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ditional institute, could not apply to this question; in similar cases, the substitute heirs or legatees were considered as heirs substitute, not as conditional institutes, Stair, 13th July 1681, Chrystie, *voce* SUBSTITUTE and CONDITIONAL INSTITUTE; 8th December 1687, Hamilton *contra* Wilson, *IBIDEM*; 3d July 1666, Fleming, *IBIDEM*. Hence, as service was necessary, and as that, and every other title, had been neglected, the bequest devolved upon the sisters of David, his heirs, and next of kin.

At advising, all the Judges appear to have been of opinion, that this was a substitution *sub conditione*, and not a conditional institution. Some thought, that though the subject was moveable, it was rendered heritable *destinatione*, and that a service was necessary to shew that David and his heirs male had failed; but a great majority were of opinion, that the subject was strictly moveable, and of course no service necessary; the case of bonds of provision, in which it was agreed no service to carry the substitutions was required, being regarded as a pointed illustration and authority.

1770. *March 1.*—They accordingly “adhered to their former interlocutors, preferring Francis Fowke and his attorney to the legacies within mentioned, bequeathed to David and Patrick; and refuse the desire of the petition.” See SUBSTITUTE and CONDITIONAL INSTITUTE.

Lord Ordinary, *Justice-Clerk.* For Francis Fowke, *Macqueen.* For Margaret and Elizabeth Duncans, Daughters of Thomas, *Lockhart, Maclaurin.* For Margaret and Helen Duncans, Daughters of John, *Rolland.* Clerk, *Home.*

R. H.

Fac. Col. No 27. p. 65.

* * * This case was appealed.

The HOUSE of LORDS, 5th February 1773, “ORDERED and ADJUDGED, that the appeal be dismissed, and that the interlocutors therein complained of, be, and are hereby affirmed.

No 39.

1777. *February 27.* POLLOCK *against* GILMOUR.

BARCLAY, a writer, made out, at Gilmour's desire, a memorandum of his proposed settlements, which being approved of by Gilmour, were given to another writer to frame, and were accordingly executed regularly by the testator. In one of these settlements, the testator conveys an heritable bond for 5000 merks, to Janet Pollock his widow, ‘with and under the special burden, that the said Janet Pollock and her foresaids shall be burdened with the payment of the sum of 2000 merks Scots, at the first term of Whitsunday or Martinmas next after the testator's death.’ But no mention is made to whom this sum is to be paid. From the memorandum of the settlements, however, it appeared, that this was an omission of the person who drew the deed, as there

was clear evidence from that memorandum, that this legacy of 2000 merks was meant to be paid to James Gilmour, the testator's brother, who on the widow's refusing to pay this legacy, sued her in an action for that end, and craved a proof for establishing that the memorandum of the settlements was taken by Barclay from the testator's mouth, and was the only rule for drawing them up. The defender *urged* the incompetency of proving by parole evidence any legacy above L. 100 Scots. THE LORDS allowed the proof. See APPENDIX.

Fol. Dic. v. 3. p. 379.

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1778. July 28 TURNBULL *against* TURNBULL &c.

TURNBULL, in his testament, burdened his Executor with a provision of 2000 merks to a niece, in liferent, and to her children in fee. The niece had several children, who all outlived the testator, but predeceased their mother. After the mother's death, it was *urged* for the heir, That the legacy had fallen. THE LORDS found the legacy had not fallen, as the persons in whose favour it was conceived, had all outlived the testator, and that it now belonged to the nearest of kin to the children of the niece.

Fol. Dic. v. 3. p. 378. Fac Col.

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. This case is No 41. p. 4248. *voc* FIAR.

1781. February 13.

THOMAS BOSTON and Others, Children of ELIZABETH HORSEBURGH *against* ALEXANDER HORSEBURGH.

IN 1736, Dr David Horseburgh executed a deed, by which, 'for the love and favour he bore to John Horseburgh of Horseburgh, his brother, he assigned and disposed to him, his heirs, executors, or assignees, the whole effects and debts that should happen to belong, or be due to him at the time of his death, with full power to the said John, whom he thereby nominated his sole executor, (but of whose heirs, it is to be remarked, no farther mention is made) to possess and dispose of the premises.' Then follows a reservation of a power to revoke, 'without consent of his brother above named;' and, after this, an obligation 'upon the said John to pay the Doctor's debts.' And the disposition concludes with a clause dispensing with delivery. But, throughout the whole deed, the mention of heirs is never repeated.

John Horseburgh, who afterwards was married, died several years before the Doctor, leaving a son, the above named Alexander; who, at the Doctor's death, in 1779, obtained himself confirmed executor-dative *qua* dispoinee or cre-

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A disposition *mortis causa* effectual to the heir of the dispoinee, though he himself predeceased the dispoinee, the dispoinee's heirs having been mentioned in the dispositive clause only, while the rest of the deed seemed to relate solely to the dispoinee himself.