No 36. been condescended on, the bills would have been sustained; besides, there does not appear any solid reason why a man may not make a present by bill; and if it bears value, why it should not be binding as effectually as if value had been given. The onerous cause is the will of the accepter, which says, he shall be owing such a sum to the drawer. In the case of Barber *contra* Hair, 8th February 1753, No 311. p. 6097. the Court sustained blank indorsations to bills by a husband to his wife upon death-bed. Indorsations are new draughts upon the accepter in favour of the indorsee, and are of the same nature with bills; yet these indorsations were sustained, though acknowledged to be on death-bed, and gratuitous.

Replied for the suspenders; The case of Barber against Hair does not apply. The only question there was, Whether a gratuitous indorsee was entitled to take the debt? This was no constitution of a new debt, but only a transmission of a debt formerly created; and although value is absolutely necessary to the constitution of a bill, yet where once constituted, there is no doubt that it may be properly transmitted by indorsation without any value paid by the indorsee. Such indorsations are every day practised, and are indeed necessary in the course of trade, as bills are often put into the hands of trustees in order to recover payment.

Suggested on the Bench; That though the writing founded on was not a proper bill, it might be sustained as evidence of a legacy, along with other circumstances; but the plurality were of opinion, that it was totally null.

THE LORDS found, that the bill in question appearing to be of the nature of legacy, was not a sufficient ground of action, and would not be astructed by collateral evidence.

For the Charger, *Walter Stewart.* For the Suspender, *Macqueen.* Clerk, *Kilpatrick.*

F. C. *Fol. Dic. v. 3. p.* 374. *Fac. Col. No* 20. *p.* 37.

*** See a similar decision 29th Jan. 1782, M'Arthur Stewart against Fullarton, No 13. p. 1408. *voce* BILL of EXCHANGE.

1769. *December* 13. SCOTS *against* CARFRAE.

No 37.
A legacy, to be divided at the legatee's death, among her children, falls by the legatee's predecease.

WILLIAM SCOT executed a testament, by which he appointed his son James his sole executor, and universal legatary, with a clause, whereby he obliged him to pay 'to Isobel Swanston, my well-beloved spouse, the sum of 1500 'merks, and that at the first term of Whitsunday or Martinmas after my de-'cease, with annualrent after the term of payment; and which sum of 1500 'merks, the said Isobel Swanston shall leave and distribute among her daugh-'ters at her death, as she shall think fit.'

Isobel Swanston predeceased her husband; and he having died some years after, an action was brought against George Carfrae, the disponee of James Scot, the son, at the instance of his sisters, for payment of the 1500 merks provided to Isobel Swanston, the fee of which they contended was vested in them by their father's settlement. No 37.

Pleaded for the pursuers; The 1500 merks were indeed made payable to Isobel Swanston; but she had only a right of liferent in that sum, which she was bound to divide among her daughters, in whom, of consequence, the fee was vested; nor can they be deprived of their right by the predecease of their mother, more than the mother could have forfeited her liferent by the predecease of the daughters. Her repudiating her interest in the legacy could not have affected them, and the accident of her death cannot have a stronger effect.

Answered for the defender; By the conception of the deed, the fee of the 1500 merks was intended to be in the mother. A limited fee indeed, which she was bound to transmit to her daughters, in the event of the provision taking place, but which might have been affected by her creditors to the exclusion of the daughters, who therefore had no right of fee, nor any thing more than a hope of succession.

But this right of fee never was vested, even in the mother; it was pendent on the uncertain event of her survivance, and cut off by her predecease; *dies incertus habetur pro conditione.*

The precise case is decided by Voet; 'Si testator legaverit Titio, pro se et 'hæredibus suis, Titius autem vivo testatore moriatur, hæredibus Titii legatum 'non debetur;' *ad tit. Qu. dies leg. num.* 1. *Id. ad tit. de mort. caus. donat. num.* 7.

And, agreeably to this, the Court have decided in the case of provisions payable at a certain age, or at the decease of the granter, in various instances, to be found in the Dictionary, *voce* IMPLIED CONDITION, and in sundry later cases, as 4th June 1741, Paterson *contra* Paterson, No 24. p. 8070.; 1st February 1749, Bells *contra* Mason, No 6. p. 6332; and 18th December 1760, Macculloch *contra* Ross, No 18. p. 6349.

THE LORDS found, that the provision of 1500 merks fell by the predecease of Isobel Swanston, and did not transmit to her daughters.

G. F. *Fol. Dic. v.* 3. *p.* 375. *Fac. Col. No* 106. *p.* 365.