1770. *March* 1.

FRANCIS FOWKE of Malmsbury, Esq; and JAMES STORMONTH, his Attorney, *against* MARGARET and ELIZABETH DUNCANS, Daughters of the deceased THOMAS DUNCAN; and *against* MARGARET snd HELEN DUNCANS, Daughters of the deceased JOHN DUNCAN; and their HUSBANDS, for their Interest.

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A man, by his will, bequeathed to his two nephews half of his personal estate, declaring, that his wife should enjoy the interest of it during her life. Found, that the legacy vested in the legatees at the testator's death.

MR DAVID DUNCAN, Rector of Denton, in Yorkshire, was married to Margaret Stirling; he died in 1744, without issue, and his spouse in 1765. Mr Duncan had two brothers, John and Thomas, who both predeceased him. John had three sons and two daughters, Margaret and Helen; Thomas had two sons, David and Patrick, and two daughters, Margaret and Elizabeth; David and Patrick both survived their uncle Mr David, but predeceased his widow, and left no issue.

Mr David Duncan, upon the 12th August 1738, executed his last will and testament; the clauses and provisions of which, material in the present question, are as follow: 'If I should leave no child, I give, devise, and bequeath 'to my wife, Margaret, one-fourth part of all my personal estate, &c. to be 'disposed of as she shall think proper; and, *Item*, I give and bequeath to 'David Duncan and Patrick Duncan, sons to my deceased brother, Thomas 'Duncan, one-half of all my personal estate, which I dispose of between them 'in manner following, *viz*. I give two-third parts of the said half to David 'Duncan, and the other one-third to his brother Patrick. *Item*, I give to the 'three sons of my deceased brother, John Duncan, one-fourth part of my said 'personal estate, &c. And my will is, that, in case any of my nephews, le-'gatees above mentioned, should die before my will takes place, having no 'male children lawfully begotten, then I devise and bequeath the share of 'him so dying to his brother or brothers-german, and to the heirs-male of his 'or their bodies, lawfully begotten, to be between or among them equally di-'vided. *Item*, My will is, that the three last fourth parts of my personal e-'state, above devised, shall not take place, or be paid, until after my wife 'Margaret's decease, if she continues single. *Item*, I give and bequeath to 'my wife Margaret, all the interests or income of my personal estate, to be by 'her possessed during her natural life, in case she shall continue unmarried,' *&c*. And he appointed his wife, and certain other persons, his executors.

Upon the testator's death in 1744, Margaret proved his will, and continued in possession of his effects till her death in 1765. David, the son of Thomas, predeceased his brother Patrick, without issue, and without a settlement; Patrick died in India in 1760, without issue, having left a will of his whole estate in favour of his wife Sophia. Sophia died soon after, having left a will in favour of her children by a former marriage; and by which she appointed her brothers Joseph and Francis Fowke her executors. Francis Fowke proved the

will in the Prerogative Court in England, and obtained letters of administration.

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Upon Mrs Duncan's death in 1765, it appeared that she had made a testament, appointing certain persons her executors. And as, upon this event, the funds of the deceased Mr David Duncan were claimed by different parties, the executors called them in a multiplepoinding.

There was no dispute either as to the fourth of Mr David Duncan's personal estate, bequeathed to his wife, or as to the other fourth, bequeathed to the sons of his eldest brother John. The fund claimed was the remaining half of his estate, bequeathed in the settlement to David and Patrick, sons of his brother Thomas; for which the competing parties were, 1*mo*, Francis Fowke, as deriving right by progress to whatever might be considered as part of the estate of Patrick; 2*do*, Margaret and Elizabeth Duncans, daughters of Thomas, and sisters to David, one of the original legatees; and, 3*dly*, Margaret and Helen Duncans, daughters of the deceased John Duncan, the elder brother of David the testator.

