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MARQUIS OF
LOTHIAN
AND OTHERS
v.
HASWELL
AND OTHERS.

‘ suit of the respondents, be affirmed ; and it is
‘ declared that the election of the counsellors and
‘ magistrates for the borough of Jedburgh, insist-
‘ ed on by respondents, were irregular and void ;
‘ and it is therefore further ordered and adjudged,
‘ that the same be reduced, and that so much of
‘ the other interlocutors complained of whereby
‘ the Court of Session decerned in the declarator
‘ at the instance of the respondents, and assoilzied
‘ from the reduction at the instance of the ap-
‘ pellants, with regard to all the elections there-
‘ by quarrelled, (excepting those of Robert Win-
‘ terup and George Scougald, the two tradesmen,)
‘ be reversed.’

For Appellants, *Ch. Areskine, W. Murray.*

For Respondents, *W. Hamilton, J. Browning.*

It does not appear upon what precise ground the House of Lords reduced the election of Haswell. If it be held that the interlocutor of the 1st February was reversed to the effect of finding that the act of 7th Geo. II. applied, then the inference from the decision would be, that, where a minority of a town council separated from the majority at a meeting for the election of magistrates, their proceedings fell under the act, although it had been found that the original meeting was not legally constituted, and the election by the majority had in consequence been set aside. But other objections were pleaded, any one of which may have been the ground of the judgment.

JEAN BURDEN, Widow of JAMES	} <i>Appellant ;</i>
Kinross, - - - - -	
DAVID SMITH, - - - - -	<i>Respondent.</i>

27th April, 1738.

MUTUAL CONTRACT.—SUCCESSION.—A provision in a marriage contract of certain sums in favour of the wife, failing children, or in the event of their deaths in minority and unmarried,—

found to be a proper *jus crediti*, and not a right of succession.

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LEGACY.—Found that a legacy to a person, his heirs, executors, and assignees, depending upon an uncertain condition, does not lapse by the death of the legatee, before the condition is purified.

Found that a legacy in these terms does not vest in the legatee so as to bestow on him any transmissible right, but that on the condition being purified, it vests for the first time in the person of his executor.

LEGITIM.—Found that the claim of legitim was not cut off by deathbed or gratuitous deeds, although the whole stock and conquest were provided to the children of the marriage, it not being declared that this was in satisfaction of the legitim.

[*Elchies voce* mutual contract, No. 7. *Voce* succession, No. 5.]

By marriage contract between John Burden and No. 43. Margaret Fullerton, (1st Sept. 1709) the former, in consideration of a sum received as marriage portion, provides the sum of 7000 merks to himself, his wife, and the survivor in liferent, and to the children of the marriage in fee; and the conquest is provided in fee to the children, and one half of it in liferent to the wife; and in case of no children surviving the husband, or in case of their dying before majority or marriage, the fee of the equal half both of the 7000 merks, and of the conquest, and the liferent of the whole of the latter is provided to the wife. The issue of the marriage were Charles and Clementina.

On the 23d May, 1722, John Burden executed on death-bed a disposition of all his property, real and personal, in favour of his son, whom failing to his daughter, subject to the provision in favour of the wife, contained in the marriage contract; and in the event of their decease before marriage, or ma-

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majority, he binds himself to pay to his wife, if she should happen to survive them, the sum of 6000 merks.

On the following day, (May 24,) John Burden executed another deed, by which, in the event of the death of his two children before majority or marriage, he binds himself, his heirs, &c. to pay to the persons after named, their heirs, executors, and assignees, certain sums of money, among which there is the sum of 8000 merks provided to his wife, over and above what she was entitled to by her marriage contract, and by the deed executed by him on the preceding day.

John Burden died soon after, as did also his son Charles, (in minority) and Clementina succeeded to the property. Margaret, his widow, intermarried with David Smith, and by the marriage contract she assigned to him all the provisions contained in her favour in her former contract, and in the subsequent deeds above mentioned.

By a subsequent general disposition, Mrs. Smith assigned to her husband all debts, sums of money, &c. that were then due, or which should be due and owing to her at the time of her death; and she appointed him her sole executor and universal legatee. She died soon after. Clementina, her daughter, survived her, but died unmarried and before attaining majority.

