*** Fountainhall reports the same case [illegible].

No 43.

In a case debated in presence between Forbes of Skellitor and Duncan Schaw, the Lords found an assignee to a tocher by the husband had right thereto, but with the burden of the conditions contained in the husband's contract of marriage; and that he behoved to find caution to take it in these terms.

Fountainhall, v. 1. p. 477.

1707. *June* 12.

M'Dowal of Logan and Rosina Agnew his Cedent, *against* Andrew Agnew of Scheuchan.

No 44.

A father granted a bond of provision to his daughter, for her portion-natural, payable after his decease, with this clause, 'that in case 'she died 'without 'heirs of her 'body, the 'same should 'return to 'the granter.' When she was old and had no children, she assigned the bond for onerous causes. The assignee was found entitled to uplift the sum, without finding caution to re-employ.

Peter and Andrew Agnews, elder and younger of Scheuchan having granted to Rosina Agnew daughter to the former, and sister to the latter, a bond bearing for love and favour, and that she might be provided in a competent portion, whereby they bound and obliged them and their's to pay to her, her heirs, executors or assignees, at the first term after her father's decease, the sum of 2500 merks Scots, as for portion-natural she could succeed to by the death of father or mother, with annualrent from the term of payment; with this provision, that if she died without heirs procreated of her own body alive the time of her decease, the money should return to the granters of the bond and their heirs. This bond Rosina Agnew assigned for an equivalent onerous cause to M'Dowal of Logan, who charged Andrew Agnew of Scheuchan for payment, after Peter the father's decease. Scheuchan suspended upon these reasons, 1*mo*, The bond is for love and favour, and for Rosina's portion-natural, which she could succeed to by the death of her father or mother, and besides the sum therein, she got liberally at the death of both. 2*do*, The suspender was only obliged to pay the sum with this provision, that if Rosina died without heirs of her own body, it should return to him and his heirs, which ingrossed quality and condition of returning exists already, she being superannuated without any children; and it doth not alter the case, that the charger is an assignee for an equivalent onerous cause; for he may blame himself that he gave money for so clogged a right.

Answered for the charger, 1*mo*, Albeit the bond be in satisfaction of what the charger's cedent could succeed to by the death of father or mother, that did not exclude their liberality to her in their own lifetime; and all she had from them was but inconsiderable, considering their fortune. 2*do*, The quality in the bond is a substitution, and not a condition either suspensive or resolutive; not a suspensive condition, because the bond provides immediate execution; nor yet a resolutive one, because it neither hinders execution for payment, nor doth annul and make void the obligement upon the non-existence of children; but

No 44. only provides that the money shall return in such an event. And such provisions to return are certainly subject to the onerous deeds of fiars; 31st January 1679, Drummond *contra* Drummond, No 26. p. 4338.; consequently the onerous assignation in favour of the charger must subsist, though the cedent were dead, and far more in this case, where there is nothing to hinder her from present execution upon the bond. 3*tio*, The bond was granted to Rosina for her portion-natural, whereof the full property would have belonged to her, and that *surrogatum* must be interpreted to belong to her *pleno jure*, which is very consistent with a substitution, but not with the nature of a conditional provision.

THE LORDS found Rosina Agnew to be fiar in the bond, and that her assignee had power to uplift, without finding caution to re-employ; and repelled the reasons of suspension in respect of the answers; and therefore found the letters orderly proceeded.

Fol. Dic. v. 1. *p.* 309. *Forbes, p.* 168.

*** Fountainhall reports the same case:

ANDREW AGNEW of Scheuchan grants bond to Rosina Agnew, his sister, for 2500 merks, as her portion natural. This bond she assigns to M'Dowal of Logan; and he charging, Scheuchan suspends, that the bond bears an express quality and condition, that if she died without heirs lawfully procreated of her body, the sum shall return to her brother, and his heirs; and *ita est*, though she be married to Samuel Muir, Provost of Ayr, yet she has no children, and is past 50 years old, and so there is neither hope nor expectation of any; therefore she nor her assignees cannot uplift it, unless with the quality of its returning to him at her decease without children; and the bond itself bears only love and favour, being gratuitous, she cannot by her assigning it forfeit his succession, and he is willing to pay, upon caution to restore it in the event of the condition. Likeas, by a decreet-arbitral, the destination of the returning of that sum in case of her decease without children, is expressly reserved unprejudged. —*Answered*, The clause of return can neither impede her uplifting nor disposing, being no more but a mere destination, and substitution of him as heir, in case it were unuplifted or unassigned at her death; and can import no more, but that he should succeed therein as heir-substitute in the case foresaid; and though the narrative bear love and favour, yet it is not simply gratuitous, but a *debitum naturale*; and Logan took assignation to it not officiously, but because she got ill payments of her annualrents; and being her cousin, he gave his own security for it, and may justly take assignation to it, seeing he would get thereby compensation against Scheuchan of a debt he owed him; and in the case Drummond *contra* Drummond, No 26. p. 4338., the Lords found such clauses of return did not hinder disposal for onerous causes; and lately, betwixt Mrs Anne Gilmour and Sir Alexander Gilmour, *voce* SUBSTITUTE, and CONDITIONAL

INSTITUTE, the Lords found such a provision to return did not impede the power of uplifting it; and here the bond made it very clear, for she had right to call for it, at the term of payment, or any term or time thereafter, notwithstanding of that clause; and the reversion in the decreet-arbitral neither made it better nor worse, unless it had been an irritancy of any right she should make to the prejudice of his succession.—*Replied*, This is not a mere substitution, but a positive quality and condition affecting the bond, which express paction cannot by such voluntary deeds be frustrated, annihilated, nor evacuated.—*Duplied*, This distinction is too metaphysical, for it is neither a suspensive nor a relative condition; not a suspensive, because the bond provides present and immediate execution after its term of payment; not relative, because it neither hinders the calling for payment, nor bears that the obligement shall cease and be void on the non-existence of children; *ergo*, it is nothing but a pure substitution; and a *spes succedendi*, in case of not disposal in her own life.——All the LORDS were clear, in case of poverty or straits, she had right to call for the principal sum; but the plurality carried, that she might assign it to Logan, and the clause could not hinder his uplifting thereof, though it eventually frustrated and evacuated the return; especially seeing she had assigned Logan's bond, which was surrogated in place of her brother's bond, in her contract of marriage with Mr Muir, her husband, and so it was for an onerous cause. Some thought, albeit she and her assignee had right to uplift the money, yet they ought to find caution to repay it in case the condition exist of her dying without children, which cannot be absolutely known till her death, and till which time they enjoy the annualrent of the 2500 merks; but this was not regarded by the Lords. No 44.

Fountainhall, *v.* 2. *p.* 373.

1725. *December* 29. IRVINES *against* IRVINE of Drum.

No 45.

ALEXANDER IRVINE of Drum granted bonds of provision to his two younger daughters, 8000 merks to each, payable at their age of 16 years; 'and in case 'of the decease of either before marriage, or before the age of 16 years, then '2000 merks of the portion of the deceased sister to fall to the survivor, and 'the remainder to the said Alexander Irvine and his heirs.' After their father's decease, both of them being past sixteen, they insisted against their brother for their several provisions, for whom it was *alleged*, That they could not have access to the said provisions, without giving security to re-employ in favour of the defender 6000 merks of the sums provided to them in the event of the decease of either before marriage.——THE LORDS found, That the pursuers ought either to re-employ their portions in terms of their bonds of provisions, at the sight of the Ordinary on the bills for the time; or at their option, before extract, to give bond to repay to the defender, and his heirs of tailzie, such part