

No 13. THE LORDS found, That Isabel could not dispone gratuitously, and that her share accressed to the surviving disponees.

Reporter, *Lord Polton.* Act. *Pat. Grant.* Alt. *Ja. Roswell.* Clerk, *Mackenzie.*
Fol. Dic. v. 3. p. 214. Edgar, p. 24.

1725. July 17.

JOHN SEMPLE, Surgeon in Edinburgh, *against* ROBERT GEDDES Surgeon there, and JANET MURRAY his Spouse.

No 14.

A father left his second son a patrimony secured on land. Failing this son, and his heirs, the sum was destined to others. The bond was uplifted in the son's minority. He ratified the discharge when major. He executed a settlement including this sum, and afterwards died. Found that the substitution in the bond had been entirely vacated.

DAVID PLENDERLEITH of Blyth, left to his second son Archibald a patrimony of 10,000 merks, which was heritably secured in Blackbarony's hands, the fee was provided to the son, and the liferent of the half thereof to the said Janet Murray, Archibald's mother. The father appointed, that if Archibald should have no heirs-male, lawfully begotten to succeed him, 'That then the equal half of the said sum should belong to Alexander Plenderleith his immediate younger brother, and the other equal half to John the third son: And if the said Archibald should only have heirs-female, then the equal half of the said portion should only belong to the heirs-female, and the other half to his brothers.'

Archibald, as soon as he passed the years of pupillarity, made choice of Mr Geddes (who had married Janet Murray his mother) to be his sole curator; and in a few days thereafter he made a testament, nominating his mother his executrix and universal legatrix.

Mr Geddes immediately uplifted the money from Blackbarony, and did not lend it out again; but Archibald advancing in age, became merchant, and employed his patrimony in trade, and after his majority he cleared accounts with Mr Geddes his curator, and discharged him; he also ratified the discharge, which in his minority had been granted to Blackbarony, of the 10,000 merks; after which he died unmarried, and his mother, as his executrix by the testament, intromitted with all his effects.

Alexander Plenderleith assigned his interest in the half of Archibald's portion to John Semple, who thereupon insisted in a reduction of the testament in favours of Mr Geddes, upon this head, that Archibald's patrimony being by their father's settlement appointed to belong, as to the one half thereof, to Alexander, in case Archibald died without heirs-male of his body, it was not in Archibald's power, by any gratuitous deed or testament, to disappoint Alexander of the half of the said patrimony, for the limitation was at least as strong as a clause of return; yea, so strong was the implied prohibition on Archibald, not to disappoint his brothers, that had he married, and left only daughters, it was not in his power to give them more than one half of his patrimony.

It was *pleaded* in defence, That whatever might have been the effect of the father's destination, if the money had remained in Blackbarony's hands, yet it having been uplifted by Archibald the fiar, with consent of his curator, and thereafter employed by him in trade, the whole effect of the destination did vanish.

It was *answered*, That as it was unjustifiable in Mr Geddes, when he was curator to Archibald, to take from him, when he was so young, a testament in favour of his own wife, so it was plain, that the money was industriously uplifted by Mr Geddes, to disappoint the destination, since it was unquestionably well secured, and the minor could have no use for it, when he was only a little past 14 years of age; and therefore the curator (who was to reap the benefit of this testament) could not be allowed to profit by a device of this kind, in disappointment of the interest of Archibald's brothers in his patrimony, which had been secured to them by their father's deliberate settlement.

Replied, That there was no need to enquire, whether the money was at first unnecessarily uplifted or not, seeing the minor lived to have necessary use for it, and employed it in trade; that after his majority, he discharged Mr Geddes his curator, and ratified the discharge granted by him to Blackbarony; so that the case came to be the same, as if Archibald the fiar had after his majority uplifted his patrimony, and applied it in trade, by which the father's destination would have fallen to the ground.

Duplied, That the substitution was truly a qualified *fidecommiss.* not restraining the fiar from the rational and necessary uses of the money, but subjecting him and his heirs to account to the substitutes for what should remain unspent thereof at his death; for, unto whatever shape the money was turned, the substitute had an interest in the effects, which were the produce of it, as a *surrogatum*.

Triplied, That such a pretence was without example or foundation; for, whatever right a substitute in a bond may have, if the bond is lawfully extinguished, it puts an end to the substitution; and that where the substitute can neither stop the uplifting, nor oblige the institute who uplifts to re-employ in the same terms, he can never have an action for repetition, and consequently the substitution is at an end to all effects and purposes.

THE LORDS, upon the 28th June 1723, had found, 'That notwithstanding the substitution, the institute having uplifted and discharged the sum, he could test on his free executry, in prejudice of the substitutes;' and now they found,

That though the curator uplifted the minor's money heritably secured, during his minority, yet he at his majority having not only discharged his curator of his whole management, but also ratified the discharge granted to the debtor, that the substitution in the heritable bond was thereby vacated, and therefore assoilzied the defenders.

Reporter, Lord Newhall.

Act. Alex. Hay & Arch. Murray.

Alt. Ro. Dundas.

Clerk, Dalrymple.

Fol. Dic. v. 3. p. 214. Edgar, p. 192.

24 P