No 28.

the sum pursued for was liable to arrestment for the cedent's debt, and if moveable, would have fallen by horning under her escheat. The debtor again being her brother, who was heir aud executor to their father, gave her only the foresaid provision; and where a father provides, that, failing younger children before their marriage, their portions should accresce to the survivors, or to the heir; yet these portions may be uplifted, disposed on, and spent for rational and onerous causes.

THE LORDS, before answer, ordained the onerous cause both of the bond and assignation to be instructed.

IN the case of Thomas Lowrie *contra* Colonel Borthwick, mentioned *supra*, it was further *alledged* for the defender, That the clause to return the sum, in case the sister died unmarried, or married without his consent, being a separate clause, not conceived in the usual terms, of 'which failing, &c.' cannot import a substitution, but a condition and provision. *2do*, The bond assigned was given in place of a bond of provision granted by the father, with the same clause, though it doth not relate thereto; and such clauses in bonds of provision to return to the heirs, import a condition which cannot be disappointed by any voluntary gratuitous assignation. *3tio*, The sister's assignation, though it bears onerous causes, the onerous cause must be otherwise instructed, since it was made to a conjunct person.

Answered, The creditor in a bond for onerous causes, allowing such a clause for the return of the money, being, in some sense, a voluntary tailzie, may alter at his pleasure, or assign without any onerous cause; November 1680, John Murray *contra* William Murray, No 27. p. 4339. *2do*, Though conjunct persons *contra extraneos creditores*, ought to prove the onerous cause of rights granted to them, that is not to be required in this case, where both parties are conjunct persons, the defender being the cedent's brother, which takes off the legal presumption.

THE LORDS decerned in favours of the pursuer.

Harcarse, (BONDS.) *No* 182. *p*. 39. and *No* 199. *p*. 44.

No 29.
A bond of provision was granted with this condition, that if the party died unmarried, the sum should return to the granter. She assigned the debt gratuitously, and died unmarried. The Lords reduced the assignation.

1683. *December*. SCOTT of Mangerton *against* SCOTT of ANCRUM.

SIR FRANCIS SCOTT of Mangerton having granted a bond of provision to Mary Scott his daughter, for the sum of 3000 merks, and in case she shonld decease unmarried, then the sum should return to Sir Francis, and his heirs; and Francis Scott his son having renewed the bond to his sister, in the same terms, and she having assigned the bond to Sir Patrick Scott of Ancrum, to take effect after her decease, in case she deceast without heirs of her own body; Mangerton pursues a reduction of the said assignation, upon these reasons, that he was creditor by the conditional provision in the bond that in case his sister died unmarried, the sum should return; and the case having existed, she having died unmarried, the bond became null, and she could not

No 29.

make any voluntary or gratuitous assignation in prejudice of that provision in the bond, as was decided the Helen Home against the Lord Rentoun, Sec. 6. *h. t.*, where the Lords found, that a clause providing the sum to return to the Lord Rentoun, failing of his sister and her heirs, behoved to be effectual to the Lord Rentoun against gratuitous and voluntary deeds; and the —— day of February 1679, Drummond against Drummond, No 26. p. 4338.; and the reason is because such a provision in the bond is not properly a naked substitution, but a qualified fee affected with that provision, by which the granter of the bond is constituted a creditor in that event; so that the party to whom the same is granted, cannot do any gratuitous or voluntary deed, to evacuate the same. *Answered*, That the said Mary Scott the cedent being fiar of the same, she may dispose of it as she pleased, either by way of gratuity, or for an onerous cause; and the foresaid clause can import no more but a substitution and destination of succession in favours of the granter of the bond; and as she might have uplifted the sum and lent it out to other persons, notwithstanding of the foresaid provision, by that same reason she may dispose of it as she pleases; and this being a substitution, the pursuer could not come to the right of the bond but by succession, seeing that clause could not transmit the fee of the sum without a formal right; and if the pursuer have right to the sum by succession, then he must represent the defunct, and consequently be obliged to warrant the defender's assignation. THE LORDS sustained the reason of reduction, and found, that the defunct could make any gratuitous voluntary assignation in prejudice of Mangerton, granter of the bond, and therefore reduced the assignation.

Fol. Dic. v. 1. p. 308. *Sir Pat. Home, MS. v. 1. No* 505.

1685. *February* 11.

COLLEGE of EDINBURGH *against* MORTIMER, SCOT and WILSON.

No 30.
A bond for borrowed money was taken to the lender in liferent and her son in fee, with a provision, that in case the son should die without heirs of his body, the sum should return to the lender and her heirs. Found that the son could not assign gratuitously.

————, Relict of Bailie Calderwood, having taken a bond for 2000 merks from one Scot, bearing the receipt of the money from herself, and payable to her in liferent, and to her son Mr Thomas in fee; with a provision, that in case he deceased without children, the sum should return to her and her heirs; the son mortified the money to the College of Edinburgh, and died without children.

In a competition which arose betwixt the College and the Mother, it was *alleged* for the College, That the mother was but heir-substitute in fee to her son, and could not quarrel his deed.

Answered; The mother who lent the money, might qualify the fee as she pleased; and the quality being inserted by way of provision, and not by the words 'which failing,' the son could not dispose of the same *lucrative*, whatever might be pleaded that he could do for an onerous cause.

'THE LORDS found, that the son had but a qualified fee, and could not mortify the money in prejudice of the provision in favours of his mother.' It was here alleged, but not proven, that the fee of the money had been formerly se-