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as Sir Alexander expounded the clause. Alleged, for Mrs. Anne, That this quality of return, in case of her not marrying, was but of the nature of a substitution of his son *eo casu;* whereas in law substitutions do not hinder her, as fiar, to uplift and dispose freely upon it at pleasure; and that the Lords had decided so in a parallel case, Helen Home *contra* the Lord Renton, No. 41. p. 4377. *voce* FIAR ABSOLUTE, LIMITED. Answered, Such clauses barred her from doing any voluntary gratuitous deed to the prejudice of her brother's succession thereto, in case of her dying before marriage; and that she understood it so, appears by a declaration she gave in 1694, obliging herself to do no voluntary deed, nor to make any gratuitous right or assignation thereof. Replied, This annual-rent is not sufficient to maintain me, according to my quality; and therefore I will bargain with some who will buy the stock, and give me an annuity of double annual-rent during my life, to make me subsist more comfortably, upon their getting the stock at my death. Duplied, by her brother, He was willing to settle an annuity upon her as any other; and if 12 *per cent.* were judged too little, he would give more, and take his hazard. The Lords thought her creditors might affect the sum, though she could not gift it away for nothing; and that in such bargains of hazard, her brother offering more ought to be preferred to any stranger; and therefore recommended to the reporter to endeavour to settle them, either by stating an annuity or otherwise.

The Lords at last having advised this case, they found she had right to uplift the sum; but she behoved to re-employ it in the terms and with the qualities of her father's bond, and her own declaration, not to dispose upon it gratuitously. See 28th February, 1683, Barclay, No. 6. p. 4311. *voce* FIAR ABSOLUTE, LIMITED.

Fountainhall, v. 2. p. 251.

1715. *Februvry 3.*

CATHARINE STEVENSON, and MR. JAMES GILLON, Advocate, her Husband, *against* The CHILDREN of the Deceased BAILIE FIFE.

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Effect of the consideration, Whether heritable or moveable? in a substitution.

Alexander Stevenson, Merchant in Edinburgh, takes bond from Young of Winterfield, payable to himself and his wife in liferent, and to their daughter Susanna Stevenson in fee; and failing the said Susanna by decease, to the said Alexander, his heirs, executors, or assignees. Susanna having survived her father, Bailie Fife, who had married one of her father's sisters, does, as tutor to the daughter, oblige Winterfield to give a corroborative security out of his lands for the sum; wherein the form of the original bond is altered, being indeed to Susanna and the heirs of her body, but failing them to his own wife and her two sisters, and the portion of the deceasing to accresce to the survivors; so that Margaret having been the only surviving sister after the niece's decease, and by this means claiming right to the whole, disponed the same to the Bailie's trustee, which is his children's title in the competition.

On the other hand, if the bond should be found heritable by destination, Susanna dying without issue of her body, both her and her father's next heir was one Alexander Stevenson, younger son to Robert Stevenson of Chesters, her father's eldest brother; and Mrs. Gillon, the said young Alexander's sister, having adjudged from him the foresaid subject, this became her title to compete. The question seeming to run upon this, Whether the bond was heritable or moveable by the first destination?

It was alleged for Catharine Stevenson, That the bond was heritable, because it contained a gradual substitution of heirs, viz. to the father and mother in liferent, to Susanna, and failing her by decease, to the father's heirs, executors, or assignees. That it was repugnant such a sum should be moveable and carried by confirmation, seeing, failing Susanna, there was necessarily required a cognition, both of her failure and the heirs of her body, and who was next called; and by our form these points were only cognoscible by an inquest, as Dirleton states a like question upon the word tailzies, and resolves the bond heritable. Conform whereto, it was lately decided betwixt Walker and Simpson, in February 1714, No. 45. p. 5475. *voce* HERITABLE AND MOVEABLE, where, in a contract of marriage, a sum being provided to the future spouses, and longest liver of them in liferent, and to the heirs to be procreated betwixt them in fee, which failing, to the wife, her nearest heirs and assignees whatsoever; the sum was found heritable, and to belong to the wife's heirs, and not to her executors.