Jean Burden, sister to John Burden, was confirmed executrix to him, and to Charles and Clementina Burdens, his children. She likewise obtained from the heir at law of Mrs. Smith, a conveyance to whatever estate, real or personal, he might be entitled to. Thereupon she instituted an action of count and reckoning against Smith.

In defence, it was pleaded that, by the assignation and general disposition in his favour by his wife, he was entitled, 1st, To the half of the 7000 merks which had been provided to his wife in the event which happened, of the children of the marriage dying before majority or marriage. 2dly, To the half of the property acquired during the marriage; and, 3dly, To the sum of 8000 merks provided to his wife by the deed of the 24th May, 1722.

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The court, upon the report of the Lord Ordinary, Feb. 19, 1785. found, upon the first point, ‘ That the said Margaret Fullerton, by the foresaid contract of marriage, was a creditor, and not an heir substitute for the half of the 7000 merks, and for the half of the conquest.’

Thereafter, (19th June) their Lordships found ‘ That, by the general disposition by Margaret Fullerton to David Smith, likewise nominating him her sole executor and universal legatee, he had right to all debts, comprehending conditional debts, whereof the condition had not then existed, as well as others; and found that the 8000 merks contained in the conditional obligation of the 24th May doth belong to David Smith, her assignee, although she died before the condition did exist or was purified.’ Both these interlocutors were adhered to.

The cause being again heard before the Lord Ordinary, it was insisted by the pursuer, that Charles and Clementina Burden having survived their father, were thereby, in their own right, entitled to the legitim; and as the father could not prejudice that by any gratuitous bond, or by a deed on death-bed, she, as executrix to them, was entitled to be

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paid their share out of the estate, before any thing could be claimed by the defender. It was answered that, as the father had made a more advantageous provision for them, by giving them all his estate, both real and personal, their tutors were justified in accepting the same; and that, as the children could not challenge this act of their tutors, it being for their advantage, and not to their prejudice, neither can their representative do so. The court, upon the report of the Lord Ordinary, (13th February 1736,) found “That there was no place “for legitim in this case;” and their Lordships afterwards adhered, (24th February.)

The appeal was brought from several interlocutors of the 19th February, 19th June, and 19th July, 1735, and 13th and 20th February, 1736.

*Pleaded for the Appellant:—*1. With regard to the 7000 merks and half the conquest; had the marriage contract been fulfilled, and the 7000 merks and conquest been settled in the manner covenanted, Margaret Fullerton being thereby only an heir substitute to her children, and during their life having nothing but a bare possibility of succession, could no more convey this than an heir substitute could convey his chance of succession before he has succeeded. But even if she had this power, she did not exercise it *habili modo*; because, by the terms of the general disposition, all that she conveyed was the debts which were then owing, or which should be owing to her at the time of her decease; and as neither of these provisions were owing either at the date of the assignation, or at the time of her death, they could not be carried by the assignation.

2. With regard to the 8000 merks, the father had no right to encumber the estate, (which, in terms of the marriage contract, became vested in his children by his death,) with the payment of this sum ; but supposing he had this power, the legacy to Mrs. Smith of the 24th May, being only conditional, and she having died before the contingency happened upon which it was given to her, it never could vest in her, but must be considered as a lapsed legacy.

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3. With regard to the right of legitim ;—even if the half of the 7000 merks, and of the conquest, and the 8000 merks claimed by the respondent, were assignable, and had been assigned *habili modo*, to the respondent, or could have been claimed by him as executor nominate of Margaret ; yet the children who died under age, and after their death, their heir (the appellant) had a title to the legitim, which the father had no power to diminish either by death-bed or gratuitous deeds.

Pleaded for the Respondent :—1. Mrs. Smith could not in any sense be considered as a substitute or heir of provision. By the terms of the marriage contract, the husband bound himself and his heirs, to secure the 7000 merks, and of the conquest to his wife and her heirs, in case the children died before attaining majority or marriage, and in that case he expressly assigns the same to her and her foresaids. She could not have taken up this provision by a service, but was a conditional creditor in it, and having by her marriage contract, and by the general disposition, assigned it to the respondent, and appointed him her residuary legatee ; he now stands in her place and is entitled to the provision, the condition being now purified by the

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death of both children before majority or marriage.

