

No 44.

which failing, to two bairns of a former marriage, Thomas and Margaret Begs, whereupon not only Thomas and his wife, but the saids Thomas and Margaret are expressly infest. Thomas and his wife having required and charged for the money, Sir Thomas suspended, upon this reason, that he could not be in security to pay to the chargers, because they could not give him a valid discharge and renunciation of the infestment, without the two bairns who stand infest. It was answered, That Thomas is only fiar, and his wife in conjunct-fee with him, which conjunct-fee, as to his wife, resolves only in a liferent; likeas, by the clause of requisition, the money is payable to him and her, and they have power to redeem; and if there were bairns of that marriage, (the infestment not being redeemed), after their decease, they behoved to be heirs of provision to their father, in regard he died last vest and seased as of fee; and, in this case, *nomen hæredum et liberorum* of the marriage signifies one thing, and the two bairns of the former marriage (failing children of this marriage) behoved also to be heirs of provision to their father; and the sasine given to the two bairns *nihil operatur* and is null, because no body can be seased but the fiar or liferenter; and it signifies no more than if a sasine were given to an heir of tailzie substitute in an infestment, which would be null, seeing no such person can be seased but upon a retour, as heir of tailzie.

THE LORDS found, that the conjunct-fee stands in the man and wife, and that the two daughters were only heirs of provision substitute, failing of the heirs of the marriage; and because the two bairns were not called in this suspension, therefore Carnock raised a double-poining against them also, wherein the father was preferred, there being no compearance for them; yet the Lords considered the case, and decided *in jure*.

*Gilmour, No 62. p. 44.*

1675. July 23. LAIRD OF LAMMINGTON *against* MOOR.

No 45.

An heritable bond being payable to a father, and after his decease to his two sons *nominatim*, and all three being infest *uni-co contextu*, the father was found fiar.

THE deceast Laird of Lammington having granted bond for 4000 merks to James Menzies of Enoch, bearing, 'The sum to be borrowed from the said James himself, and in name of his sons;' and, therefore, it is payable to the said James, he being on life, and failing of him, by decease, to John and William Baillies his two sons, and failing one of them, to the other surviving, his heirs or assignees; wherein there is a precept of sasine for infesting the father and two sons, who were accordingly infest. The bond in security is disposed by the said James Menzies to Grizel Baillie and John Moor her husband in liferent, and to their children in fee. This Lammington grants bond of corroboration, containing requisition; whereupon requisition being used by the said Grizel and her husband, they charge Lammington, and he suspends, on this reason, that the said Grizel and her husband are only liferenters, and their children are fiars, to whom only payment can be made.

THE LORDS decerned Lammington to pay the sum to the use of the children, but appointed it to be put in the clerk's hands, that security might be taken therefore to the parents in liferent, and to the children in fee, by the sight of the Lords.

No 45.

Lammington further *alleges*, that he being charged upon a bond of corroboration of a former security by infeftment, he was not obliged to make payment to the chargers, because they were never infeft, but had only an assignation from James Menzies the father, who was but liferenter, and his two sons were fiars, and were not only heirs-substitute, because they were infeft in their father's life, and in the same infeftment with him. *2do*, Lammington was not obliged to pay till his lands were disburthened of the infeftment by resignation of persons infeft.

THE LORDS found, that James Menzies the father was fiar, and, during his life, might uplift and dispone at his pleasure; and that the two sons were but heirs substitute, and their infeftment did supply the necessity of infeftment as heir, after his father's death; but found that Lammington ought not to pay, till his lands were disburthened by resignation of a person infeft as heir both to the father and to the sons, they being all dead, and one person falling to be heir to all the three, that no question might arise to Lammington, to whom the fee belonged.—*See SERVICE and CONFIRMATION.*

*Fol. Dic. v. 1. p. 301. Stair, v. 2. p. 360.*

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S E C T. IV.

Whether it is expressed, that the Father is Liferenter only.

1626. July 28. L. TULLIALLAN *against* L. CLACKMANAN.

IN a suspension betwixt the L. of Tulliallan against L. Clackmanan, anent the payment of the principal sum of 4000 merks, and annualrent thereof, which sum Tulliallan was obliged to pay to the L. of Clackmanan, and his spouse, and the longest liver of them two, at Whitsunday 1625; and, in case of their deceases, to Alexander Bruce their son in fee; and, upon this obligation, follows infeftment, after the said term of the said annualrent, for the said principal sum, to the said L. Clackmanan, and his spouse, in liferent, and to their said son in fee. In the said obligation it is provided, that the suspender should be obliged to pay the principal sum at any term whereat he should be charged, notwith-

No 46.

A bond was taken to the lender and his spouse, and the longest liver of them, at a certain term, and to their son *nominatim* in fee; upon which infeftment followed after the