No 7.
declaring, that if any of his children died, the portion of such should accresce to the survivers. The son was found comprehended in this provision, and that he dying, his portion accresced.

'the portion or portions of the deceasing child or children were to be equally 'divided' amongst the surviving children of both marriages; providing such 'child or children died before their marriages or majority:' Also providing, 'that in case his moveable estate, exclusive of his plenishing, should fall short 'of the sum of 32,000 merks Scots money, to which he valued the same, and 'that by the insolvency of any of the debtors, specially or generally before-'mentioned, then, and in that event, his daughters and son were to suffer a 'proportional share of any loss, by the insolvency of any debtors, and that 'effeiring to their respective designed interests in his moveable estate.' And named David his executor and universal legatar.

David and Marjory died soon after their father; and Elizabeth was married to Patrick Carnegy of Lour, to whom she disponed all effects 'which fell and 'accresced to her by the death of her father or brother,' and died.

Patrick Carnegy claimed an equal share of David's succession with the two surviving sisters. as disponed to him by his wife, to whom it belonged, in virtue of the clause in their father's will, whereby the portion of a deceasing child accresced to the survivers.

Pleaded for the defenders; David had no portion, but was an universal successor; and no provision being made concerning his succession, it must go to his legal representatives, which they only are, as their sister Elizabeth made up no titles in her lifetime; and it is only the portions of the daughters that are appointed to accresce, on their death, to the survivers.

Pleaded for the pursuer; The testator's intention was to give all his children portions; and, excepting that his son's was made larger than the rest, to preserve an equality amongst them, by making the portion of the deceased accresce to the survivers. The son's portion was to be 12,000 merks; and, in case of deficiency, the rest were to suffer a proportional loss with him; and the portion of the 'child' deceasing was to accresce to the surviving 'children', in which enunciation the son was comprehended, consequently also under the term 'child,' whose provision was to accresce.

THE LORDS, 2d November, found, that the portion of the son did accresce to the surviving children, *ipso jure*, without any titles being made up thereto; and therefore found, that the pursuer had right to the third part of what belonged to the son, in right of his wife. And this day, on bill and answers, adhered.

Reporter, *Elchies.* Act. *Lockhart et Ferguson.* Alt. *R. Craigie & R. Dundas.*
Clerk, *Gibson.*

D. Falconer, v. 1. No 107. p. 122.

1749. *December* 15.
BINNING of Wallyford *against* The CREDITORS of AUCHINBRECK.

No 8.
Provisions to children payable at their

MR CHARLES MAITLAND of Hatton, afterwards Earl of Lauderdale, granted a bond of provision to his children, for certain sums, "payable at their seve-

No 8.
age of eighteen, and if any of them died, the share to accresce to the rest, found to accresce whether they arrived at that age or not.

ral ages of eighteen years complete, and sooner, if any of them should happen to be married before they attained to that age." And in the mean time obliged himself to aliment them; "provided, that if it should happen, John, Charles, and Mary Maitlands (his children) to depart this life unmarried, or within year and day after marriage, without a child," then the provision of that child or children so deceasing "should return back, accresce, and pertain to his eldest son and heir, succeeding to him in his lands and estate, for the weal and standing of his family: And in case it should happen, Thomas, or Alexander Maitlands, or the child in his wife's belly, or all of them three, to depart this life unmarried, or within year and day after marriage, and without a child; in that case, the equal half of the portion and provision of the person so deceasing, as said was, should appertain and belong to the said Mary Maitland, if she were in life, and the other half of the provision of the person so deceasing should appertain and belong to the other two surviving, by equal division betwixt them: And in case two of the last three should decease in manner above mentioned, and one live, then the equal half of both their provisions should belong to his said daughter Mary, if she were in life, and the other half of their provisions should belong to the third surviving the other two; and if all the last three should depart this life in manner above mentioned, then the half of the provisions of all these three, viz. Thomas, Alexander, and the child in his wife's belly, should belong to his said daughter Mary, and the other half of their provisions should belong to his eldest son, as said was: And in case his said daughter Mary were not in life, the time of the decease of one or all of them, then he ordained the provisions of one or all of the last three children, viz. Thomas, Alexander, and the child in his wife's belly, to fall back again to his eldest son, and their part of that present bond, after their decease, as said was, to be void and null: In which case, or in the case of the decease of the first three, John, Charles, or Mary, or any of them, he and his foresaids should be free and quit of the payment of their respective provisions:" Reserving power to alter, and dispensing with delivery.

Mr William Maitland, the child described as *in utero*, obtained a decreet *cognitionis causa* against Richard Earl of Lauderdale, his eldest brother, on a renunciation to be heir, for his own provision, and the fourth of Thomas's who was deceased, as fallen to him by the substitution; and thereupon adjudged, which he conveyed to Sir James Campbell of Auchinbreck, as an incumbrance on the estase of Glassery, purchased by him.

Objected by Binning of Wallyford, another adjudger of these lands, to this adjudication, That the decreet whereon it proceeded contained no proof, that Mr Thomas Maitland arrived to the age of eighteen: And if he did not, the provision never became due, and consequently could not go to the substitute.

Answered, Mr William is conditionally institute in the provision, if it should never be carried by Mr Thomas's arriving at the age limited; or, in other words, this is a vulgar substitution.

Replied, The provisions of the younger children are declared to accresce to each other, in the same events that these of the elder return to the heir, which is on their surviving the age limited; for before that time they were not due, and could not return: Beside, if it should be held, the substitution could take place, though the deceasing child did not arrive at eighteen, it would be impossible to say what was the term of payment. No 8.

Duplied, It appears, that the provisions returning, and the bonds being declared void, are used as synonimous expressions.

THE LORDS found, That the portion provided to Mr Thomas Maitland did accresce to his brothers and sisters, as provided by the bond, whether he arrived at the age of eighteen years or not, and, therefore, repelled the objections to the adjudication.

D. Falconer, v. 2. No 111. *p.* 128.

*** Kilkerran reports the same case.

ANOTHER interest produced for the Creditors of Sir James Campbell of Auchinbreck, in the ranking mentioned December 5. 1749, The Representatives of Binning *contra* the Creditors of Auchinbreck, *voce* LITIGIOUS, was an adjudication in 1694, at the instance of Mr William Maitland, youngest son of Charles Earl of Lauderdale, proceeding on an adjudication *cognitionis causa*, against Richard Earl of Lauderdale, for 6000 merks, contained in his bond of provision, granted in 1671, payable at the first term after his father's death, as also for 2000 merks of his brother Thomas's portion, which, by his bond of provision, was declared to accresce to William in case of Thomas's death.

To this interest, the Binnings *objected*, that it was null as to the said 2000 merks, in respect the substitution of William could only take place in the event, that the sum to which he was substituted became a debt, which it only did by Thomas's arriving to the age of eighteen, when by his bond of provision it is made payable. And there being no proof in the decree on which the adjudication proceeded, that either Thomas was dead, or that he had arrived at the age of eighteen, the adjudication was therefore void as to that sum.

As to the want of proof, that Thomas was dead at the date of the decree, that gave no difficulty, as a man's being dead may pass as notorious, however a proof may be necessary, where any doubt is as to the time of his death.

But as to the other point, the LORDS were of different opinions, and appointed parties to be heard in their presence, upon the import of the clause of substitution, and whether the accretion would have taken place in case Thomas had died before his age of eighteen.

The provisions were payable to the children at their respective ages of eighteen complete, or sooner, if any of them should be married before that

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."