

it a legacy, much more when it is a bond of provision and a conditional debt. To make out which, the defender insisted, that though in the common case of legacies left to any person *nominatim*, if the *legatee* die before the testator, he cannot transmit to his heirs the *hope* of legacy, which is all he has at his death; yet, that the person who *devises* the legacy, cannot substitute one to him, so as though the institute fail before the testator, the substitute shall take the legacy, is, he believed, founded in no law. And here the intention of the father is most *enix*; the words are absolute, 'In case of the decease of any of the children before their majority.' And no doubt, this *case* or *condition* is purified, the children dying before their father as well as after; and the other children come in by force of the clause, whatever time that event happen before majority. Indeed, in this case it is not properly by way of *substitution*, that the children draw their share of the defunct's portion, but as *conditional institutes*; which condition is now purified. They have no claim as *successors* to the defunct; they need no service to her; nor when they get her share, will they be liable for her debts. In all the clause, there is not a word that looks like a substitution or succession; the provision is, that one child deceasing, his or her share shall *acresce and be divided*. Had the father designed a *substitution*, he would not have forgot the words, *descend, succeeded by*, and such like; which are rather more common, and which appear to have been shunned of design. That there was here no substitution intended, will further appear from this circumstance, that the share of the person dying before majority was to go to the rest, which could only be as *conditional institutes*; for by way of substitution they could draw nothing; seeing by the children's dying before majority, the condition could never be purified with respect to the institute, who never having had a right, none can be derived from him. The same reasoning will apply with rather more force in obligations than in legacies; and these provisions were truly conditional debts, not at all legacies.

'THE LORDS found, That the provision of the predeceasing child, in this case, accresced to the surviving children.'

Fol. Dic. v. 1. p. 425. Rem. Dec. v. 1. No 77. p. 153.

1748. December 7.

LECKIE against RENNY.

JAMES RENNY, portioner of St Ninians, disposed his whole estate heritable and moveable, to James Renny his nephew in liferent, and David the son of James in fee; burdened with his debts and donations, particularly one of 1000 merks Scots to Andrew Lecky writer, payable with interest from a year and day after his death; excluding James Renny from the administration, which he provided should be in the hands and power of certain persons, amongst whom were the said Andrew Lecky, David Walker, and William Danskin, whom he

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No 16.

No 17.

A legacy being left to one whom the testator named tutor to his heir, it was held an implied condition he should accept the office.

No 17. named to be tutors to the said David Renny during his minority; declaring any three of them to be a quorum.

James Renny died in July 1728; and the tutors, except Andrew Lecky, having accepted of the office, named William Danskin their factor, without taking caution; and it was agreed the pupil's effects were embezzled; but Andrew Lecky *alleged* he had met with them the first day, inspected the writings, and appointed a time for a second meeting; before which they met without his privity, and appointed the factor; and that he often in a year thereafter complained of this conduct, offering to accept if he were removed, and a proper one appointed, and security taken. It appeared also, that, 12th July 1729, he took an instrument against them, complaining of their mal-administration, for which he could not accept the office; but declared he was still willing to accept, if the factor's accounts should be cleared, and a proper factor appointed, with sufficient security. To which it was *answered* by David Walker, that he recalled the factory, in so far as it was granted by him, and by the factor, that he was ready to account.

Andrew Lecky obtained decret before the Sheriff for his legacy; which was suspended, and the suspension discussed at the instance of Robert Lecky his son, to whom the claim was assigned.

Pleaded for the suspender, By the Roman law, a legacy left to a tutor, cannot be claimed, if he excuse himself from the office, *l. 28. §. 1. l. 32. & 33. D. De excusationibus tutorum; l. 5. §. 2. D. De his quibus ut indignis; l. 25. C. De legatis.* This rule is received in our law; Dirleton, word Tutors; Stair, Book 1. tit. 6. § 6. 2d February 1675, Scrymgeour against Wedderburn, No 25. p. 6357.; 16th June 1675, Thomson and Haliburton against Ogilvy and Watson, No 26. p. 6362. And this suspender's claim is most favourable, as he has suffered by the mismanagement of the other tutors; which it was Andrew Leckie's duty to have prevented.

Pleaded for the charger, By the civil law, the tutor did not forfeit his legacy, unless it appeared to have been left as an engagement to serve the office; but however he cannot be said to have ungratefully refused to accept, which is the ground of the forfeiture, where he had so good reason of abstaining, as the mismanagement of the other tutors; which was such that his acceptance could have been of no service to the pupil, as he would have been over-ruled in every thing, and would only have made himself liable for their mal-administration.

Replied, A good excuse for not accepting, will not entitle him to the legacy; since by the civil law, the only case where the question could occur was where there was an excuse, for otherwise a tutor could not decline; and the misbehaviour of the rest was an additional reason why Andrew Lecky ought to have accepted and removed them.

Duplied, He might have been ruined before he could have obtained a decret of removal.

THE LORDS found, that in this case the charger's cedent had no right to the sum given him by the disponer.

No 17.

Reporter, *Elchies.* Act. *Lockhart.* Alt. *Haldane.* Clerk, *Gibson.*
Fol. Dic. v. 3. p. 300. D. Falconer, v. 2. No 19. p. 21.

* * * Kilkerran reports the same case :

ONE of six tutors, to whom a legacy of 6000 merks was left, not having accepted the office, was found not entitled to the legacy, and his answer repelled, that the other tutors had chosen one of their number factor, without taking a cautioner for him ; and that he had offered to join with them, if they would call him to account, and establish a factor who would find caution. It appeared that this offer was made merely in the view to save his legacy, a short time before he raised his process ; that, along with the offer, he had protested not to be prejudged in his legacy, and that he had not taken any measures to secure the pupil against the hazard he suggested, which he might have done by a process for having the other tutors removed as suspected.

Kilkerran, (TUTOR AND CURATOR.) No 13. p. 589.

1760. December 18. MACCULLOCH of Mulderg *against* Ross of Pitcalny.

IN the year 1702, James Macculloch, then of Mulderg, having at that time two sons, granted a bond of provision in favour of his daughter Jean, for 7000 merks, payable the first term after her marriage ; and further, an additional provision in the following words : ' And failing of heirs-male lawfully begotten of my body, I hereby bind and oblige me and my foresaids, to content and pay to the said Jean my daughter, the sum of other 7000 merks, at the second Whitsunday or Martinmas after failing of my said heirs-male,' &c.

James Macculloch was succeeded by his son David, who lived till the 1755 ; and in him the heirs-male of the body of James Macculloch failed. Jean died before the year 1720. Ross of Pitcalny, her son, adjudged the estate of Mulderg, for payment of this additional provision of 7000 merks, the heirs-male of the granter having now failed. John Macculloch of Mulderg brought a reduction of this adjudication.

Pleaded for the pursuer, From the general tenor of this bond, it is evident, that the provision was intended by the granter to be paid to his daughter, only in the event of her living till the existence of the condition at which it is declared to take place. The provision of the first 7000 merks was only to take place in the event of her marriage ; so that if she died unmarried, it could not be a burden upon the family. The same is the case with regard to this additional provision.

No 18.

Additional provision to a daughter, failing heirs-male of the granter's body, does not take place if the daughter dies before the heirs-male fail.