1680. *November* 18. MURRAY *against* MURRAY.

No 27.
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 debt- '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.

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 obligement 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.* 801.

*** 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.

No 28.
A brother granted a bond to his sister for an onerous cause, with this provision, 'that 'if she should

COLONEL BORTHWICK of Ditchmount having granted bond to Martha Borthwick, his sister, for 4000 merks, with this provision, if she should decease 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, *alledged* 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

No 28.
'die unmar-
'ried, the
'sum should
'return to
'the grant-
'er.' The
Lords found
the brother
liable to pay
the bond to
her assignee.

might have uplifted, so she might have disposed of it as she pleased; and that provision in the bond was but of the nature of a substitution, which could only take effect in case the said Martha had not assigned and disposed of the sum in her own time, which she having done, it ought to be effectual, especially seeing it bears to have been granted for onerous causes. *Replied*, That the said clause in the bond is not of the nature of a substitution, but of a condition, and is *resoluta obligationis* whenever the same exists, for that albeit it pass a thousand hands, *transit semper cum onere;* and albeit that clause should import a substitution, yet it is clear by a decision, Bonar against Arnot, Jan. 1683, *voce* PROVISION TO HEIRS AND CHILDREN, that the creditor could not frustrate the effect thereof by granting any assignation or any gratuitous evident. That albeit the assignation made by the said Martha to Jean Forrest, the pursuer's cedent, be for onerous causes, yet she being the said Martha's sister's daughter, and so a conjunct and confident person, the narrative of the assignation cannot prove the onerous cause, unless it be otherways instructed. And albeit the assignation were for an onerous cause, yet it cannot be respected, because it was not intimated to the Colonel before Martha the cedent's decease; so the assignation not being intimated, the fee of the sum was not validly transmitted before the condition existed by Martha's decease; for the sum being in *bonis defuncti* of Martha, the assignation not having been intimated before her decease, *ipso momento* that she died, the condition of the bond being purified, the sum did belong to the Colonel, whether the clause in the bond be understood a resolutive condition or substitution. THE LORDS, before answer, did ordain either party to adduce what adminicles they had to prove that the bond was granted by the Colonel for onerous causes, or only for love and favour; and there being witnesses adduced, which did prove that the cause of granting the bond was, that the Lord Balmerinoch being debtor to Martha in the like sum, she did assign the same to the Colonel, and did get from him this bond in place thereof, which being advised, the LORDS found the Colonel liable for the sum.

Fol. Dic. v. 1. *p.* 308. *Sir Pat. Home, MS. v.* 1. *No* 396.

*** Harcarse reports the same case:

A BOND for 4000 merks, granted by Colonel Borthwick to his sister, and to her heirs and executors, being assigned to Jean Forrest for onerous oauses, and pursued for by Thomas Lowrie, to whom it was transferred by the assignee his debtor; it was *alleged* for the defender, That the bond contained a provision, that in case the creditor died unmarried, or should marry without his consent, the bond should be null, and the money return to himself; and therefore payment cannot be sought, except upon caution to refund in that event.

Answered for the pursuer; That the foresaid clause is not adjected to the obligement to pay, so as to make it condititional, but is conceived by way of a distinct clause, and so is the case of a substitution; which clauses are adjected to cut off executors and others succeeding *ab intestato*, but not to restrain the effect of dominion, and liberty to uplift and dispone for onerous causes; and

the sum pursued for was liable to arrestment for the cedent's debt, and if move- No 28.
able, would have fallen by horning under her escheat. The debtor again being her brother, who was heir and executor to their father, gave her only the foresaid provision; and where a father provides, that, failing younger children before their marriage, their portions should accresce to the survivors, or to the heir; yet these portions may be uplifted, disposed on, and spent for rational and onerous causes.

THE LORDS, before answer, ordained the onerous cause both of the bond and assignation to be instructed.

IN the case of Thomas Lowrie *contra* Colonel Borthwick, mentioned *supra*, it was further *alledged* for the defender, That the clause to return the sum, in case the sister died unmarried, or married without his consent, being a separate clause, not conceived in the usual terms, of 'which failing, &c.' cannot import a substitution, but a condition and provision. 2*do*, The bond assigned was given in place of a bond of provision granted by the father, with the same clause, though it doth not relate thereto; and such clauses in bonds of provision to return to the heirs, import a condition which cannot be disappointed by any voluntary gratuitous assignation. 3*tio*, The sister's assignation, though it bears onerous causes, the onerous cause must be otherwise instructed, since it was made to a conjunct person.

Answered, The creditor in a bond for onerous causes, allowing such a clause for the return of the money, being, in some sense, a voluntary tailzie, may alter at his pleasure, or assign without any onerous cause; November 1680, John Murray *contra* William Murray, No 27. p. 4339. 2*do*, Though conjunct persons *contra extraneos creditores*, ought to prove the onerous cause of rights granted to them, that is not to be required in this case, where both parties are conjunct persons, the defender being the cedent's brother, which takes off the legal presumption.

THE LORDS decerned in favours of the pursuer.

Harcarse, (BONDS.) *No* 182. *p.* 39. and *No* 199. *p.* 44.

No 29.
A bond of provision was granted with this condition, that if the party died unmarried, the sum should return to the granter. She assigned the debt gratuitously, and died unmarried. The Lords reduced the assignation.

1683. *December.* SCOTT of Mangerton *against* SCOTT of ANCRUM.

SIR FRANCIS SCOTT of Mangerton having granted a bond of provision to Mary Scott his daughter, for the sum of 3000 merks, and in case she should decease unmarried, then the sum should return to Sir Francis, and his heirs; and Francis Scott his son having renewed the bond to his sister, in the same terms, and she having assigned the bond to Sir Patrick Scott of Anerum, to take effect after her decease, in case she deceast without heirs of her own body; Mangerton pursues a reduction of the said assignation, upon these reasons, that he was creditor by the conditional provision in the bond that in case his sister died unmarried, the sum should return; and the case having existed, she having died unmarried, the bond became null, and she could not