INSTITUTE, the Lords found such a provision to return did not impede the power of uplifting it; and here the bond made it very clear, for she had right to call for it, at the term of payment, or any term or time thereafter, notwithstanding of that clause; and the reversion in the decreet-arbitral neither made it better nor worse, unless it had been an irritancy of any right she should make to the prejudice of his succession.—*Replied*, This is not a mere substitution, but a positive quality and condition affecting the bond, which express paction cannot by such voluntary deeds be frustrated, annihilated, nor evacuated.—*Duplied*, This distinction is too metaphysical, for it is neither a suspensive nor a relative condition; not a suspensive, because the bond provides present and immediate execution after its term of payment; not relative, because it neither hinders the calling for payment, nor bears that the obligement shall cease and be void on the non-existence of children; *ergo*, it is nothing but a pure substitution; and a *spes succedendi*, in case of not disposal in her own life.——All the LORDS were clear, in case of poverty or straits, she had right to call for the principal sum; but the plurality carried, that she might assign it to Logan, and the clause could not hinder his uplifting thereof, though it eventually frustrated and evacuated the return; especially seeing she had assigned Logan's bond, which was surrogated in place of her brother's bond, in her contract of marriage with Mr Muir, her husband, and so it was for an onerous cause. Some thought, albeit she and her assignee had right to uplift the money, yet they ought to find caution to repay it in case the condition exist of her dying without children, which cannot be absolutely known till her death, and till which time they enjoy the annualrent of the 2500 merks; but this was not regarded by the Lords. No 44.

Fountainhall, *v.* 2. *p.* 373.

1725. *December* 29. IRVINES *against* IRVINE of Drum.

No 45.

ALEXANDER IRVINE of Drum granted bonds of provision to his two younger daughters, 8000 merks to each, payable at their age of 16 years; 'and in case 'of the decease of either before marriage, or before the age of 16 years, then '2000 merks of the portion of the deceased sister to fall to the survivor, and 'the remainder to the said Alexander Irvine and his heirs.' After their father's decease, both of them being past sixteen, they insisted against their brother for their several provisions, for whom it was *alleged*, That they could not have access to the said provisions, without giving security to re-employ in favour of the defender 6000 merks of the sums provided to them in the event of the decease of either before marriage.——THE LORDS found, That the pursuers ought either to re-employ their portions in terms of their bonds of provisions, at the sight of the Ordinary on the bills for the time; or at their option, before extract, to give bond to repay to the defender, and his heirs of tailzie, such part

No 45. of their portions as by their bonds of provisions are provided to return in the case of their decease unmarried, provided only they have so much free estate over and above the payment of their debts. *See* APPENDIX.

Fol. Dic. v. 1. *p.* 309.

SECT. VII.

Husband's power of disposal over Tocher provided in a Contract of Marriage.

No 46.
A husband, to whom the tocher was payable by his wife's father, to be employed, with as much of his own, upon land, 'to the 'husband and 'wife, and the 'heirs of the 'marriage;' with consent of his wife, assigned the same to his creditors. It was found, that the debtor was not obliged to pay the tocher to the creditors, nor to any other effect than to be laid out in terms of the contract of marriage.

1623. *November* 21. LOGAN *against* L. KINBLECHMONT.

THE Goodman of Kinblechmont being obliged by contract of marriage betwixt his daughter and Mr John Hamilton, to pay to the said Mr John the sum of 4000 merks in tocher, to the effect that the same, and as much to be furnished by the said Mr John, might be employed upon land to the said Mr John and his spouse, and to the heirs to be begotten betwixt them; and Logan, as assignee made by the said Mr John and his spouse to that same sum, which was obliged to have been paid by Kinblechmont, as said is, for satisfying of a debt owing to the assignee by the said Mr John, charges Kinblechmont for payment thereof, who suspends upon this reason, viz. That he was not obliged to pay the sum, but to the effect it might be employed upon land to his son-in-law and daughter, and to their heirs, with the like sum to be furnished by the cedent, as said is; and therefore he could not be holden to pay it to the charger, for satisfying of the cedent's debt, being otherwise destinate, by the tenor of the clause of the contract, which constituted him debtor therein. This reason was found relevant; for the LORDS found, That the assignee could not charge the suspender to pay the sum to any other effect, than according as he was obliged in the contract, seeing the cedent could not ask the same himself, but to that use; and this was found relevant, albeit it was *answered* by the assignee, charger, That he was made assignee both by the husband and the wife, who had the only interest to seek the employment, and who might have disharged the same, being conceived in their favours; for if the sum were employed conform to the contract, the husband might uplift the same, and was master thereof; and so seeing he might uplift the same, if it had been laid upon land, he might also effectually make assignation thereof; which was repelled by the LORDS, seeing the tenor of the parties obligation, who was only obliged to pay for a special end destinate by him, could not be altered without his own consent, who was so obliged.