND *against* DRUMMOND.

No 26.

A person granted bonds of provision to his daughters, and the heirs of their bodies, whom failing, to return to the granter. Found that the daughter could not dispo-
ne gratuitously.

JEAN DRUMMOND for herself, and as assignee by her sister Margaret, pursues Drummond of Riccarton for payment of two bonds of provision granted by his father, and corroborated by himself, payable to them, and to the heirs of their body, and which failing to return to the granter. The defender *alleged* absolutor; as to Margaret's bond, because she died without heirs of her body, and albeit there were mutual assignations granted by the two sisters to each other, in case of their decease without children, yet these were fraudulent, null deeds, to evacuate the provision of returning; for though the term was come on Margaret's death, and that she might have disposed for any onerous or necessary cause, as a tocher by her contract of marriage, or for her entertainment, yet she could do no deed gratuitous or fraudulent, to exclude the clause of returning. It was *answered*, That Margaret was fiar, and the term come, and so might lift the sum, and dispose of it at her pleasure, and the defender could pretend no more but to be heir substitute, failing heirs of her body, and so could not quarrel, but was obliged to fulfil her assignation; neither contains the bond any clause irritant, or not to dispo-
ne. It was *replied*, that heirs of provision are not simple heirs, but partly creditors, and may quarrel any deed fraudulent, or gratuitous, prejudicial to their provision, especially bonds of provision, where the mind of the granter should not be eluded.

THE LORDS found the defence relevant, that the mutual assignations were fraudulent and gratuitous, and that notwithstanding thereof, the sum returned to the defender.

Fol. Dic. v. 1. p. 308. Stair, v. 2. p. 686.

* * * Fountainhall reports the same case :

IN Drummond of Riccarton's case, 'The LORDS found, where a bond of provision is given to a daughter, with this express condition, that if she die unmarried, the sum shall return to the granter, and his family; that she could do no gratuitous deed in prejudice of the foresaid quality in the bond, and that she might not evacuate the same by any voluntary assignation thereof. And found, that it was no necessary nor onerous cause, that she made a mutual tailzie with another, and assigned it to him.' This decision drives them to marry. In a substitution like this, in a bond of provision given to Mary Scot, Margerton's sister, she having assigned it, and afterwards dying unmarried, Sir John Nisbet, and Sir G. Lockhart, resolved, that she had no power voluntarily to assign it, in prejudice of the substitutes.

Fountainhall, v. 1. p. 39.