

1680. November 18.

MURRAY against MURRAY.

WILLIAM MURRAY having charged John Murray for 500 merks contained in his bond, he suspends upon this reason, that by the bond it is provided, 'that the sum is payable to the charger, and the heirs of his body, and if he have no heirs, to accresce and belong to the debtor,' and therefore he cannot lift the principal sum, but only the annualrent; at least he must find caution to re-employ it in the same terms. The charger *answered*, That the bond being for borrowed money, the debtor is only substitute heir to the creditor in case he have no heirs of his body, and thereby has only *spem succedendi*, but the creditor remains fiar, and may uplift and dispose upon the same at his pleasure, and alter the substitution, as any man may alter his heirs of tailzie or provision; for this is no conditional bond, nor is there any anterior cause that might infer an obligation upon the creditor not to change the substitution, as when parents cause their heirs apparent, or do themselves give bonds of provision to children, to pay such sums to the children and heirs of their body, which failing to return to the granter or their heirs.

THE LORDS found, that this was but a mere gratuitous substitution, which the creditor might alter at his pleasure, unless an anterior cause were shewn.

Fol. Dic. v. 1. p. 308. Stair, v. 2. p. 301.

* * * Fountainhall reports the same case :

ONE suspends a charge on a bond on this reason, that it bore a clause in case the creditor died without heirs of his own body, then the sum shall fall in to the debtor, and he craved to have him find caution to re-employ it in the same terms. *Answered*, He is absolutely fiar. THE LORDS found, seeing there was no onerous cause condescended on for the substitution, that he might uplift and dispose of the money at his pleasure; but where a provision is given by a father to his child with a tailzie to another child, or where one tailzies his fortune for onerous causes, the case will alter.

Fountainhall, MS.

1683. February.

LOWRIE against COLONEL BORTHWICK.

COLONEL BORTHWICK of Ditchmount having granted bond to Martha Borthwick, his sister, for 4000 merks, with this provision, if she should de cease before her marriage, the sum should return to the Colonel; and she having assigned the bond to Jean Forrest her niece, and she having transferred the same to Thomas Lowrie, who having pursued the Colonel for payment, *alleged* for the defender, that Martha Borthwick the cedent, having deceased unmarried, the bond became extinct, and the sum did return to the Colonel, conform to the provision of the bond. *Answered*, That she being fiar of the sum, as she

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A charge on a bond was suspended, because it bore a clause. 'in case the creditor died without heirs of his body, the sum should fall to the debtor, or, who now craved that caution should be found to re-employ it in the same terms. The Lords found, that the bond being for borrowed money, and the substitution gratuitous, the creditor might uplift the money at his pleasure.

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A brother granted a bond to his sister for an onerous cause, with this provision, 'that if she should