

S E C T. V.

In questions among Children, who understood to be Fiar?

1670. *January 5.*

INNES *against* INNES.

No 60.

A person provided a certain sum to his eldest son, and in case of decease to two younger children equally. One of the younger children having died, the other claimed the whole sum *jure accrescendi*. The Lords preferred the heirs of the deceased.

———— INNES having granted an assignation of an heritable bond of 6000 merks, 4000 merks thereof to Robert Innes his eldest son, and 2000 merks thereof to William and Janet Innes his younger children, and in case of Robert's decease, providing his part amongst the rest equally; Janet having died before Robert, her heirs and Robert's heirs compete for the sum, for Robert died without children; and William, as heir to Robert, claimed the whole sum, upon this ground, that Janet being substitute by the father to Robert, without any mention of Janet's heirs, Janet having died before Robert, she had never right, and her substitution became absolutely void, and her heirs not being express, this substitution cannot extend to them; because, though ordinarily heirs are comprehended though not express, *qui acquirit sibi acquirit suis*, yet here is no acquisition, but a voluntary substitution, whereby it may be rationally conjectured the mind of the defunct was, that he would prefer Janet to Robert's heirs of line, not being heirs of his body; but not that he would prefer Janet's heirs, which were a degree further from his own other bairns. And the case of substitutions in the Roman law was urged, that if the substitute died before the institute, the substitute's heirs have never place. It was answered, That institutions and substitutions with us do far differ from the Roman substitutions, whereby, if the institute succeed, the substitute has never place as heir to the institute, but the institute's heirs whatsoever; which failing, the institute is there interpreted so, that if the institute never be heir, then the substitute has place as heir of tailzie and provision to the institute; so that here Janet's heirs are heirs to Robert, who had no heirs of his body, and do exclude William his brother; and, though Janet's heirs be not mentioned, yet they are understood and comprehended, because in tailzies and provisions there uses never to be an institution or substitution of a single person without the heirs of their body; and though there be some singular cases, in which heirs, not being express, are not comprehended, this is none of them. It was further alleged for William, That William and Janet being substituted jointly, Janet deceasing before Robert, her share accresces to him *jure accrescendi ex conjuncta substitutione*. It was answered, That there is here only *substitutio conjuncta verbis*, but *disjuncta rebus*, for the sum is declared to belong to William and Janet equally, so that each of them has but right to a half.

THE LORDS preferred the heirs of Janet ; and found, that they had right as heirs of provision to Robert, and that they ought to be served to him, and not to Janet, who had never right herself, having died before she was or could be heir to Robert. See SUCCESSION.

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Fol. Dic. v. 1. p. 303. Stair, v. 1. p. 657.

. Gosford reports the same case :

1669. *July 24.*—IN a double pouding, raised at the instance of the Earl of Errol, debtor by bond in the sum of 8000 merks, to Patrick Innes of Tisbury, whereof he had assigned 6000 merks to Robert his son, and in case he should happen to die, that the same should fall to William, Margaret, and Janet equally, the question was, that Janet having died before Robert, and having left a son who was heir, whether or not, by virtue of the substitution, which was only conditional, in case of Robert's decease before the person substitute, and the substitution not being made to the heirs of the person substitute, the said Janet's son should have right to that portion which should have fallen to her if she had survived her brother?—THE LORDS found, that the said Janet's son had right notwithstanding, and that there was a great difference betwixt a tailzie in a personal bond by way of substitution, and a tailzie of lands, as likewise betwixt them and legacies, wherein several persons are substitute in case of decease, or several legatars substitute, any of them dying before the first persons in the tailzie of substitution, their heirs have no right by the civil law ; and this assignation, made by a father for the provision of his children, to a bond granted by himself in the terms foresaid ; in which cases the LORDS found, by our law and practise, any of the persons substitute dying before that child, by whose decease, without heirs, his portion is to fall to the rest, the heirs or executors of that person deceasing, will come in alike with the rest of the persons substitute who survive.

1670. *January 5.*—IN the foresaid cause, of Innes against Innes, it being further *alleged*, beside the grounds of the civil law, as to substitutions and legacies, that the said Janet, who was one of the persons substitute, was only provided to succeed conditionally in case of failzie of Robert, which condition was never purified, she dying before him, and so could transmit no right to her heirs or executors ; as likewise, that, in this case, there being three persons substitute, who were *conjuncti re et verbis*, one of them dying, the surviving had only right *jure accrescendi*.—THE LORDS, notwithstanding, did adhere to their former interlocutor, in respect that the assignation made by the father was not conditional, being conceived as said is ; neither were they *re et verbis conjuncti*, but, on the contrary, did assign the whole debt due by the Earl of Errol to them, and their heirs ; and, in case that the said Robert died, did assign them equally to succeed to his part. But in case the debate had fallen upon a tailzie of lands

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to several persons, and failing of the first, and heirs of his body, to the second and third, without mentioning of heirs, the second dying before the first person of the tailzie, and leaving heirs behind him, whether his heirs, or the third person mentioned in the tailzie, would succeed, the question would be more difficult.

Gosford, MS. No 191. p. 76. & No 218. p. 87.

No 61.

A bond being granted to two sisters in fee, and the longest liver of them, neither the husband of the first deceasing, nor her executors, will have right to any part thereof.

1673. *January.* ISOBEL and GILES ARCHIBALDS *against* OGILVIE.

IN a double poiding, raised at the instance of Mr Thomas Hay, who was cautioner in a bond of 2000 merks granted to the said two sisters, there being compearance made for the son of Alexander Ogilvie, who had married the said Isobel Archibald, one of the said sisters, to his second wife, it was *alleged* for him, That he ought to be preferred, at least to the half of the sum due to his mother-in-law; by his father's marriage with her he had right to her part of the sum *jure mariti*, the bond being moveable. It was *answered* for the said Isobel, That the bond being granted to her and her sister Giles, and the longest liver of them two, their heirs and executors, her husband dying while both the sisters were alive, no part thereof could belong to her husband's heirs or executors, and he could have only right to her part of the annualrent during the marriage, seeing the fee of the sum was provided for the longest liver of the two sisters, and could not belong to the other sister. *2do*, The bond bearing annualrent to be paid during the not payment of the principal sum could not belong to Ogilvie her husband's executor, who survived her, because, by the act of Parliament 1641, such bonds are declared only to be moveable as to all persons *nisi quoad fiscum et relictam*; and as to Isobel, or her executors, could have had no right, if the bond annualrent had been made to her husband, so neither ought his executors to have right he dying before her, there being *par ratio*.—THE LORDS did prefer the said Isobel, and found that the fee of the bond could not fall to Ogilvie, nor his executors, unless the said Isobel's sister Giles had died during the said Isobel's marriage with Ogilvie; but, if it had been so, it is thought that it would have belonged to him, and so the wife had only right *jure relictæ* to an half or a third part thereof; and the husband would not have been excluded upon the act of Parliament 1641.

Fol. Dic. v. 1. p. 297. Gosford, MS. No 567. p. 307.

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1736. *December 17.* BURNET *against* BURNET.

MR ALEXANDER BURNET, minister of the British congregation in Dantzic, made his will in the year 1712, wherein he names certain trustees, (and whom he calls the executors of this his last will), to see to the ordering and managing