No 21. *alleged* for the sisters, That the substitution imported that the defunct could not gratuitously assign, seeing the provisions were small, and the father considered that they might be bettered by the hazard of the substitution.

Answered, The substitution in favour of the survivors being conceived by the clause *which failing*, and not by a separate clause, nor in favours of the heir of the family; which is the case of some practicks, as that of Riccarton, No 26. p. 4338. Craigs, &c.

THE LORDS sustained the gratuitous assignation.——This is not clear, it being a qualified fee, as to lucrative deeds.

Fol. Dic. v. 1. *p.* 307. *Harcarse*, (BONDS.) *No* 212. *p.* 48.

No 22. 1710. *December* 14. SMITH and WALLACE *against* SMITH.

A PARTY having granted bond to his younger children, as a competency for their better living, wherein he obliged himself to pay particular sums to each of them at the first term after his decease; 'and that the same should be in satis-'faction of all portion-natural, or what else they could claim by his death, and 'that the portion of any of them happening to die without heirs of their 'own body, should be divided equally among the survivors;' and one of the children having conveyed his provision to the heir, out of a grateful sense of good offices and services received from him, the LORDS found that he might dispose of his portion for causes reasonable, though not onerous, notwithstanding the substitution. *Fol. Dic. v.* 1. *p.* 307. *Fountainhall.*

*** *See* This case, No 50. p. 3512.

*** Forbes reports the same case:

THE deceased Mr John Smith disponed his land-estate to his eldest son William, and granted a bond of provision to his five younger children after-mentioned, as a competency for their better living, wherein he obliged himself, his heirs and executors, to pay to Patrick Smith L. 2000; to Beatrix 3000 merks, to Susanna L. 2000, and to John and Euphan 5000 merks equally betwixt them, &c.; and that at the first term of Whitsunday or Martinmas after the granter's decease, whenever the same should happen, with the ordinary annualrent from the term of payment; provided that the sums of money so paid, should be in full satisfaction of all portion-natural, or what else they, or either of them could ask or crave through the father's decease; and that, in case of any of these children's decease without lawful heirs of their own body, their portion should be divided equally among the rest surviving. John Smith died before his father, and Patrick died after him, but conveyed what was resting of his portion by testament in favour of his eldest brother William, for good offices received from him.

Euphan Smith, and her husband for his interest, pursued William her eldest brother, as representing their father, for payment of her own portion, and her share of John and Patrick's. No 22.

Alleged for the defender; He is not liable to the pursuer for any part of John's portion; because, he being furnished by his father with all necessaries during his lifetime, and dying before the father, wanted not the sum of 2500 merks provided to him, as a competency for his better living. Again, neither principal nor annualrent being due till the next term after the father's death, and it being uncertain if John would survive his father, *dies incertus habetur pro conditione;* which condition failing by John's happening to die before his father, made the provision fall, 17th January 1665, Edgar *contra* Edgar, *voce* IMPLIED CONDITION.

Replied for the pursuer; The terms of the substitution are general, without distinguishing whether the institute children die before or after the father. *2do*, Had not the father inclined, that the portion of the deceasing *quandocunque*, should belong to the survivors, he would, immediately upon John's death, have altered the bond; which he did not, though he lived after John a considerable time. Who doubts that the vulgar substitution, *si hæres non erit*, comprehends the case, *si hæres esse non potuerit*, by dying before the testator? Or was it ever alleged, that a bond payable to any person at the granter's death, and failing him to a third party, is not due, if the first creditor die; or that a debtor is free, by his creditor's dying before the term of payment? *3tio*, John had a right to his provision, which would by his death have passed to his heirs, had it not been for the substitution which divides it equally among the surviving younger children; for *dabo cum moriar* or *cum tu morieris*, is not an obligement conditional, but *in diem certum*, which *cessit licet non venit*, *L.* 79. *ff. Condit. et Demonstrat. Vinnii Comment. in Instit. de Verb. Obligat.* § 2. The decision betwixt Edgar and Edgar is misapplied, being in the case of a bond payable to children at a certain age, which was uncertain to exist, and *pro conditione habebatur;* whereas it is most certain that all must die. *4to*, Whether John had right or no, by dying before his father; and whether the father's death be considered as a certain, or uncertain day, Euphan being expressly substituted in the event of John's dying without children of his own body, which hath fallen out, she hath right; for the right of a substitute depends not upon a succession to the first institute, but upon the condition of the substitution; and the institute failing, is considered as if his name had never been mentioned in the bond; it being a principle, that *substitutus sub conditione, existente conditione, habetur pro instituto;* so in the case of tailzies, it cannot be pretended that if the first institute die before the granter, the whole substitutes are cut off.

