1792. *June* 2. GEORGE BROWN *against* ROBERT COVENTRY.

No. 23.
Substitution of heirs may take place in moveables, but not to be admitted without express words.

David Barclay executed a deed of settlement in favour of Coventry, as his executor and universal disponee, under the burden " of making payment of a sum of money to Rachael Barclay in life-rent, for her life-rent use only, and to the heirs of her body in fee, whom failing, to the said Robert Coventry, his heirs, executors, and assignees."

Rachel Barclay enjoyed this life-rent some years; but, dying after having been married, she left an infant daughter; her husband, Brown, also surviving. As administrator-in-law for the infant, he sued Coventry, the executor, for payment, and obtained decree; but before the money was paid, the infant died. Brown now demanded it, as the executor of his child; and having expede a confirmation, raised an action against Coventry; who objected, that the right of the legacy had devolved to himself as substitute by the above-mentioned deed. In support of this defence, the latter

Pleaded: The words " whom failing " have long been understood to comprehend both " conditional institution " and " substitution." See cases *supra*, *h. t.*

In the present instance, they must have imported " substitution;" as " institution" was unnecessary, where the right of the legacy, if lapsed, would at any rate fall to the defender as general disponee.

Our law does not, like the Roman, admit only *substitutio pupillaris*, (of which substitution the present case indeed is an example); but, in all cases, it allows the ordering of succession by substitution. Above a century ago, substitutions in legacies were found to be effectual; Christie *contra* Christie, No. 30. p. 8197. *voce* LEGITIM; also, Campbell *contra* Campbell, No. 18. p. 14855.; Stewart's Ans. p. 283.; Ersk. B. 3. T. 8. § 44. The late decision, Stevenson's Trustees *contra* Graham, has been erroneously supposed of a contrary tendency; it being founded on special words, excluding accrescence or substitution after the term of payment; (9th February, 1790, not reported; see APPENDIX.)

The substitution here, it is true, being a mere destination, if the child had lived to the age of majority, and then disposed of the money otherwise, the defender's right would have been defeated; or had she even uplifted it, after attaining to years of discretion, there might have been a doubt, whether that did not imply a change of the substitution. But she having died in infancy, there could be no alteration by her, either express or tacit.

Nor would it have been a circumstance of any importance, though the money had been paid in the child's life-time; for money exacted by a tutor or admistrator-in-law can never evacuate a substitution, or make any alteration upon the pupil's succession; see *voce* MINOR, and *voce* TUTOR AND PUPIL; 25th February, 1663, Aikenhead, *voce* WRIT; Ersk. B. 1. T. 7. § 18, 33.

Answered: It should seem that things of a permanent nature alone were the proper subject of substitutions or tailzied succession; not sums of money, or debts, which are liable to continual changes.

No. 24.

If a debt due by bond, containing substitutions, have been paid to the creditor or institute, what sort of a title, on his death, should the substitute make up? The bond being cancelled, and the debt extinguished, he could not serve heir of provision under the one, or establish a title to the other, when both had ceased to exist. Neither could he have any claim against the heir, his right being but a *spes successionis*, and not a *jus crediti*.

It seems to have been admitted, that upon the money being paid to the institute, at least when capable of will, the substitution is vacated. Now, as this cannot proceed from any presumption of intention, founded on the circumstance of his receiving the payment, which may often be contingent, or even involuntary, the inference is plain, that it must take place on the arrival of the term of payment. In regard to the argument of the conditional institution of the defender being nugatory, as he was the general disponee, the rule applies, *Superflua non nocent*.

That our more ancient law disallowed tailzied succession in the case of sums of money, has not been denied. As to the decision, Christie *contra* Christie, it was disapproved of unanimously by the Court on a later occasion; see No. 18. p. 14855. and that of Campbell related not to a legacy, but to a general disposition. Lord Dirleton's opinion is clear against substitutions in legacies; Tit. Substitut. in Legacies. See also Bankton, v. 2. p. 388. § 44. Stevenson's Trustees *contra* Graham, 9th February, 1790, (mentioned above.)

As the money ought to have been previously paid by the defender, this is equivalent to actual payment; L. 161. D. De reg. jur.; Ersk. B. 3. T. 3. § 85. Nor is it necessary to notice the defender's argument on this head; which takes it for granted, that the substitution was to take place even after the term of payment.

The Lord Ordinary repelled the defence.

A reclaiming petition having been presented, and followed with answers, the Court appointed a hearing in presence.

On advising the cause, their Lordships were unanimously of opinion, that tailzied succession might take place in legacies of moveables, in which case service as heir of provision would be necessary; that these, however, not being naturally the subject of such a destination, this was not to be presumed *in dubio;* and that, in the present case, the testator's intention was to be held to have been that of creating a conditional institution, and not a substitution.

The Lords therefore adhered to the interlocutor of the Lord Ordinary.

Lord Ordinary, *Justice-Clerk.* Act. *Rolland.* Alt. *M. Ross.* Clerk, *Sinclair.*

S. *Fol. Dic. v. 4. p. 303. Fac. Coll. No. 213. p. 447.*

See CONDITION—IMPLIED CONDITION—SERVICE AND CONFIRMATION—FIAR, ABSOLUTE, LIMITED—APPENDIX.