

there the money was lent by Mortimer the mother, and the bond contained a provision, That failing heirs of the son's body, the money should return to the mother; which was of the nature of a provision or condition, and not a simple substitution; and the mother was not under that obligation to provide her son as the father was; seeing *legitima non debetur ex parte matris, sed tantum ex parte patris*.

Tripled for the pursuer; By the civil law, no institute could disappoint the substitution, even by onerous deeds, *L. 3. § 2. 3. Cod. communia de Legat. et Fidei-commis. Cujac. Oper. quæ edi voluit, Tom. 1. Cons. 22.*; and though our law hath so far receded from the civil law, as to allow to dispone for onerous causes, it allows not of rational, in opposition to onerous deeds; for what is reasonable or unreasonable, is not a question in law, but a question of prudence, which is most uncertain according to the various opinions of mankind; and as to the decision cited by the defender, it makes nothing for him, many things being allowed *favore matrimonii et liberorum*, which is a most onerous cause, that ought not to be drawn in consequence.

THE LORDS found, That Patrick could dispose upon his portion or provision by testament, or otherwise, for causes reasonable, though not onerous, notwithstanding of the substitution in the bond of provision. See IMPLIED CONDITION.

Forbes, p. 450.

SECT. V.

Clause of Return.

1627. January 30. MACKALA against TENANT.

In the cause decided betwixt Thomas Mackala writer, against Mr Joseph Tenant, the LORDS found, That an obligation being of this tenor, viz. 'Where the debtor was bound to pay the sum therein contained to the creditor, herself allenary in her own lifetime, and the annual rent thereof yearly to the said creditor during that time;' whereupon inhibition was executed against the debtor, and bearing, 'that the sum should pertain to the debtor after the creditor's decease;' the LORDS found, That this obligation and inhibition was cessable, and might be transmitted by the creditor effectually in the person of

No 22.

No 23.

A debt was taken payable to the creditor alone, during her life, and the sum to belong to the debtor after her death. Found, notwithstanding, the creditor might dispose of the money at his pleasure.

No 23.

an assignee, and also that the assignee, or the creditor herself, might seek payment of the principal sum from the debtor, notwithstanding of the foresaid clause, appointing the sum to pertain to the debtor after the creditor's decease; which clause did not free the debtor from payment of the principal sum to the creditor, or her assignee, when any of them should seek it, the same being sought in the creditor's own lifetime; but not being sought in her lifetime, it was found that the executor or the heir of the creditor would not have right to seek it from the debtor, in respect of the foresaid tenor of the bond; and therefore, the LORDS found no necessity of caution to make the money furthcoming again to the debtor after the decease of the principal creditor, seeing she or her assignee might dispone thereupon at pleasure.

Act. Aiton.

Alt. Stuart.

Clerk, Gibson.

Fol. Dic. v. i. p. 308. Durie, p. 265.

No 24.

A father provided a younger son in a sum, and for his better payment let to him a tack, with provision, that if the son should die unmarried, the said sum and tack should return to the father, and his heirs male; but if he should decease within year and day after his marriage, but without heirs male of his body, that the right thereof then should be equally divided among his brothers and sisters. The Lords found, that the sum and tack might be comprised from the son for his own debt, notwithstanding the above conditions.

1666. February 7.

L. TILLIQUHILLIE against L. LEYS.

UMQUHILE SIR THOMAS BURNET of Leys, did give in patrimony to his son James Burnet the sum of 10,000 merks Scots; and for his better payment set to him a tack of the lands of Colliscore and others, with provision, that if the said James should die unmarried, the said sum and tack should return to the said Leys himself, and his heirs male; but if the said James should decease within year and day after his marriage, but without heirs male of his body, that the right thereof then should equally be divided amongst his brethren and sisters-german. The said James being major, but unmarried, is debtor to Sir Robert Douglas of Tilliquhillie, who comprised the right of the said tack for satisfying of his debt, and the sum of 10,000 merks provided, as said is; and thereupon pursues a declarator against Sir Thomas Burnet, now of Leys, heir by progress to the granter of the tack, and the said James, his other brethren and sisters, and craves the said sum may be declared, with the right of the said tack, to belong to him, as having comprised in manner foresaid.—THE LORDS found the compriser had right to the sum and tack, notwithstanding of the provisions and conditions therein contained, which they found did not prejudice the said James of his right of *dominium* thereto, but that he was absolute *dominus* of the said sum and tack; and that as he might have dispomed upon the same, so it might be comprised from him by his creditors. This case reported the foresaid day, but did not receive the Lords interlocutor till several days after.

Fol. Dic. v. i. p. 307. Newbyth, MS. p. 55.