reasonable tocher. A conveyance *omnium bonorum* that the party then has or may succeed to cannot be onerous, and therefore is constructed to be with the burden of all debts. Yet the Lords found the subjects effectually conveyed to Mr Drummond notwithstanding the prohibition, and preferred him, *renit. tantum* Kames, *et me*; and 28th November adhered. (See No. 16, and No. 24, *voce* MUTUAL CONTRACT.)

No. 18. 1742, Dec. 1, 15. GRIZEL, &c. MARJORIBANKS, *against* THEIR BROTHER.

THE Note relative to this case is subjoined to the text.

No. 19. 1753, Feb. 2. CAPTAIN W. DOUGLAS *against* MRS DOUGLAS.

CAPTAIN DOUGLAS, as heir-male of Kirkness, pursues reduction of a settlement in 1722, made by the deceased Sir Robert Douglas in favours of heirs of line, and by the Major-General in 1741 in favours *nominatim* of this defender, founded on the original grant by the Earl of Morton to his second son, and heirs-male of his body, which failing, to return to the family; and another charter in 1638 by the next Earl of Morton, to the grandson of the first granter, and heirs-male of his body, with the like clause of return, and an express prohibition not to do any thing in prejudice of the return, which proceeded on an onerous transaction, and a conveyance by the Earl of certain apprisings acquired by the Earl on Kirkness's predecessors debts. The principal defences were, that the original clause of return was discharged and altered by another charter by the next Earl of Morton to the original granter, his heirs and assignees; and as to the charter 1638, the limitation is only in favours of the family of Morton, not of the intermediate heirs-male, who have not thereby any *jus quæsitum*, and none but the family of Morton, when those heirs-male fail, can quarrel alterations of the succession, as in the common case of contracts of marriage to the heirs-male of the marriage, which failing, the heirs-male of any other marriage, which failing, the heirs-female of the marriage, there is a *jus quæsitum* to those heirs-female, but no *jus quæsitum* to the heirs-male of any other marriage, though preferred before them. 2dly, Prescription both negative and positive upon a charter to heirs and assignees in 1687, and infeftment on it, and quoted the case of M'Kerston and William Gray's case, where the negative prescription was repelled, because the deed contained no limitations, and though only a personal deed, yet not being altered, carried the succession. The Lords sustained both these defences.—We agreed that the charter 1595 was effectually altered, and the clause of return discharged by the charter 1607, and that the limitations 1638 were only in favours of the family of Morton, and not of the intermediate heirs-male. Mr Craigie, who was counsel for the pursuer, admitted that the charter 1607 did effectually discharge the clause of return in the charter 1595, and seemed also to think, that if the charter 1638 had been the only charter that contained a clause of return, the limitations could only have been understood in favours of the family of Morton; but insisted, that in this case the charter 1638 was only a revival of the original clause of return, when the estate was given as an appanage to a second son of the family, and he thought in such returns the implied limitation was not only in

favours of the donor, but also of all the intermediate heirs; and he spoke of it to me afterwards as his real opinion, and wished that we might not determine that point. I had a good deal of difficulty on the general point. In a common clause of return, the limitation in favours of the donor and his heirs, though now settled, is only by implication. It would be a further extension of it to carry it also in favours of the intermediate heirs, and the above instance of marriage settlements is a very strong argument, though I own there is this difference between them, that a clause of return implies a limitation in favours of the donor, (when the event of the failure of heirs-male shall happen) not only on the original heir, but on all the intermediate heirs, that they shall not disappoint the return, whereas the implied restriction in marriage settlements only is upon the husband, and neither the heirs-male of the marriage, nor failing them of any other marriage are under any limitation to these heirs-male. 2dly, That is the case of reversion and remainder heirs in England, and was before the statute *de donis*, and yet that statute says expressly, that that was against the donor's intention; and I confess, if the succession was lawfully altered in prejudice of the intermediate heirs, the clause of return cannot long be of any service, not only because of the difficulty of proof of failure of the intermediate heirs after they have been some generations out of possession, and possibly become very obscure, but also because of prescription; but I could not conceive that the implied limitation in a clause of return of an appanage given to a younger son, could have a stronger effect in favours of either the donor or the intermediate heirs, than an express prohibition to alter, even where it is not an appanage, but an onerous contract, as was the case of the charter 1638. And as all the Lords agreed, and even Mr Craigie seemed to admit that the charter 1607 was an effectual discharge of the clause of return in the charter 1595, that was a further argument that there was no *jus quæsitum* to the intermediate heirs, otherwise Earl Morton could not have discharged it. Lord-Justice-Clerk, upon this question, also mentioned the decision, Lady Chatto, (Kerr) against her brother. But I am not acquainted with the case. As to the prescription, I thought the charter 1687, and sasine 1689, would not have altered the male succession had there been no subsequent alteration made, because of Sir William Douglas's contract of marriage, providing the succession to heirs-male after the charter, and though the sasine on the charter was after the contract, that would not have altered the succession, as in the case of Major Skene of Carralstone's heirs; but as both the charter and contract were without any limitations, I thought it a good title of prescription both positive and negative.

No. 20. 1754, Feb. 6. MARGARET, &c. MUIRHEAD *against* MARY DICKSON.

JAMES MUIRHEAD, father to those two pursuers, by his contract of marriage in 1685 with Margaret Lindsay, with advice and consent of Sir George Lockhart of Carnwath, and Sir John Lockhart of Castlehill, whose relation the Lady was, provided his estate of about 3000 merks yearly, and conquest, to the heirs-male of the marriage, whom failing, to the heirs-male of his body in any other marriage, whom failing, to the heirs whatsoever of that first marriage, and the contract contains the obligation,—(The clause is quoted in