

SECT. IX.

Alimentary Provision, where the Grantee comes to be otherwise provided. Condition, *Si sine liberis decesserit.*

No 49.

1688. July 13. GRAY of Crichtie *against* MARQUIS of MONROSE.

THE Marquis of Montrose having granted a bond for 800 merks yearly to Lady Jean his sister, expressing to be for her aliment and subsistence, and the said Lady Jean having afterwards, through the moyen of the late Marquis, son to the granter, obtained a yearly pension of L. 100 from the King, she neglected several years to call for the 800 merks; but at her death she legated L. 150 Sterling to the Lady Gray, with whom she had staid, and 2000 merks Scots to the physician that had attended her eleven years, which legatars pursued this young Earl.

Alleged for the defender; That the testator having a sufficient fund of aliment by the L. 100 pension, the impulsive cause of the bond ceased; especially considering, that the pension was procured by the defender's father.

THE LORDS decerned, because though the aliment was the impulsive cause of the bond, it did not cease to be effectual by the supervenient accession of the pension.

Fol. Dic. v. 1. p. 429. Harcarse, (ALIMENT.) No 24. p. 6.

No 50.

1738. November 21. MAGISTRATES of MONTROSE *against* ROBERTSON.

IN a provision to children, whereby the deceasing's part was declared to fall to the surviving children, it was found that the part of one descended to his children; it being the implied or presumed will of the father, that the substitution to the survivors should take place only *si instituti sine liberis decesserint.*

Fol. Dic. v. 1. p. 430. Kilkerran, (PROVISION to HEIRS and CHILDREN.) No 3. p. 455.

* * * C. Home reports the same case :

IN the year 1697, the Magistrates of Montrose borrowed 200 merks from David Robertson, for which they granted their bond, obliging themselves, &c. to repay the said sum to him and his wife, for their life rent use allenary, and to James, David, Alexander, and Isobel Robertsons, their lawful children, equally amongst them in fee; and, in case of the decease of any of them, that the same should be equally divided amongst the surviving bairns. David Ro-

Robertson and his sons having died, Isobel, *anno* 1721, claimed payment of the bond from the Magistrates, as her father's only surviving child, and, upon that account, having right to the fee of the whole, in virtue of the foresaid substitution. Accordingly, the Magistrates paid the bond, and took her discharge; after which a process was brought against them, *anno* 1735, at the instance of James Robertson, shipmaster in St Andrews, son to James Robertson, one of the substitutes in the bond, who claimed payment of such share thereof as belonged to his father. After this, the pursuer went out of the country; and the process having fallen asleep, the Magistrates, in order to bring the question to a speedy conclusion, brought a declarator, to have it found, that the above discharge was a sufficient exoneration of the debt to them.

Pleaded for James; Though, by the above bond, it was provided, that, upon the decease of any of the fiars, their share shall accresce to the surviving bairns, yet the same could only be understood, in case they shall decease without leaving children; therefore, so far as concerned his interest in the bond, the payment made to Isobel was unwarrantable. In support whereof, it was observed, that where a father makes a provision in favour of a child, and, failing him by decease, substitutes another person, or even another child, that, in such a case, it is always understood, that the substitution is only to take place, in case the institute die without children, *inest conditio, si sine liberis decesserit*. Nor is there any thing more agreeable to natural equity, than for a father, when he gives a provision to a son, to give it, failing that son, to his children; as the only end and design he can have in giving thereof to his children, is, to enable them to set out in the world, support their families, and give provisions to their children after them; a doctrine clearly founded in the principles of the civil law, as appears from *L. 102. D. De cond. et demonst. L. 6. Cod. De inst. et substit.* And likewise in our practice, as Lord Stair observes, *Tit. HEIRS*, with respect to the benefit of heirs, that they have right not only to obligations conceived in favour of the defunct and his heirs, but though there be no mention of heirs, unless by the nature of the obligation, there be a specialty appropriating them to the person of the defunct only, as commissions, trust, &c. January 9. 1662, *E. Murray* against *Grant*, *voce* PERSONAL and TRANSMISSIBLE; February 2. 1667, *Powrie* against *Dykes*, *voce* PRESUMPTION; January 5. 1670, *Innes*, No 60. p. 4272.

Pleaded for the Magistrates; That this question depends on the import of the words, which fall to be explained according to their plain and obvious meaning, unless a good reason can be given for the contrary, and such as can be supposed to enter into the mind of the defunct. Nor can the authorities of the civil law, referred to, have any weight with us; as these were merely positive constitutions, that only had force with them in certain cases; particularly where strangers were substitute to children, *ne videatur testator alienas successiones propriis anteponeere, L. 30. Cod. De fideicommiss.* which seems to have been the chief reason of this construction, but cannot apply to the point in hand. Besides, these even did not take place in favour of such children as were exist-

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ing when the substitution was made; because they were understood to be purposely omitted, if not expressly substituted. Now, in the present case, the defender was born long before the grandfather's decease; and, as he could not but have the substitution in his eye every time he looked into the bond, it is to be presumed, that if he had inclined to extend the same to his grandchild, it would have been done by some express deed after the defender was born. In the *next* place, This question cannot be governed by any of the principles of the civil law, as James, the substitute, died before his father David; whereby the defender, upon these principles, could have no claim to any part of his grandfather's succession. *Lastly*, The pursuer's predecessors were *in bona fide* to pay the debt to the surviving substitute, when no other party appeared to interpel them. Neither did they know whether the predeceasing substitutes had left any children or not; seeing none of them appeared to make any claim upon the bond for 14 years.

THE LORDS found, that James's share did descend to his children, notwithstanding the substitution, &c.

G. Home, No 103. p. 164.

1758. December 20. BETHIA YULE *against* JOSEPH YULE.

No 51.

Conditio, si sine liberis decesserit, does not take place, where the father has known of his children without making any alteration.

JOSEPH YULE, when unmarried, and near eighty years of age, lent out two sums of 1000 merks each, upon two bonds. Both bonds bore the money to be borrowed from him, and they were taken payable to him; and failing him by decease, to his brother Joseph. These sums were equal to about one-fourth of his fortune.

Afterwards he married, and had children; he lived three years after the date of the bonds, and two years after the birth of his first child, but never made any alteration in the tenor of the bonds.

Joseph had been in use to impress money into John's hands, to lend out for him; and John, before his death, had been heard to say, that he had taken care of his brother. But whether such sums or conversations had any reference to the bonds in question, did not clearly appear.

Upon John's death, his daughter Bethia claimed these bonds, on this ground, that the substitution to Joseph must be understood to have been under an implied condition, *si sine liberis decesserit*, and fell to the ground as soon as that condition failed by the existence of children; and supported her plea on the authority of the civil law, contained in the response of Papinian, in l. 102. *D. De conditionibus et demonstrationibus*; and l. 30. *Cod. De fideicommiss.* extending the limits of that response; and l. 40. par. 3. *D. De pact.*

Answered for Joseph Yule, The response of Papinian, which introduced the implied condition, *si sine liberis decesserit*, does not apply to the case in hand.