Pleaded for Francis Fowke,

It was an established rule in law, that the right of a legatee was established by the death of the testator; and as both David and Patrick Duncan had survived their uncle, the legacy in question became *vested* in their persons, immediately upon his death in 1744; and, as David and Patrick were *substituted* to one another, in the event of the decease of any of them before the will's taking place, and as David predeceased his brother Patrick, his share, immediately upon his death, became also *vested* in Patrick; and, of course, was part of his estate, and disposed of by his settlements.

To the claim of Margaret and Elizabeth Duncans, the daughters of Thomas, who, admitting that the legacy became vested in their brothers David and Patrick, immediately upon their uncle's death, *contended*, That the substitution of the two brothers, the one to the other, then flew off; so that, upon David's death, his share devolved upon his nearest in kin, *viz.* his brother Patrick and his two sisters; and that, as Patrick had made up no titles to his brother, it could not be carried by the settlements he had executed—it was *pleaded*,

The present case being a *quæstio voluntatis*, must be determined upon a fair and just construction of the settlement, and agreeable to what shall appear to have been the will of the defunct, expressed or implied. No reason could be assigned why the substitution in the present instance should not take place, as well in the event of the legatees surviving the testator, as if one of them had predeceased him. By the old law, the rule was different; the second person named being considered not as a substitute, but as a conditional institute; but this was afterwards justly departed from. Such settlements were considered as proper tailzied successions; and so long as the subject remained *in medio*, and the substitution not altered, the substitute, *ex præsumpta voluntate testato-*

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ris, was preferred to the heir *ab intestato* of the institute, at whatever time he should fail.

To the claim of Margaret and Helen Duncans, the daughters of John, who *maintained*, That, as it was an implied condition in the bequest, that the legatees should survive the widow, and, as this condition had failed, the bequest was lapsed; and, therefore, fell to be taken up in part by them, as two of the testator's nearest of kin—it was *pleaded*,

Though the claimant had no occasion to dispute the general rule in the civil law, that, when a legacy was left expressly *sub conditione*, it hung upon the existence of the condition; yet that there was another rule clearly established, and applicable to the case that occurred. The adjection of an uncertain day, for instance, if adjected not to the legacy, but to the payment, did not make the legacy conditional, nor prevented the transmissions of the right, Sande, *lib.* 4. *tit.* 6. *defin.* 7. *quest.* 3. Vinnius Instit. *tit. de Hæred. Instit.* § 9. *n.* 7. Voet, *ad digest. in tit. de usufructu et quem ad*, &c. § 12. These authorities were strictly applicable to the present question, and the intention of the testator was obvious. The liferent only was given to the wife; and hence it was plain, that the right of the legatees to the fee of the subject *vested* in them upon the death of the testator; and that the *payment* only was suspended till the death of the wife, that her liferent might not be defeated; or, in the words of the authorities quoted, *ne interim turbent uxorem in usufructu*; and upon these principles had the Court determined in the case 1763, the Children of Campbell of Auchenbreck, *

Pleaded for Margaret and Elizabeth Duncans, daughters of Thomas,

Though the bequest *vested* in the legatees at the testator's death, but postponed, as to the payment, till the expiry of the widow's liferent; yet, as a consequence of this proposition, Mr Fowke had no claim in right of Patrick to the share of David. The substitution was not a general one, "whom failing;" which might, perhaps, if David did nothing to defeat it, have, *quandocunque decesserit*, given Patrick a right. The substitution, on the contrary, provided for one event, the death of the legatee before the will took place, *i. e.* when the testator himself died. Now, as that event did not happen, the substitution was at an end; and the legacy being vested in David, devolved, upon his death, to his nearest of kin, his sisters and Patrick; but as Patrick had made up no title, they were, of course, entitled to the whole of that share.