2. The respondent has right to the 8000 merks also. In the *first* place, it was not a legacy, but a conditional obligation. The father bound himself and his heirs, to pay to Margaret Fullerton, and her heirs, executors, and assignees this sum, in the event of his children dying before attaining majority, or unmarried; and this event having happened, she, and now her assignee is entitled to it. The distinction in the words made use of in the two deeds of the 23d and 24th May, shows clearly that the testator did not intend to make the payment of the 8000 merks dependant upon her survivance. In the deed of the 23d May the 6000 merks are provided to the wife, not merely in the case of the children dying unmarried and under age, but also in case Margaret shall happen to survive them, which event not having happened, she was not entitled to the provision; but in the deed of the 24th May, (by which the 8000 merks is provided) no such condition is mentioned, which shows that she was to be entitled to the provision whether she survived them or not, provided they died under age, and unmarried. But *secondly*, even if it were a legacy it would not lapse, because it was given to Margaret, her heirs, executors, and assignees; in which case, such heir, upon the death of the legatee, becomes entitled to the legacy when the condition is purified.

3. Although the children were entitled to legitim, yet their father having made a more advantageous provision in their favour, this must be considered as coming in the place of it; and the appellant cannot now, in the name of the children, have any claim to such legitim.

After hearing counsel, “it is ordered and ad-
 “judged, &c. that the said interlocutor of the
 “19th February, 1735, whereby the Lords of Ses-
 “sion found ‘that Margaret Fullerton the wife, by
 ‘the contract of marriage passed between her and
 ‘John Burden, her first husband, was a creditor,
 ‘and not an heir substitute for the half of the
 ‘7000 merks, and the half of the conquest;’ be,
 “and the same is hereby affirmed, with this addi-
 “tion, viz. ‘and that the respondent Smith is en-
 ‘titled to the said half of the said 7000 merks, and
 ‘half of the conquest, under the general disposi-
 ‘tion from Margaret his wife; and that the child-
 ‘ren of the said marriage were entitled to the other
 ‘half of the said 7000 merks, and also to the other
 ‘half of the conquest;’ and that the said interlocu-
 “tor of the 19th June, whereby the Lords found
 ‘that by the general disposition by Margaret Ful-
 ‘lerton to David Smith, likewise nominating him
 ‘her residuary legatee, he had right to all debts,
 ‘comprehending conditional debts, whereof the
 ‘conditions had not then existed, as well as others,
 ‘and found that the 8000 merks contained in the
 ‘conditional obligation of the 29th May, 1722,
 ‘granted by John Burden to his wife, payable to
 ‘her, her heirs, executors, or assignees, doth be-
 ‘long to David Smith, the assignee, albeit she died
 ‘before the condition did exist or was purified,’ be,
 “and the same is hereby reversed; and that so
 “much of the said interlocutor of the 19th July,
 “whereby the said Lords of Session “adhered” to
 “the interlocutor of the 19th February, be, and
 “the same is hereby affirmed, with the addition
 “herein made to the said interlocutor of the 19th
 “February; but that so much of the same inter-

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“locutor, whereby the Lords adhered to the inter-
 “locutor of the 19th June, be, and the same is
 “hereby reversed; and that the interlocutor of the
 “said 10th February, whereby the said Lords of
 “Session found ‘that there was no legitim in this
 ‘case,’ be, and the same is hereby reversed; and
 “it is hereby declared, that the said children were
 “entitled to a legitim in this case; and it is here-
 “by further ordered and adjudged, that so much
 “of the said interlocutor of the 20th of the same
 “February, which is contrary to, or inconsistent
 “with, this judgment, be, and the same is hereby
 “also reversed; and it is further ordered, that it
 “be remitted to the said Lords of Session to pro-
 “ceed accordingly.”

For Appellant, *Ch. Areskine, W. Murray.*

For Respondent, *W. Hamilton, J. Graham.*

The MAGISTRATES of MONTROSE,	-	<i>Appellants;</i>
DAVID ERSKINE of Dun, Esq. one	}	<i>Respondent.</i>
of the Senators of the College		
of Justice,		

12th May, 1738.

PROCESS.—APPEAL—It being objected that the Lord Advocate, who had an interest in the cause, and who had been a party in the Court of Session, was not made a party to the appeal; and that the cause had not been finally determined in the Court of Session;—the appeal was dismissed.

No. 44.

JAMES V. by a charter under the Great Seal, granted to Sir James Erskine of Brechin, his heirs and assignees, the right of Constabulary of the Burgh