No 8. age, and the bond contained the following clause: "And in case it shall happen, the said Thomas, Alexander, or William Maitlands, to die unmarried, or within year and day after marriage, without a child; in that case, the equal half of the portion of the person so deceasing, which to Thomas was 8000 merks, shall pertain and belong to Mary Maitland my daughter, if she be in life (she was afterwards Countess of Southesk,) and the other half of the provision of the person so deceasing, shall appertain and belong to the other two surviving, by equal division betwixt them," &c.

And parties being heard upon the import of this clause, the LORDS, on the 15th December, found, "That though Mr Thomas Maitland had died before he attained the age of eighteen, the clause of accretion in the bond of provision would have taken place; and, therefore, repelled the objection to the adjudication; and remitted to the Ordinary to proceed accordingly."

In all matters concerning substitutions, as we have few statutes, we have always followed the civil law. It was thence we had the doctrine that *dies incertus num sit exiturus, pro conditione habetur*. It was thence we had the vulgar substitutions *si hæres non erit*, and in which case only a substitution took place with them, excepting the two instances of pupillar and exemplary substitutions. We have indeed begun to carry the matter farther, and to give substitutions effect, even where the institute becomes heir *et postea decesserit*; the first instance whereof was that of Christie in 1681, *voce* SUBSTITUTE and CONDITIONAL INSTITUTE, and more lately, M'Millan against Campbell, November 1740, IBIDEM. And the question here appeared to the majority to be no other than this, Whether a substitution should take place *si institutus hæres non erit*, which to our predecessors would have been a strange question, as it was the only case in which with them the substitution was allowed to take place; and it were strange, if we should now find that the substitution takes not place in the only case in which our predecessors admitted it, and that it takes place in the case, where, as our law once stood, it did not take place, *si hæres erit, et postea decesserit*, as would appear from Dirleton and Stair to have been the law in their time.

Kilkerran (SUBSTITUTION) *No* 3. *p.* 523.

No 9.
A provision to a grandchild made payable on the grandchild's marriage, or attaining a certain age, lapses by his dying before that period unmarried.

1788. *November* 19. SAMUEL OMEY *against* JANET MACLARTY.

JAMES CRAWFORD, by a trust-deed, settled on Archibald Omey, his grandson, by a son deceased, L. 600, "declaring, That the interest should be regularly paid to him from the first term of Whitsunday or Martinmas after the granter's decease, to his (Archibald's) majority or marriage, which ever of these should first happen, when the principal sums were to be paid by the trustees, and not sooner."

No 9.

Archibald Omey having died before his majority unmarried, and the money being claimed by Samuel and Mary Omey, his brother and sister, as his next of kin, Janet Maclarty, and other executors of Mr Crawford, who opposed this claim, contended, that the provision had lapsed by the death of the grantee, and

Pleaded, Though in proper bonds of provision, those granted by a father to his children, provisions made payable on the children's attaining a certain age, being intended for answering their occasions at that period, become ineffectual, if they shall die before it; yet the constitution of a legacy is understood to be independent of the term of payment. By the legatee's survivorship, the legacy vests, and the adjection of a term of payment serves only to postpone the time at which he or his heir is intitled to claim possession. Such, in conformity to the Roman law, was the decision of the Court, in the case of Burnetts *contra* Forbes, 9th December 1783, *voce* LEGACY. Now, the sum in question is to be considered as a legacy, and not as a provision to a child; the granter not being the father but the grandfather. Besides, the interest having been immediately payable, the principal sum itself must of consequence have likewise been due.

Answered, As the above admission proceeds on the supposition of bonds of provision granted by a father being the just consequence of a natural obligation, so the same obligation lying on grandfathers in their order, it is evident, that there can be no distinction between that case and the present. As to the interests being due in the mean time, this was evidently a separate provision, and distinguished from that which was contingent on the event specified.

The cause was taken to report, a number of other questions having occurred on the construction of Mr Crawford's settlements; when

The Court seemed to admit no distinction between the cases of a father and of a grandfather settling provisions to children or grandchildren. Some of the Judges too doubted the propriety of distinguishing between legacies and provisions to children, holding the rule of the Roman law as equally applicable to both, that *dies incertus pro conditione habetur*.

THE LORDS found, "That as Archibald Omey died before majority or marriage, the sum of L. 600 provided to him lapsed, and did not transmit to his nearest in kin."

Reporter, *Lord Hailes*. For Omey, *Wight*. Alt. *Macleod-Bannatyne*. Clerk, *Menzies*.

S. *Fac. Col. No 47. p. 82.*