tenements which fell to the pursuer as heir, by uplifting other moveables or heritable sums, since it was *in rem versum hæredis*. No. 2.

Newbyth MS. p. 42.

1675. *July* 23. LAMINGTON *against* MUIR.

No. 3.

AN heritable bond being payable to a father, and, after his decease, to his two sons *nominatim*, all three were infeft *unico contextu*, the precept of sasine being in the same terms. Though the sons were only here substitutes, yet the Lords thought that their infeftment supplied the necessity of a service.

Fol. Dic. v. 2. *p.* 367. *Stair.*

*** This case is No. 45. p. 4252. *voce* FIAR.

1680. *February* 4. ROBERTSON *against* PRESTON.

No. 4.
Persons *nominatim* substituted in bonds, need no service nor confirmation.

MARY ROBERTSON pursues the representatives of my Lord Preston, for payment of a bond due by him to her. They alleged no process, because the bond being conceived payable by the pursuer's father, and failing of him by decease to her, the father was fiar, and she was but heir-substitute; and he having survived the term of payment, the sum was *in bonis defuncti*, and so must be confirmed. It was answered, That bonds of this tenor are always effectual without confirmation, being much more than a conditional assignation, to take effect at the cedent's death; for by the very tenor of the bond, it is intimated and notour to the debtor.

The Lords found no necessity of confirmation.

Fol. Dic. v. 2. *p.* 367. *Stair, v.* 2. *p.* 751.

*** See Thomson *against* Merkland, No. 11. p. 5774. *voce* HUSBAND and WIFE.

1708. *February* 12. KER *against* HOWISON.

No. 5.
An eldest brother being fiar, and the second only substitute, it was found, that the latter, without being served heir in special, could not dispone.

MR. RICHARD HOWISON, minister at Musselburgh, having bought some acres near the windmill of Edinburgh, he takes the rights to his wife and himself in liferent, and to William, his eldest son, and his heirs, which failing to Richard his second son, and his heirs, and they also failing, to his own heirs and assignees; and the sasine bears not only himself and William his eldest son, but also Richard his second son, to be *nominatim et per expressum* infeft. William, the eldest son, going a voyage to the Indies, dies there; whereon Richard the second son serves himself heir in general to William, and dispones these acres to Jean

No. 5. Howison, and Mr. John Lookup, her husband, she being his eldest sister. The second called Rebecca, being married to Archibald Ker, dies, leaving a son, who was served heir in special to William his uncle, who died last legally vested and seised, and thereupon is infeft by the magistrates of Edinburgh, as Gubernators to Heriot's hospital, the superior of these acres; and pursuing for mails and duties, compearance is made for Mrs. Lookup and her husband, who crave preference on the disposition from Richard; against which, Ker repeated his reduction on these reasons, 1*mo*, That their right was a *non habente potestatem*, seeing Richard her author was only served general heir to his brother William, and never infeft, and being only a substitute in the original infeftment, he could transmit no right, unless he had been heir in special, and infeft. 2*do*, Mr. Lookup was curator to his sister-in-law Rebecca, and so was *in mala fide* to take a right from Richard, to the seclusion of them from their brother's succession; and it is a dishonest attempt in tutors and curators to grasp at their pupil's inheritance and succession, which would have fallen to them in law, had not you covetously interposed, and got the sole right to yourself. See Tutor of Stormont *contra* His Pupil, December 1662, No. 202. p. 11524. 3*tio*, To evidence your designs, the very next day after your disposition, you caused him to interdict himself to you as a silly weak lad, and then sent him to Flanders, where he was killed. Answered for Mr. Lookup, that Richard his author was actually infeft, and the father plainly designed it should make Richard fiar in case of William's death, so in effect it was a simultaneous, at least a successive fee. To the *second*, though Rebecca was his pupil, yet Richard was not, and so no law impedes why he might not take a disposition from Richard, who might dispose of his own at pleasure, and owing many obligations to his eldest sister, preferred her; and as he was not his curator, so his liferent was reserved, and likewise the heirs of his own body; and a consequential seclusion of his sister's remote hope of succeeding to him can never make the deed invalid; and the interdiction was a fair rational offer made by Richard himself, as we know sundry persons neither fatuous nor furious have yielded to such restraints, to prevent the importunity of some unkind self-seeking relations. Replied, A successive fee is a chimera in law, for *duo non possunt per rerum naturam esse domini ejusdem rei eodem tempore in solidum*. So that it is incontestible, that William the first institute was fiar, and Richard, though infeft, was only substitute, and could never have right without a special service to William, and infeftment thereon; and though Richard was not his pupil, yet Rebecca the sister was; and it is inconsistent with the sacred office of curatory to divert her *spes succedendi*, and engross it to yourself; and for the interdiction, his weakness and notour simplicity being the cause of it, could not creep upon him in one night, and therefore it must be presumed he was as weak when he gave you the disposition, as he was the day after when you bound him up by the interdiction. The Lords found there could not be two fiars at once, and that Richard was only a substitute, and dying uninfeft, Mrs. Lookup's right from him was *a non habente potestatem*, and that Ker needed not serve heir to him, but only to William, who died last vested and seized. Then it was alleged on the 24th

act 1695, that Richard was three years in possession of these acres after his brother's death, and so they could not pass by him, but must be liable for his debts, and bound to make good the warrandice of his disposition. This point not being fully debated, it was remitted to the Ordinary to be farther heard. No. 5.

Fol. Dic. v. 2. *p.* 367. *Fountainhall, v.* 2. *p.* 429.

*** This case is also reported by Forbes.

MR. RICHARD HOWISON, minister at Inveresk, having taken a disposition of some acres of land in the easter croft of Bristo, to himself in liferent, and to William Howison, his eldest son, his heirs and assignees in fee, which failing, to Richard his second son, his heirs and assignees, &c. upon which disposition all were infeft, by symbols given to the father for himself in liferent, and as procurator for his two sons, who are named in the instrument of sasine; after the death of the father and William the eldest son, Richard served himself heir in general to his brother, and then disponed the land to Jean Howison, his eldest sister, and died. Archibald Ker, the second sister's son, being served heir to William, his uncle, and infeft, pursued mails and duties against the tenants; wherein compearance was made for Jean Howison and her husband, who craved preference upon Richard's disposition.

Alleged for Archibald Ker, That he had raised reduction of that disposition, as being granted *a non habente potestatem;* in so far as Richard was only a substitute to his brother William the institute fiar, and could transmit no right to lands that William died infeft in, without being served and infeft as heir in special to him. For the symbol of infeftment given to Richard when William was infeft was superfluous and ineffectual, seeing two fiars in the same subject at one time are inconsistent in law. Nor was the general service sufficient to carry a subject whereupon infeftment had followed; so that Jean Howison's right being null, Archibald Ker, as infeft upon a special service, has undoubted right to the acres.

Answered for Jean Howison, That the father by the strain of the disposition, and his taking infeftment in name of both his sons, designed not a substitution but a successive fee, for preventing the necessity of a service in case of William's decease; and Archibald Ker could not, passing by Richard, serve heir to William, whom Richard was served heir to.

The Lords found, That William was fiar, and Richard only substitute, and without being served heir in special, could not dispone; and therefore the disposition is *a non habente potestatem;* and found, that the pursuer is not obliged to serve heir to Richard, who was only served heir in general to William.

Forbes, p. 237.