

No 41.

\*.\* Gosford reports the same case :

THE Lord Rentoun's father having given a bond of provision to Helen Home for the sum of 2000 merks, for which she did pursue the Lord Rentoun, it was *alleged*, that there being a condition in the bond, that in case she should die unmarried, that then the bond should be void and null, therefore, the pursuer, not being married, ought to re-employ the said sum with that same condition, and could not otherways uplift the same, or dispose of the money in prejudice of the defender, in whose favour that condition was inserted in the bond by the father. It was *replied*, that the sum provided to the pursuer being payable at the first term after her attaining to ten years of age, she might uplift the same, and was not obliged to re-employ with the said condition, there being no such obligation annexed to the condition of the bond ; which condition could not hinder a lawful creditor to affect the same by arrestment, the pursuer's right being absolute, and she having power to uplift the same at any term after ten years of age. THE LORDS did find, that the pursuer had power to uplift the same sum without necessity of re-employment, or finding caution that it should be furthcoming in case she should die unmarried ; for the sum of the bond being payable as said is, they thought that the meaning of that clause and condition was only, that in case the said daughter should die unmarried, and should not uplift the said sum, but his eldest son and heir should continue debtor, that then it should not fall or appertain to any of her brethren and sisters, but her provision should be extinct, and his heirs liberated of the obligation, and that such clauses did not hinder the bairns so provided to uplift or assign, or creditors to affect the same.

*Gosford, MS. No 367. p. 179.*

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1682. *February.*

Mrs BROMLEY *against* Her Brother, Sir PETER FRASER of DOORS.

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SIR ALEXANDER FRASER having given a bond of provision L. 20,000 Sterling to his daughter Elizabeth, with this quality, That if she deceased without children, or unmarried, the sum should return to his heir ; she having married, but having no children, pursued the heir for the money, who *alleged*, that she ought to find caution to return it upon the event of the condition in the bond.

THE LORDS decerned the defender to pay, without obliging the pursuer to find caution, reserving the defender's interest as accords.

*Fol. Dic. v. 1. p. 309. Harcarse, (BONDS.) p. 39.*

\* \* Sir P. Home reports the same case :

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SIR ALEXANDER FRASER of Doors having granted bond of provision to Mrs Elizabeth Fraser, his daughter, for the sum of L. 24,000, bearing this quality, That if she should depart this life without heirs of her own body, and unmarried, then and in that case, the foresaid sum should fall and pertain to her father and ——— heirs of tailzie and provision; and she having pursued Mary Fraser, Sir Alexander's relict, for exhibition of the bond, and Sir Peter Fraser, his son, for payment of the sum, as he who stood infeft in the estate of Doors, by disposition from his father, with the burden of his father's debts and children's provisions; *alleged* for the relict, That there could be no process of exhibition sustained against her, because she was not in Scotland, and so cannot be pursued here, but in England where she remains, according to that principle of law, that *actor sequitur forum rei*; for, whatever might be pretended in case the pursuit were for a liquid debt, that process might be sustained to be the ground of a diligence to affect a Scots estate belonging to the relict; yet that reason does not hold in an exhibition of a bond which can be the ground of a debt against her; and, as to Sir Peter, he could not be liable, because the condition of the bond is not existent but is still pendent, and has *tractum temporis successivum*, so that until she be married, she cannot seek payment of the sum; at least, if she do uplift it, she ought to find caution to return the sum to the defender as heir of tailzie and provision, in case the condition of the bond shall exist, that she die without heirs and unmarried; at least she ought to re-employ it as oft as she uplifts it, in the terms of the bond of provision: For in law, such a quality in a bond of provision, made by a father to his child, is equivalent to a condition, and must be understood *cum effectu*, and that it is not in the power of the said Mrs Elizabeth to evacuate the same; at least whatever might be pretended as to just, requisite, and lawful acts; yet, this quality of the bond must be effectual against all voluntary rights, as was decided on the 25th January 1679, in the case of Mr James Daes against Mr John Daes, *voce* SUBSTITUTE, and CONDITIONAL INSTITUTE; where Mr James having granted a bond to his brother for his provision, with that quality, that in case his brother died without children, the sum should return to Mr James; and, he being charged for payment, the LORDS ordained the sum to be re-employed, conform to that destination. And the same was decided in Drummond against Drummond, No 26. p. 4338. where the LORDS found the sister's bond of provision, bearing that quality, she could not make a tailzie or any voluntary deed without an onerous cause, whereby her brother might be frustrated or defrauded of his hope and expectation of that sum, in case she died unmarried; seeing parents may adject any qualities and conditions in their children's bond of provision they think fit, and it cannot be pretended that the condition of the bond has existed; and the pursuer having been already married, seeing the fa-

