all; in which case he would get much more than by standing to the transaction. *2do.* As it was a profitable bargain to Philiphaugh, so thir pursuers, as executors to their sister, can have no more right than she could have claimed herself: But *ita est*, she eventually had none; for her provision was conditional, in case she attained to the age of 16; but *ita est*, she died at 11; and it is plain, that, both by the common law and ours, *dies incertus pro conditione habetur;* and in children's portions a sum due at a certain age, if they die before that, their representatives can claim nothing. *L.* 49. *sec.* 2.; *Legat.* 1. *L.* 22.; *D. Quando dies legat. ced.* See Stair, *tit.* Of Obligations; as also, 17*th January* 1665, *Edgar;* and 17*th January* 1677, *Belches.*

ANSWERED,—They were not here approving the contract *pro parte*, and reprobating it *pro reliqua;* but only craving, that the substitution of the mother to the daughter might be interpreted *in terminis juris* for a surrogation; seeing the tutors of minors, in taking security for their money, cannot change, alter, nor invert the natural channel of succession from the nearest heirs who would otherwise have succeeded; and there be several instances where the institution subsists, and yet one is permitted to impugn the substitution. Neither can her jointure enter into consideration, because, Philiphaugh's family being then low, the heir would have got an aliment from the liferenter. And though the payment of the daughter's portion was suspended till sixteen, yet the obligation began at her father's death; *tum cessit dies obligationis:* so the mentioning her age of sixteen was only the *terminus solutionis;* and, by the Roman law, such legacies are not conditional, but presently due,—*L.* 25. *C. Quando Dies Legat. et l.* 46. *D. ad S. C. Trebel.*

The Lords did not decide this subtile case, but recommended to some of their number to endeavour to settle the parties. But several of the Lords inclined to think, that albeit the minor's friends could, by a tailyie and substitution, divert the natural succession, and give it to a remoter, in prejudice of the nearest of kin; yet that, if they quarrelled any part of the transaction, the other party ought to be free to pass from the whole, and crave to be in their own place, as if the said bargain had never been made. *Vol. I. Page* 730.

1696. *July* 29. DR CHRISTOPHER IRVIN *against* ELIZABETH KER and THOMAS SKEENE.

[See the prior and subsequent parts of the Report of this Case, Dictionary, pages 331 and 332.]

THE mutual bills and complaints between Doctor Christopher Irvin and Elizabeth Ker, his father's relict, (mentioned 19th Feb. 1696,) anent the summary dispossessing her family out of her house in Edinburgh, were reported. The Doctor ALLEGED, That she had fled on the raising the criminal process of adultery and poisoning against her; and that her daughter-in-law and servants had voluntarily deserted the house; and so, there being *vacua possessio*, he, as heir and standing infeft, might summarily enter.

ANSWERED,—Though, *in acquirenda possessione*, some corporeal act of detention be requisite, yet, where it is only *in retinenda*, that can be done *solo animo:*

But here there was more, seeing she retained it by her family and servants; and, *esto* they had deserted it, either through terror or collusion, that relinquishing cannot prejudge her; else tenants and servants could easily betray their masters. REPLIED,—He offered to prove they removed voluntarily.

The Lords found, Though this were proven, it was not relevant to divest her of the possession, without her own special warrant and deed; and therefore would take no trial of the way and manner of their removing or abandoning the possession. Then the Doctor craved she might be put under caution for the rent. The Lords found, Seeing there was no process, she could not be obliged thereto.

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1696. *July* 29. The LADY CARDROSS *against* The EARL of TRAQUAIR.

PHESDO reported the Lady Cardross against the Earl of Traquair, who defended himself with the benefit of a possessory judgment, by virtue of apprisings, and other singular titles in his own and his mother's person. ANSWERED,—That to make a legal possessory judgment, besides a colourable title, there was likewise requisite *bona fides*, and lawful possession; but here the Earl's possession was plainly vitious; for his mother and he had intruded themselves into the possession in her brother's minority, by the negligence of his tutors; and the *vitia possessionis* are known in law to be when the entry is either *vi, clam, aut præcario. 2do.* It was interrupted by a decreet obtained by Lady Halton, the other co-heir, against the Earl for her half.

The Lords considered this possession was not precisely for seven years, but had continued more than double that time, and so could not be reputed clandestine; and, besides the general point, How far an interruption at the instance of one co-heir will operate for another, (from which point they abstracted at this time,)—seven years had run even since that interruption; and therefore they inclined to sustain the possessory judgment. But, at the intervention of some of the Lords, it was delayed till November. *Vol. I. Page* 731.

1696. *July* 31. ROBERTSON *against* MURRAY.

IN a competition between Robertson, as nominated the King's Master-tailor by King James, and Murray who had a gift of the said office from King William; the Lords were clear in the general, that a gift, during life, given by King James before October 1688, when the Prince of Orange set out upon his expedition, was preferable, and not revocable by a posterior gift of King William. But here the question arising anent making the beggars' blue gowns, and there not being a *modus vacandi* expressed in Robertson's gift *quoad* that, and one Calderwood, who was *in titulo*, being then on life; they preferred Murray's gift, *quoad* this particular employment of the gowns only.

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