

REPRESENTATION.

13999

THE LORDS repelled this defence, because the pursuer having intented declarator against Annandale in his own life, they thought the provision was equivalent to an interdiction, which purged that passive title.

No 5.

Stair, v. I. p. 106.

1666. July 3.

FLEMING against FLEMING.

No 6.

DAME ELIZABETH FLEMING being executrix to her husband, and tutrix to her children, gave out the sum of 6000 merks to the Lord Cardross, and took a bond, bearing the same payable to herself in liferent, and to Malcolm and Andrew Flemings, and failing the one by decease, to the other. This bond, by a former interlocutor, was found not to be altogether a donation, but it satisfied the two bairns' portions *pro tanto*. Malcolm being now dead, Andrew, the survivor, claimed the sum by the substitution. Thereafter the children, as executors to Malcolm, claimed the same, on this ground, that this sum not being found a donation, but to be given in satisfaction of Andrew's portion, the tutor could not substitute any heir to Malcolm, but behoved to remain as it had been lent, as Malcolm's own means, in which case it would belong to his whole brethren and sisters, and not to Andrew only. Andrew *alleged*, That he being substitute by his mother, who had now right from the remanent children, she who had constituted this substitution could never quarrel the same. It was *answered* for the Mother, That she did not quarrel the substitution; but that albeit the substitution took place, Andrew was her substitute, and so was in the same condition as Malcolm, so that Malcolm's half behoved still to be taken away by compensation, in so far as she was creditor to Malcolm, as if Malcolm were alive. It was further *alleged* for Andrew, That in such a clause as this there was no fiar, and heir, but two conditional, or alternative fiars, viz. either of the children that survived; and therefore such clauses would never make the substitute heir to represent the defunct, and be liable to his debts.

Heir of provision in a bond liable only *in valore*.

THE LORDS found, that, by the clause of substitution, the person substitute was heir of provision, yet not so as to be liable to the person substitute his whole debt, but *quoad valorem* of what the substitute had obtained by the substitution; and therefore found the sums to belong to Andrew as heir substitute, and yet with the burden of the compensation, in the same case as was competent against Malcolm himself.

By which decision it follows, that the Mother's substitution to Malcolm was effectual, for which there is no reason, but the error was in the first concoction, for this sum should have been found a pure donation by the mother, not only in respect of her liferent reserved, which she past from, but in respect of the

No 6. substitution, which she could not pass from, being *jus tertii*. See SUBSTITUTE AND CONDITIONAL INSTITUTE.

Fol. Dic. v. 2. p. 345. Stair, v. 1. p. 386.

* * * Newbyth reports this case :

MALCOLM FLEMING, merchant, burghess of Edinburgh, having deceased *in anno* 1648, having left a considerable estate in money, upon bond, merchant-ware, and counts, and a number of children, to whom his wife Elizabeth Fleming, now spouse to Sir John Gibson, being tutrix, and having confirmed her husband's testament for the behoof of the children, their being a count and reckoning pursued against her, and her husband Sir John for his interest, by Andrew Fleming, who was a posthume, for his part of his executry; and there having been a sum of 6000 merks lent by the said Mother, *in anno* 1650, to the Laird of Cardross, which, by the conception of the bond, is provided to Malcolm and Andrew Fleming, equally betwixt them; and failing of the one's part by decease, to the other; and failing of both, to the mother, with a reservation of the liferent to her; Malcolm being dead, and his part, by virtue of the substitution in the bond, accrescing to Andrew, it was debated, whether Malcolm's part of the bond, which was 3000 merks, did belong to Andrew, with the burden of Malcolm's debt owing by him to his mother, or without any burden. THE LORDS found, that albeit Malcolm being dead, Andrew would have had right to his part of the sums of money summarily, without confirmation, or without a service; yet that the same belonging to Malcolm, could only be transmitted to Andrew with the burden of any debts owing by Malcolm to his mother; and therefore found that she instructing Malcolm to be her debtor, had right to his part of the sums of money contained in the bond; albeit it was alleged, that since it could not fall under Malcolm's executry, it could not belong to his creditors, so that they might affect the same to Andrew's prejudice.

This is a notable decision, and deserves consideration, there being, in my opinion, a great difference betwixt substitution in heritage and moveables. In the former, the right is not transmitted without a service, albeit the party substituted be particularly named therein; but it is far otherwise in moveables, where the substitution is rather like a condition than a substitution.

Newbyth, MS. p. 67.

No 7.
Found, that
payment of
money in a
bond, was un-
warrantable,

1682. December. RIDDOKH against DRUMMOND.

MR DAVID DRUMMOND of Milnab having granted an heritable bond of 2000 merks to William Riddoch, younger, and the heirs-male of his body, which failing, to David Riddoch and the heirs-male of his body, which failing, to the