

S E C T. III.

Children infest as Substitutes.

1663. January 14. THOMAS BEG *against* SIR THOMAS NICOLSON.

THOMAS BEG charges Sir Thomas Nicolson of Carnock upon his bond of 4000 merks. He suspends, on this reason, the charger is only liferenter, and hath no right to lift the sum, because the bond is conceived thus, 'to Thomas Beg and his spouse, the longest liver of them two, in conjunct-fee, and to the bairns procreate betwixt them, which failing, to two bairns of a former marriage, Thomas and Margaret Begg;' and which bond contains a precept of sasine for infesting the said Thomas and his spouse, and the bairns of the marriage, which failing, the said Thomas and Margaret, bairns of the former marriage; according to which there was a sasine taken, not only to the two spouses, but to the two bairns, *nominatim*, who therefore are fiars.

THE LORDS repelled the reason; because, having considered the bond and infestment, conceived as aforesaid, they found the husband, by the conjunct-fee, to be fiar, and the bairns of the marriage to be destinate heirs of provision, and the said Margaret and Thomas to be only substitute as heirs of tailzie, failing the bairns of the marriage; and that, therefore, if the father had died infest in the annualrent, if there had been bairns of the marriage, they, male and female, jointly and equally behoved to be served specially as heirs of provision to their father, and so infest; and, failing bairns, Thomas and Margaret behoved also to be so served and infest; for albeit there needs no general service where persons are *nominatim* substitute in a personal right requiring no infestment, yet, where there is infestment, there must be a special service. And therefore found the father fiar might uplift the money, or might change the destination thereof as he pleased; and albeit Thomas and Margaret were infest *nominatim*, yet they found the sasine was without warrant, bearing only to infest them in case of failzie of heirs of the marriage, and the infestment could only be granted to the conjunct fiars.

Fol. Dic. v. I. p. 301. Stair, v. I. p. 155.

* * Gilmour reports the same case:

SIR THOMAS NICOLSON of Carnock having granted bond and infestment of annualrent for 4000 merks to Thomas Beg and his spouse, the longest liver of them two in conjunct-fee, and to the heirs or bairns to be gotten betwixt them;

No 44.

A bond was taken payable to a husband and wife in conjunct-fee, and to the children procreated betwixt them, whom failing, to Thomas and Margaret, children of a former marriage.

It was argued, that sasine having been taken, not only to the husband and wife, but to Thomas and Margaret *nominatim*, they are therefore fiars, and the husband only liferenter. The husband was found fiar, and Thomas and Margaret only substitutes.

No 44.

which failing, to two bairns of a former marriage, Thomas and Margaret Begg, whereupon not only Thomas and his wife, but the saids Thomas and Margaret are expressly infest. Thomas and his wife having required and charged for the money, Sir Thomas suspended, upon this reason, that he could not be in security to pay to the chargers, because they could not give him a valid discharge and renunciation of the infestment, without the two bairns who stand infest. It was answered, That Thomas is only fiar, and his wife in conjunct-fee with him, which conjunct-fee, as to his wife, resolves only in a liferent; likeas, by the clause of requisition, the money is payable to him and her, and they have power to redeem; and if there were bairns of that marriage, (the infestment not being redeemed), after their decease, they behoved to be heirs of provision to their father, in regard he died last vest and seased as of fee; and, in this case, *nomen hæredum et liberorum* of the marriage signifies one thing, and the two bairns of the former marriage (failing children of this marriage) behoved also to be heirs of provision to their father; and the sasine given to the two bairns *nihil operatur* and is null, because no body can be seased but the fiar or liferenter; and it signifies no more than if a sasine were given to an heir of tailzie substitute in an infestment, which would be null, seeing no such person can be seased but upon a retour, as heir of tailzie.

THE LORDS found, that the conjunct-fee stands in the man and wife, and that the two daughters were only heirs of provision substitute, failing of the heirs of the marriage; and because the two bairns were not called in this suspension, therefore Carnock raised a double-poining against them also, wherein the father was preferred, there being no compearance for them; yet the Lords considered the case, and decided *in jure*.

Gilmour, No 62. p. 44.

1675. July 23. LAIRD OF LAMMINGTON *against* MOOR.

No 45.

An heritable bond being payable to a father, and after his decease to his two sons *nominatim*, and all three being infest *uni-co contextu*, the father was found fiar.

THE deceast Laird of Lammington having granted bond for 4000 merks to James Menzies of Enoch, bearing, 'The sum to be borrowed from the said James himself, and in name of his sons;' and, therefore, it is payable to the said James, he being on life, and failing of him, by decease, to John and William Baillies his two sons, and failing one of them, to the other surviving, his heirs or assignees; wherein there is a precept of sasine for infesting the father and two sons, who were accordingly infest. The bond in security is disposed by the said James Menzies to Grizel Baillie and John Moor her husband in liferent, and to their children in fee. This Lammington grants bond of corroboration, containing requisition; whereupon requisition being used by the said Grizel and her husband, they charge Lammington, and he suspends, on this reason, that the said Grizel and her husband are only liferenters, and their children are fiars, to whom only payment can be made.