been so although George Auchterlony had declared the trust upon death-bed. The case of *Forbes* is strong—that of *Pringle of Crichton* does not apply; for there was homologation by the heir, and, in consequence of it, a renunciation, by the father, of certain reserved rights.

On the 12th December 1769, "the Lords unanimously found that the annualrents, before Alexander's death, and after George's death, belonged to the heir: also found, that the annualrents from the death of Alexander to the death of George. Found that the trustees are preferable as to the other subjects in controversy." [This is the substance of the interlocutor, though not its words.]

*Act.* H. Dundas. *Alt.* A. Lockhart. *Rep.* Justice-Clerk.

*Diss.* as to second point,—Kaimes, Coalston. *Diss.* as to third point,—Coalston, Hailes, Monboddo. *Non liquet*,—Strichen, Kaimes.

Remitted on appeal.

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1769. *December* 13. MARGARET, HELEN, ELIZABETH, MARY, and AGNES SCOTTS *against* GEORGE CARFRAE.

## LEGACY.

**A Legacy, left to be divided at the legatee's death among her children, falls by the legatee's predecease.**

[*Fac. Coll., IV.* 365; *Dictionary*, 8090.]

AUCHINLECK. The 1500 merks, provided by William Scott to his wife, Isobel Swanston, is made payable at the first term after his death, with interest from that term; "which sum, it is said, the said Isobel Swanston shall leave and distribute amongst her daughters at her death, as she shall think fit." Isobel Swanston died before William Scott, and consequently the 1500 merks were never due to her; and, if not to her, neither to the daughters.

MONBODDO. I think there is ground in law for supporting the claim of the daughters to the 1500 merks. It is the same thing as if William Scott had left a legacy to his wife; whom failing, to his daughters, as she should divide it. "She shall leave." This shows the meaning of the testator. By the Roman law, this might not have been good; but, by our law, a legacy, to a person and his heirs, has been found effectual, though the trustee died before the testator.

JUSTICE-CLERK. The 1500 merks is neither more nor less than a legacy to Isobel Swanston, in case she survived her husband. The intention was, that the daughters should continue in some measure dependant on her; but she predeceased her husband, and consequently the legacy fell. When there is a

substitution, there may be a difficulty, unless circumstances point out what was meant; but there is no substitution here, expressed or implied.

COALSTON. The provision of 1500 merks is a legacy to the wife: it fell by her predecease. Supposing that there had been a *fideicommiss* it would have fallen by the predecease of the wife.

KAIMES. There is no claim for the 1500 merks. Isobel Swanston was only bound to pay a like sum of 1500 merks to her children; no obligation on her to pay the sum, for she never had it.

GARDENSTON. According to a liberal interpretation of the clause, this is the same thing as if the father had settled the fee upon the children.

PRESIDENT. I cannot put a construction upon words which they cannot bear. I know of no intention but what parties express. *Charles, Earl of Selkirk*, meant to give his whole estate to *Lord Daer*,—and yet the Court gave *Lord Daer* no part of it. The supposed *fideicommiss* to the wife would not have prevented the subject from being attached and carried off by her creditors.

On the 13th December 1769, "the Lords found that the provision of 1500 merks fell by the predecease of Isobel Swanston, and did not transmit to the daughters."

*Act.* G. Hepburn. *Alt.* R. Sinclair, Ilay Campbell. *Rep.* Hailes.
*Diss.* Pitfour, Gardenston, Monboddo.

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1769. *December* 13. WILLIAM, LORD HALKERTON, and OTHERS, *against* JAMES SCOTT of Brotherton.

## SALMON FISHING.

Penalties *quoad futura* in the case of the Salmon Fishing of North Esk refused.

[*Fac. Coll.*, *V.* 16; *Dictionary*, 14,276.]

COALSTON. I always doubted of the propriety of the judgments imposing penalties. The Court has been carried away by the idea of the enormity of the offence: it has imposed penalties from 600 merks to L.50 sterling. By parity of reason, it might have imposed a penalty of L.500 or of L.5000. Why inflict penalties on the future transgressors of the laws as to fishing and hunting—and not in every case where there is a judgment *ad factum præstandum?*

HAILES. Of the same opinion. I think the Court is to determine causes when they come before them, instead of perplexing themselves with penalties inflicted before the transgression. If penalties are to be *prepared* in one case, why not in all? And then, by parity of reason, he who is found guilty of a bloodwit may be ordered not to break another man's head under the penalty of