

understood the same with a tack, or a prorogation of a tack, since it is not so much as a mutual contract.—THE LORDS found the obligation not effectual against a singular successor.—*See APPENDIX.*

*Fol. Dic. v. 2. p. 17.*

No 29.

1749. January 18.

MERCERS *against* MERCERS and JAMIESON.

THOMAS MERCER, Depute Commissary Clerk of Edinburgh, was thrice married, to Sarah Baird, Anna Smart, and Elizabeth Jamieson, by each of whom he had issue; and by his contract with Anna Smart, he became bound to settle 12,000 merks of his own money, together with 6000 merks received of tocher, on himself and spouse, in conjunct fee and liferent, and on the heirs and bairns of the marriage in fee, to whom also he bound the whole conquest; 'providing, that the bond of provision granted, or to be granted to Thomas, Laurence, and Sarah Mercers, his three children of his former marriage, for the sum of 6000 merks, bearing annualrent, was and should be free and forthcoming to the said three children, out of the first and readiest of what stock the said Thomas Mercer had already acquired, or should happen to acquire, and should be in satisfaction to them of all that they, or either of them, could ask, claim, or crave, by or through the decease of the said Thomas, their father, any manner of way, heritable or moveable, whensoever the same, at the pleasure of God, should happen, except there were no children procreated betwixt the said parties; and failing of them, or any of them, by decease, the deceiver's part to fall, accresce, or pertain to the bairn, one or more, to be procreated betwixt the said Thomas Mercer and the said Anna Smart, equally and proportionally amongst them.'

Jean, the only child of Anna Smart, was married, and, with concurrence of her husband, entered into a submission with her father, upon her claim on her mother's contract of marriage, and particularly on the substitution in her favour, to the shares of two of the children of the first marriage, deceased without issue; and a decret-arbitral was pronounced.

Thomas Mercer younger, predeceased his father, leaving children; and Thomas Mercer elder, left, at his death, considerable effects to Elizabeth Jamieson and her children; whereupon the children of Thomas younger pursued them for 2000 merks, provided to their father by the contract betwixt Thomas elder and Sarah Smart.

*Answered,* There is in that contract no obligation in their favour, but only a provision, that a bond granted or to be granted, should be free and forthcoming to them, and no such bond was ever granted.

THE LORD ORDINARY, 9th June 1748, "in consideration of the whole circumstances of the case, repelled the defences pleaded for the defenders, and found them liable to the pursuers for the principal sum and annualrents libelled."

No 30.

A contract of marriage, settling the conquest, with exception of a bond, granted or to be granted to the husband's children of a former marriage, found to give them a right, tho' no bond was ever granted.

- No 30.

*Pleaded* in a reclaiming bill; The intent of the clause was to have it in the power of the father to provide for the children of the first marriage, notwithstanding the obligation he came under by the contract with his second wife, but not to bind him up to give them these sums; and accordingly there is no obligation in their favour, but a faculty reserved to him of granting bonds of provision. To consider this as an obligation would infer an inconsistency, as it is stipulated in favour of the children of Anna Smart, that they should succeed to the shares of those that should fail. Now, as the power of division behoved to remain with him, he could elude this substitution, by allotting the whole sum, or near it, to the survivors; but considering it as a faculty, there arose no debt, and consequently no substitution till the bond was actually granted.

No inference can be drawn from the submission betwixt Thomas Mercer and his daughter Jean, of her right of substitution, as she submitted all pretences, and her claim was the same, whether the shares of the deceased never were a burden on the sums in her mother's contract, or returned to her by the substitution. The bond, in fact, was never granted to Thomas Mercer, in regard of his having received more from his father in his life.

*Answered*; Thomas Mercer's intentions, when he entered into the second marriage, was to provide the children of the first, as it was reasonable he should, and therefore he burdened the contract with 6000 merks to them, over which he reserved no power of division, as he substituted the children of the second marriage *per capita* to the deceasers. A substitution to a right is proper, but a substitution to a faculty is something unheard of; and Jean having right to this substitution, he entered into a submission with her upon that right. There could have been no dubiety, if the clause had not referred to a bond to be granted, which does not appear; but this is only *falsa demonstratio*, and there is no evidence the debt was satisfied in the lifetime of young Thomas Mercer.

THE LORDS adhered.

Act. Lockhart.

Alt. Ferguson.

Clerk, Kirkpatrick.

Fol. Dic. v. 2. p. 24. D. Falconer, v. 2. No 46. p. 44.

No 31.

A minute obliging parties to extend a tack on stamped paper, under a penalty, but not bearing 'attour per- formance,' is binding, and cannot be resiled from on paying the penalty.

1753. August 11.

STEPHEN BROOMFIELD of Mains against JOHN YOUNG of Shankfoot.

By minute of tack, dated 9th April 1750, Stephen Broomfield set to John Young the lands of Hassendean for the space of five years, for which Young was to pay a certain yearly tack-duty; and the minute concludes with these words, 'And all parties agree, that this minute be extended on stamped paper, betwixt and the first of May, under the penalty of L. 10 Sterling, to be paid by the party failer to the party observer or willing to observe.'

A few days after the date of the said minute, John Young intimated under form of instrument to Stephen Broomfield, that he resiled from the agreement of entering into a five years tack; whereupon Stephen Broomfield brought a