Duplied for the defender; In this case *dies nec cessit, nec venit*, the obligement being payable at an uncertain day, viz. to John Smith if he lived till the term after his father's death, albeit it was certain the father would die. The defender's case is much stronger than that of the Edgars; for John's provision had

No 22. no effect; whereas the Edgars survived the granter of the provision, and enjoyed an interest of five per cent. provided to them till they should attain to the age appointed for payment of the principal sum. The clause of division is no part of the obligement constituting the portion, but is only adjected after it; so that where the obligement for the portion ceaseth through not existence of the condition, the portion, which is not, cannot be divided. Again, the words 'in full satisfaction of all portion-natural, or other things that can be craved 'through the father's decease,' necessarily import, that John could lay no claim to it, without surviving his father; seeing a portion-natural is only due at the father's death. The presumption from the father's not cancelling the bond is of no weight; the father having died shortly after his son, and had little time to think of business; nor was it necessary to alter the bond, which subsisted as to four of the children, and did evanish as to John, by failing of the condition exprest.

THE LORDS found, That the pursuer hath right to her share of John's portion, who died before his father; in respect of the substitution in the bond of provision.

The pursuer did further insist for a share of Patrick's portion, who died after his father.

Answered for the defender; He hath right to what is unpaid of Patrick's portion, as executor and universal legatary to him, which he was made by the defunct out of a rational and grateful sense of the many good offices and services he had done to him, by taking special care of his education, and getting him into a post.

Replied for the pursuer; Patrick could not by any gratuitous deed in favour of the defender, evacuate the father's express substitution of the younger children to Patrick's portion in the case of his dying without heirs of his own body, 31st January 1679, Drummond *contra* Drummond, No 26. p. 4338.; 10th February 1685, The College of Edinburgh *contra* Mortimer, No 30. p. 4342.; for substitutes are to be considered as heirs of provision, and as creditors in the succession.

Duplied for the defender; By the course of decisions, deeds, if just and rational, albeit not for onerous causes in money or value, are sustained, notwithstanding destinations, substitutions, clauses of return, or division; particularly, 16th June 1676, Mitchel *contra* Littlejohn, No 11. p. 3190.; a donation without an onerous and necessary cause to a wife, who died within year and day of the marriage, was sustained as a just and rational deed. As to the decisions cited by the pursuer, they do not meet the present case; for in that of Drummond *contra* Drummond, the bond of provision to the sisters expressly contained a clause, That it should return to the granter himself and his heirs; which is stronger and more favourable than a substitution; and Patrick's disposing by testament in favour of his father's heir, is rather fortified by that practick. The other case betwixt the College and Wilson, is as little to the purpose; for

there the money was lent by Mortimer the mother, and the bond contained a provision, That failing heirs of the son's body, the money should return to the mother; which was of the nature of a provision or condition, and not a simple substitution; and the mother was not under that obligation to provide her son as the father was; seeing *legitima non debetur ex parte matris, sed tantum ex parte patris.* No 22.

Triplied for the pursuer; By the civil law, no institute could disappoint the substitution, even by onerous deeds, *L.* 3. § 2. 3. *Cod. communia de Legat. et Fidei-commiss. Cujac. Oper. quæ edi voluit, Tom.* 1. *Cons.* 22.; and though our law hath so far receded from the civil law, as to allow to dispone for onerous causes, it allows not of rational, in opposition to onerous deeds; for what is reasonable or unreasonable, is not a question in law, but a question of prudence, which is most uncertain according to the various opinions of mankind; and as to the decision cited by the defender, it makes nothing for him, many things being allowed *favore matrimonii et liberorum*, which is a most onerous cause, that ought not to be drawn in consequence.

THE LORDS found, That Patrick could dispose upon his portion or provision by testament, or otherwise, for causes reasonable, though not onerous, notwithstanding of the substitution in the bond of provision. *See* IMPLIED CONDITION.

Forbes, p. 450.

SECT. V.

Clause of Return.

No 23.
A debt was taken payable to the creditor alone, during her life, and the sum to belong to the debtor after her death. Found, notwithstanding, the creditor might dispose of the money at pleasure.

1627. *January* 30. MACKALA *against* TENANT.

IN the cause decided betwixt Thomas Mackala writer, against Mr Joseph Tenant, the LORDS found, That an obligation being of this tenor, viz. 'Where 'the debtor was bound to pay the sum therein contained to the creditor, her-'self allenarly in her own lifetime, and the annualrent thereof yearly to the 'said creditor during that time;' whereupon inhibition was executed against the debtor, and bearing, 'that the sum should pertain to the debtor after the 'creditor's decease;' the LORDS found, That this obligation and inhibition was cessable, and might be transmitted by the creditor effectually in the person of