Pleaded for Margaret and Helen Duncans, daughters of John,

1*mo*, Although the testator had gone no further than to declare, that the legacies were payable at his wife's death; yet as they would in that case have been held to be *conditional*, and only due in case the legatee survived the widow, the condition never had existed; so that the bequest being lapsed, things returned to the same state as if Mr Duncan had died intestate, as to this part of his property; which, therefore, fell to be taken up by his four

* Examine General List of Names.

nieces, the daughters of John and of Thomas, his nearest of kin. As it was uncertain whether the time at which the legacies became due, *viz.* the wife's death, should ever arise during the lifetime of the legatees, the case was one of those acknowledged in the civil law, where the adjection of an uncertain day rendered the legacy conditional. Voet, *ad digest. in tit. Quando dies legationis*, § 2. Stair, *b.* 1. *t.* 3. § 7. 17th January 1665, Edgar *contra* Edgar, No. 1. p. 6325.; 21st February 1677, Belsches *contra* Belsches, No. 2. p. 6327.

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2do, The case was much stronger; for the testator had not only said, that the legacies should not be payable till his wife's death, but had expressly declared that his will, as to this half, should not *take place* till then. This, as it was extremely natural, was the only period he seems to have had in view; and hence these words, taken in their usual acceptation, must mean, that the will was to have no force; and, of course, that the legacies should neither vest nor take effect before that event.

Upon advising informations, the Court, upon 15th November 1769, pronounced the following judgment: "Find, that the legacies within mentioned did vest in the legatees at the testator's death; and further find, that the substitution, in favour of Patrick, did take place; and, therefore, prefer Francis Fowke, and his attorney, to the whole legacies bequeathed to David and Patrick."

The first branch of the interlocutor, finding that the legacies vested in the legatees at the testator's death, was acquiesced in by all concerned: But, on the other points, Margaret and Elizabeth, the daughters of Thomas Duncan, gave in a reclaiming petition, maintaining, *1mo*, That, as the predecease of any of the legatees, before the will took place, that is, before the testator's death, and the failure of issue-male of the legatee so predeceasing, were the express conditions upon which the substitution was to take effect, and as the first of these conditions had failed, *quoad* the legacy bequeathed to David, the substitution of Patrick could not take place; *2do*, Upon the supposition that the substitution had taken place, and the legacy had vested in David; yet, as Patrick had neglected to make up any title to this subject, either by service or confirmation, it could not be carried by Patrick's testament, but devolved upon the petitioners, as the nearest of kin, and right heirs to David.

Upon the 2d February 1770, "the LORDS having advised this petition with answers, they refuse the petition, so far as it prays to find that the substitution, in favour of Patrick, did not take place, by reason of the failure of the condition upon which it was made to depend; but, before answer, whether it was necessary for Patrick, by a service, to establish a right in his person to David's legacy; and whether, as he neglected to do so, the same remains in David *hereditate jacente?* they ordain parties to give in memorials thereon."

Pleaded for Francis Fowke,

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1mo, Though the law hath required service or infeftment, or what is equivalent, as absolutely necessary to transfer an heritable right from the dead to the living, it was the genius of the law of Scotland to render the transmission of moveable subjects as simple as possible. Apprehending the possession of the *ipsa corpora* of moveables of the defunct vested the right; confirming a part, vested the whole; and receiving payment from the debtor, or getting renewals of securities, rendered confirmation unnecessary.

More apt instances to the present question frequently occurred. In the case of bonds of provision, containing a substitution of children to one another, the interest of a child deceasing vested in the survivors without a service; and it was an established point, that a *nominatim* substitute in a bond had no occasion either for service or confirmation, as the right vested in him *ipso jure* upon the death of the institute; Stair, 23d July 1675, Laird of Lamington, *voce* SERVICE and CONFIRMATION; 4th February 1680, Robertson against Preston, IBIDEM; Stair's Inst. b. 3. t. 5. § 25. When such was the doctrine in these instances, no reason could be given why the same rule should not hold in the case of *nominatim* substitutes in legacies, whether special or general; and in the case accordingly, Stair, 5th December 1665, Hill against Maxwell, *voce* SERVICE and CONFIRMATION, the very point was decided.

