

## S E C T. VI.

Where there is a clause of return, must caution be found to re-employ the money, if uplifted?

1671. July 4. HELEN HOME *against* The LORD JUSTICE CLERK.

THERE being a bond granted by the Laird of of Rentoun to Helen Home his daughter, obliging him and his heirs to pay the sum to her at her age of ten years complete with annualrent; so long as she should suffer the same unpaid, and then subjoining this clause, that in case she should die unmarried the bond should be void; whereupon the said Helen pursues the Lord Justice Clerk her brother, who *alleged* upon the foresaid clause, that the effect thereof must necessarily be, that the said Helen should make no voluntary gratuitous right in prejudice of her father or his heirs; that the sum should return if she were not married. It was *answered*, that this clause not being the ordinary clause of substitution, provision, or return, cannot be understood a suspensive clause, hindering the lifting of the money, neither yet a resolute clause in case the pursuer marry not; but it can only have the effect of a clause of substitution, that if the pursuer died unmarried, and the sum unuplifted, or disposed, her father's heir is preferred to her own heir, or nearest of kin; for the term of payment being her age of ten years, she might then lift the sum; and there is no provision to re-employ it of this tenor, or to find caution to restore, if she were not married. It was *answered*, that this clause cannot be interpreted as a naked substitution, but as a condition of the bond, equivalent to that which is frequent in provisions to children, and contracts of marriage; that in case the party had no children, the sum should return, which was always interpreted more than a single substitution, and to import a condition or obligation against any voluntary deed or disposition; and though the party be thereby fiar of the sum, yet it imports a limited-fee, with a provision to do no deed in the contrary, without a cause onerous; and albeit re-employment of the sum be not express in this bond, it is implied in the nature of it.

THE LORDS found, that seeing the bond had a particular term, and no condition to re-employ, and the question now was only of voluntary dispositions, without causes onerous, whereof there was none at present existent, the LORDS decerned the sum to be paid to the pursuer, reserving to the defender his reason of preference against any disposition, or assignation, without a cause onerous, if the same should happen to be made.

*Fol. Dic. v. I. p. 309. Stair, v. I. p. 748.*

## No 41.

In a bond of provision with a clause of return, there being no express obligation to re-employ, the sum was found payable to the pursuer without finding caution to re-employ, reserving to the defender his reasons of preference against any gratuitous disposition that should happen to be made.

No 41.

\*.\* Gosford reports the same case :

THE Lord Rentoun's father having given a bond of provision to Helen Home for the sum of 2000 merks, for which she did pursue the Lord Rentoun, it was *alleged*, that there being a condition in the bond, that in case she should die unmarried, that then the bond should be void and null, therefore, the pursuer, not being married, ought to re-employ the said sum with that same condition, and could not otherways uplift the same, or dispose of the money in prejudice of the defender, in whose favour that condition was inserted in the bond by the father. It was *replied*, that the sum provided to the pursuer being payable at the first term after her attaining to ten years of age, she might uplift the same, and was not obliged to re-employ with the said condition, there being no such obligation annexed to the condition of the bond ; which condition could not hinder a lawful creditor to affect the same by arrestment, the pursuer's right being absolute, and she having power to uplift the same at any term after ten years of age. THE LORDS did find, that the pursuer had power to uplift the same sum without necessity of re-employment, or finding caution that it should be furthcoming in case she should die unmarried ; for the sum of the bond being payable as said is, they thought that the meaning of that clause and condition was only, that in case the said daughter should die unmarried, and should not uplift the said sum, but his eldest son and heir should continue debtor, that then it should not fall or appertain to any of her brethren and sisters, but her provision should be extinct, and his heirs liberated of the obligation, and that such clauses did not hinder the bairns so provided to uplift or assign, or creditors to affect the same.

*Gosford, MS. No 367. p. 179.*

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1682. *February.*

Mrs BROMLEY *against* Her Brother, Sir PETER FRASER of DOORS.

No 42.

SIR ALEXANDER FRASER having given a bond of provision L. 20,000 Sterling to his daughter Elizabeth, with this quality, That if she deceased without children, or unmarried, the sum should return to his heir ; she having married, but having no children, pursued the heir for the money, who *alleged*, that she ought to find caution to return it upon the event of the condition in the bond.

THE LORDS decerned the defender to pay, without obliging the pursuer to find caution, reserving the defender's interest as accords.

*Fol. Dic. v. 1. p. 309. Harcarse, (BONDS.) p. 39.*