Answered for the Fifes, That in bonds where there is no clause of infeftment, nor executors expressly secluded, the sums never belong to the heir, but to executors; and thus the right of this bond came to Alexander's executors *designative*, who are heirs substitute to Susanna the fiar. And though the subject which was moveable by the original bond, became heritable by the supervening right of wadset, yet that nowise altered the succession, as provided by the original bond, but only made an additional security heritable *quoad* the debtor, which is not extraordinary, as is clear in infeftments of annual-rent.

As to the decision founded on, answered, That the same did not meet this case; for there the question was about a succession in a contract of marriage; here the subject is a bond of borrowed money; there, there was a series of substitutions one failing another; here is only one substitution, viz. Alexander Stevenson's executors, as heirs-substitute to Susanna the fiar; there, there was no mention of executors in the clause of substitution, but only of heirs; but here executors are expressly contained in the clause of substitution. And *Lastly*, In the said decision the subject required a service before it could be transmitted, which made it heritable, there being no mention of executors; but here, that defect is supplied by the heritable corroborative security, wherein the three sisters are expressly substituted, and accordingly contained in the infeftment.

The Lords, in regard there was but one substitution in the original bond to Susanna Stevenson, fiar of the sums therein, viz. to the said Alexander Stevenson,

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his heirs, executors, or assignees, found, upon the death of Susanna, the succession by the original bond would have devolved upon the executors of Alexander Stevenson.

1715. *February* 19.—Against the interlocutor pronounced in this cause the 3d instant, finding, That in respect there was but one substitution to the fiar in the heritable bond, upon the death of the said fiar, the succession, by the original bond, would have devolved upon the executors of Alexander Stevenson, in whose favours is was granted, Catharine Stevenson and her husband do now reclaim upon several grounds before proponed, and now upon this separate ground, That granting the succession would devolve upon the executors of Alexander Stevenson, as heirs of provision to Susanna the fiar, yet in this view Bailie Fife's children must subsume, that Susanna's aunts, as her executors, or nearest of kin, were served heirs of provision to her, which they had not done, nor were they of any blood either to Alexander or Susanna, being children of Bailie Fife by another marriage; so that upon the footing of the above interlocutor, Catharine Stevenson and her brother, are the only executors to both, and thereby preferable to the Fifes, who had produced neither confirmation nor service, as heirs of provision in the person of the aunts, nor had they connected any title in their person from these aunts, so as to exclude Catharine's right of blood, which, together with the title she produced from the heir, was sufficient *ad fundandam litem*, since she could always confirm before extract.

Answered for the Fifes, That Alexander Stevenson's sisters needed neither service nor confirmation, because the tutor had saved them the trouble, by taking the bond to them *nominatim*, which they accepted of, and disponed their shares accordingly. And though a tutor cannot by any deed of his alter the course of his pupil's succession, yet he can so far better his pupil and successors their condition, as to save them the trouble of service or confirmation, by taking the right to the successors *nominatim*, who would have succeeded by virtue of the general word executors contained in the first bond; so that in this case the substitution taken *nominatim* to Alexander's executors, on whom the Lords have found the right devolved, established the title sufficiently in the person of these executors, from whom the children of Bailie Fife derive their right.

The Lords adhered to their former interlocutor, but remitted to the Ordinary to hear parties procurators upon this point, viz. If the succession by the original bond would have devolved upon the executors of Alexander Stevenson, Whether tharine Stevenson confirming, or as executors *designativè* serving heir of provision before extract, could be preferred to Bailie Fife's children, they not having shown any right by confirmation or service?

Act. *Sir Wal. Pringle. & Se.* Alt. *Ja. Hamilton & Ro. Dundas.* Clerk, *Sir James Justice.*

Bruce, v. 1. *No.* 52. *p.* 66. *and No.* 81. *p.* 97.