The objection stated, that a service was necessary to shew that the male issue of Patrick and David had failed, did not apply. It was an established rule in law, *quod positus in conditione non censetur positus in institutione*; and as, in this case, the issue male of David were not called by the deed, but would have been entitled only to take up the succession as nearest heirs to their father, in respect the condition under which it was given away to a stranger had failed, it was plain no title was required to be made up in the person of Patrick; who being the substitute immediately to his brother *sub conditione*, rendered it unnecessary to ascertain by a service that the condition was purified; a fact which, like any other, might, if disputed, be established by evidence. Stewart, Ans. to Dirleton, p. 283.

3*tio*, The legatees, in the present instance, must be regarded either as *nominatim* substitutes, in which event, the law was clear, or as conditional institutes, as to which, again, it was a fixed rule, that the survivor, upon the existence of the condition, was entitled to take the whole in his own right. The words of the will were, "In case any of my nephews, legatees, should die before my will takes place, having no male issue, then I devise and bequeath the share of him so dying to his brother or brothers german;" thereby creating the survivor a conditional institute, who was in law entitled to take the bequest in his own right, without acknowledging the deceasing brother, or being obliged to make up titles.

Pleaded for Margaret and Elisabeth Duncans, daughters of Thomas,

It was established in the present question, that David's legacy vested in him by his surviving the testator; that the subsidiary bequest of Patrick to

David had all along been considered as a proper substitution, and not as a condititional institution; and that the substitution of Patrick to David, and *vice versa* of David to Patrick, was not simple and absolute, but failing heirs-male of their respective bodies.

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Upon these premises it was maintained,

1mo, There was no occasion to dispute the principle, that in the case of a *nominatim* substitute, where no nearer could possibly intervene, no service was necessary; but that it was not applicable to the present instance. The substitution of these brothers to one another was not simple and absolute, but the reverse; they were called to each others succession only upon the failure of issue male of their respective bodies, which of course required a service to ascertain the failure, and cognosce Patrick's right. If David had left a son, it was impossible to dispute, but that, in order to take up the right, he must have been served heir; and if a service would have been requisite to the son of David, the first substitute, upon whose failure only the after substitution in favour of Patrick could take place, it would be extremely singular, if Patrick, the second and subsidiary substitute, should be so much in a better situation as to be entitled to vest himself in the right *ipso jure* without a service.

2do, The distinction between a proper substitute and a conditional institute was extremely obvious; and at once shewed that there were no pretensions in the present case to found upon the latter character. If the devise was such, that the substitute legatee, who came to take by the failure of those who were preferred to him, could connect with the testator without the intervention of any other, he became a conditional institute, and would take in that character, though, *ex figura verborum*, the devise was in form of a substitution. But when the legacy or other right had once vested in the person of the first legatee, which rendered all future connection with the testator impracticable, as it was in right of the institute or legatee that the substitute must take, a service of course was requisite. No person, therefore, could be construed a conditional institute but when he connected with that person in whom the right vested, circumstances which did not apply to the present case; and as it was the first legatee only in whom the right vested *ipso jure*; all the substitute legatees must take by succession, one after another, which could only be done by a service.

By the former law, prior to the year 1625, a substitution was understood to import no more than a subsidiary institution; and as soon, therefore, as the institute took, the condition upon which the substitute was called failed. In the year 1625, in the case of Watt *contra* Dobie, *voce* SUBSTITUTE and CONDITIONAL INSTITUTE, the contrary principle was acknowledged, that a substitution took place as well when the institute failed before as after his taking the succession; yet it never was doubted, that after the right was fairly vested in the institute, it could not be taken from under his *hæreditas jacens*, and pass to the substitute, but by a service. The idea, therefore, of Patrick's being a con-

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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, 13thJuly 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.

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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