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ther did not know of her marriage the time of the granting of the bond, which was after the marriage; and, that marriage being now dissolved and her husband deceased, the quality of the bond must now be considered as to the future time, if she be thereafter married; and, albeit the pursuer could uplift the sum without caution, or re-employing the same in the terms of the bond, yet the defender being minor, he cannot be personally liable, not having meddled with the estate; neither can he properly be pursued for the debt, it not being year and day past since his father died; and it was always entire for him to renounce. *Answered*, That as to the relict, process ought to be sustained against her, seeing the pursuer declares she is content to restrict the execution of the decret as to any estate lying in Scotland belonging to the defender, and the personal execution against her in case she be found in this kingdom; and the pursuer is content there be a commission granted for taking her oath. And, as to Sir Peter, the sum by the bond being payable to the pursuer, her heirs, executors, and assigns, she has the absolute fee and property of the sum, and therefore may uplift and dispose of the same at her pleasure. And the foresaid provision in the bond was only to take effect in case of the pursuer's decease, without disposing of the sum by assignation, testament, or otherwise, for the provision itself does in law import no more than a simple right of substitution, viz. that the sum should fall and pertain to her father, and his heirs of tailzie and provision who are substitute to the pursuer, failing heirs of her body; which being but *jus successionis*, the pursuer may evacuate that at her pleasure; and *hoc ipso*, that she may uplift the sum, the substitution becomes null and void, so that she cannot be obliged to find caution to return the sum in case the condition of the bond do not exist, nor is she obliged to re-employ it with that quality, but may dispose of the sum, whether for or without an onerous cause, as is clear by many decisions, both ancient and modern; the 22d February 1623, Leitch, *voce* SUBSTITUTE, and CONDITIONAL INSTITUTE; 10th February 1627, and 25th July 1642\*, and by a late decision, in the case of Bruce against Anderson, No 3. p. 607. and No 27. p. 4232. who was a person substituted in Bruce's contract of marriage, failing children of the marriage; which were in much stronger terms than can be alleged in this case, the sum, by the conception of this bond, being payable to the pursuer, her heirs and assignees; whereas, in the foresaid case, the sum was only provided to the bairns to be procreated, and was a provision contained in a contract of marriage; and, failing of children, to the persons therein mentioned, whose interest was found to resolve in a right of substitution; as also, the provisions in the bond being, failing heirs of the pursuer's body, and that she died unmarried, the condition of the bond already existed, the pursuer having been married, and whether the father knew of her marriage, or that the bond was granted after her marriage, it does not import, the quality of the bond being indefinite, is sufficiently qualified, it being made appear, that the pursuer was at any time married: And the defender being infest upon the disposition from his father, he cannot be allowed to renounce. THE LORDS found the pursuer has right to uplift the sum,

\* See APPENDIX.

and is not holden to re-employ, or find caution for re-employing the same; and therefore decerned against Sir Peter Fraser, the defender, superseding execution until the first of June next, being year and day after the defunct's decease; betwixt and which time, if the defender shall renounce the benefit of the disposition granted to him by his father, and declares he is not liable personally, but prejudice to the pursuer, to proceed and adjudge the lands, and supersedes to give answer to the other point, anent the exhibition, against the relict of Sir Alexander Fraser.

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*Sir Pat. Home, v. I. No 136. p. 212.*

\* \* \* This case is also reported by Fountainhall :

MADAM BROOMLAY, *alias* FRASER, against Sir Peter Fraser of Doors, her brother.—THE LORDS, on Newton's report, found this following clause in her bond of provision from her father the Doctor, for L. 2000 Sterling, viz. that it should be payable to her, her heirs, executors, and assignees; but in case she should die unmarried or without children, then it should return to the father's heirs of tailzie; did not impede her from uplifting the sum, that substitution being only conditional, and at most but *spes successionis*, and a destination which she might evacuate; and that it was *copulativa oratio*, to the verity whereof both behoved to exist; but *ita est*, one of them had failed already, viz. she was married: And therefore the Lords found that she was not bound either to re-employ, or to find caution to re-employ the said sum in the event of her having no children, and dying unmarried. They superseded to give answer to that point, If Sir Alexander Fraser's relict (who was an English woman, and had never been in Scotland,) can be pursued in an exhibition of writs here, seeing *actor sequitur forum rei*; though the pursuer offered to consent to a commission to examine her on the having these writs at London, and declared she would restrict it to affect the estate and jointure she had in Scotland alienarily.

The clause in her bond resembles something the *jus accrescendi inter collegarios* in the Roman law, the application whereof may be considered: Of Copulative Speeches, See § 11. *Institut. de hered. instituend.*—*ibique Vinnium, &c.*

*Fountainhall, v. I. p. 172.*

1687. November 10. DUNCAN SCHAW *against* FORBES of Skellitor.

GEORGE FORBES of Skellitor being obliged, in his daughter Jean's contract of marriage with Duncan Schaw portioner of Crathenare, to pay 1000 merks of tocher, to which the husband was to add 2000 merks, and employ it to him and her in conjunct-fee and liferent, and to the heirs to be procreated of the marriage

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In a contract of marriage, a husband was bound to employ a sum in conjunct-fee and liferent, and