

S E C T. X.

Whether Propenable against an Heir, who has the Benefit of Discussion.—Where the Debt upon which Compensation is Proponed, is destined to Certain Purposes.

1696. December 18.

The CHILDREN of BAILIE THOMAS ROBERTSON *against* WILLIAM ROBERTSON.

PHILIPHAUGH reported the Children of Bailie Thomas Robertson against William Robertson. Thomas Robertson being debtor by bond to John Robertson, and, failing of him by decease, to William Robertson his younger son, for 2000 merks; when Thomas dies, William the substitute (his father also being dead) gets a bond of corroboration from Thomas Robertson's son; which bond they now suspend on this reason, That the deceased Thomas and John Robertsons, the charger's and suspender's fathers, being bound, conjunctly and severally, for a greater sum to Sir Hugh McCulloch of Pilton, they have paid the whole debt, and retired the bond with a discharge, and so must have compensation.—*Answered*, This is not *inter easdem personas*, as all compensations ought to be; *2do*, This is not competent now, after you have personally bound yourselves by a bond of corroboration, which, though it be no innovation of the debt, yet is so far a delegation as passes from any former grounds of compensation existing before the bond, as this did, and should have been mentioned then; *3tio*, A substitute in a bond cannot be liable for the fiar's debts, to whom he is substitute, not even *ad valorem*, till first all the other heirs be discussed; *ita est*, the charger has an elder brother who is answerable for his father's debts.—*Replied*, This is *inter eosdem*; for *ipso momento* they granted this bond of corroboration, there was *concursus debiti et crediti*; and the granting a corroborative security can never cut them off from any just and legal exception they had against the debt corroborated, such as payment by a discharge; and compensation was equivalent. Yet the law makes several differences between them, and if a corroboration had not that effect to cut off all defences formerly competent, it is little worth, except only that it affords summary execution, which he had not by the first bond.—THE LORDS, by plurality, found the compensation not receiveable in this case, both in respect of the intervening bond of corroboration, and that he was but a younger son, and they might pursue his elder brother, as heir, on these grounds of compensation, to relieve them *pro rata* of these debts. How far substitutes in bonds are heirs, *See* Stair, tit. HEIRS. It is a nice question, how far the institute or first creditor's debt can be obtruded to compensate against the substitute, if no corroboration had here intervened. *See* 3d July 1666, Fleming against Fleming, *voce* REPRESENTATION.

Fol. Dic. v. I. p. 162. Fountainhall, v. I. p. 745.

No 78.

A father took a bond to himself, and failing him a younger son. The debtor, after the father's death, granted a bond of corroboration to the son. Afterwards, he suspended a charge for the same, pleading compensation upon a debt due to him by the father. Found not proponable, until the other heirs were discuss.