No 13. ought to be considered upon the same footing as a bond of provision by a father to a child; having an implied condition, That if the child predeceased the father, or died before the term when the provision became due, it did not transmit to the child's heir.

Answered for Isabel, This was no bond of provision to a child, William had his own father living to provide for him; but was a debt created by Alexander upon the subject he disponed; and, therefore, like other debts, transmits to heirs. There is nothing in the circumstance, that it was subject to a power of revocation. The disposition to John vested in him the right immediately. The only effect of the power of revocation was, that the right so vested might afterwards have been defeated; but that never happened; and, therefore, it remained always vested in John, with the burden imposed upon it of the debt to William, and, consequently, to William's heir, though William happened to die before the sum was exigible.

"The Lords found, That the conveyance of 3000 merks, in favour of William, was vacated by his predeceasing the granter."

For Isabel, *Montgomery, Lockhart.* For Katharine, *Macintosh.*

F. D. *Fol. Dic. v.* 3. *p.* 300. *Fac Col. No* 60. *p.* 98.

SECT. III.

Deeds containing Substitutions.

1624. *November* 11.

No 14. The Bairns of Wallace of Ellerslie *against* Their Eldest Brother.

A father made a bond of provision in favour of his children, obliging himself to pay to each of them a certain sum, with this clause, that if any of them should die without heirs of their body, their share should accresce to the survivers. Two of the

Umquhile old Wallace of Ellerslie having made a bond in favour of his bairns, obliging him and his heirs to pay to each of them a certain sum of money, by and attour that which should fall to them by his decease, as their bairn's part of gear, and by and attour any legacy which he might leave to them in his latter-will; upon this bond the said bairns pursue their eldest brother, as heir to their father, to make payment to them of the said sums. In the which process, the Lords sustained the action at the pursuer's instance, albeit it was alleged, that the bond was made 25 years before the defunct's decease, during the which whole time, the bond never became the pursuer's evident, nor at no time during the lifetime of the maker, but remained still ever till he died beside himself, and since his decease was only recovered by the pursuers, by what means it is uncertain: which allegeance was repelled, seeing now the bond was in the hands of the pursuers the time of their pursuit, as their evident, which the Lords found sufficient.

No 14.
children having died before their father, it was found, that their provisions did not accresce to the survivers, the bond having remained in his hands during his life.

In this process also, the LORDS sustained the pursuit against the defender, albeit it was not year and day bypast since the decease of his father, as was alleged should have been before process could have been moved against him, conform to the 76th act of the 6th Parliament of James IV. in respect he was convened as heir entered to his father, and not as lawfully charged; and also the LORDS found no necessity that the pursuer should produce and intruct instantly that he was heir, but found it sufficient to prove the same *cum processu*.

Act. ——. Alt. *Nicolson*. Clerk, *Hay*.

1624. *November* 13.—IN the action mentioned 11th November, betwixt Wallace of Ellerslie and his brothers, the LORDS found the exception relevant, whereby it was alleged that the father, in his own time, after the date of the bond, had provided the bairns, in whose favour the bond was conceived, to as great sums, equivalent to the sums provided to them by the bond; which allegeance bearing the said provision, the LORDS found sufficient, being proved, to elide the action upon the bond libelled; and found that the defender had no necessity to say, that the said last provision made by the father, was given in satisfaction of the said bond; seeing that behoved to be understood, that the father would rather liberate himself of his preceding bond, than to have given the said last provision to his bairns, and to have the former obligation still to stand over and above his head, for *quisque magis præsumitur se liberare quam donare*.

In this same process, two of the bairns, in whose favour the provision contained in the bond was made, being deceased before the father, maker of the bond, which bond bore, 'that the part provided to any of the said bairns, who should 'decease without heirs of their own body, should accresce to the rest of the 'bairns surviving;' and the said bairns surviving having pursued for the defunct's bairns part, the LORDS found no action for the part of the bairns who died before their father, notwithstanding of the foresaid clause of the obligation, in respect the bond remained still in the father's hands so long as he lived; so that the same could not be qualified to have come in the hands of the bairns who were deceased, during their lifetime, and so became never their evident; and as that bond would never have produced an action to the bairns against their father, if they had been all living in the father's lifetime, so now two of them being dead before the father, and the provision being appointed to them for their help and sustentation, themselves being dead, none of their brethren could acclaim that part provided for their sustentation, notwithstanding of the clause foresaid bearing, 'that the part of the deceasing should accresce to the survivers.'

Fol. Dic. v. 1. p. 425. Durie, p. 145. & 146.