

I M P L I E D W I L L .

1666. July 18.

WEDDERBURN *against* SCRIMGEOUR.

No 1.

A FATHER having left a legacy, thinking his wife was with child, in these terms, that if his wife should have a male child, the legatar should have the sum of 4,000 merks; and that if she should have a daughter, the legatar should have the sum of 5,000 merks.

THE LORDS found, that though she had no child, the legacy should be effectual *ex præsumpta voluntate testatoris*; seeing it cannot be thought, but that he rather intended a legacy for him, if he had no child, than in the case she should bring forth a child; *Et in conditionibus primum locum obtinet voluntas defuncti, eaque regit conditiones.* L. 19. D. De conditionibus.

1666. July 26.—IN the case Scrimgeour and Wedderburn of Kingenny, (mentioned before 18th July), a legacy being to be effectual in that case only, if the testator's wife should not be brought to bed of a man child; it was found, that a male child should be understood a living child; and that *homo mortuus* and a dead child is *nullus* in law; and that the legacy should be effectual, though she had been brought to bed of a male child, but dead.

Fol. Dic. v. 1. p. 441. Dirleton, No 18. p. 9. and No 32. p. 14.

* * * Newbyth reports the same case :

UMQUHILE Major Scrimgeour having only two daughters, viz. Margaret and Janet, makes his testament thus, " I leave Kilgenny and others to be tutors to my two daughters; and if it please God my wife be with a man child, I leave to my said son the sum of _____, of my said moveables, but if my said spouse shall be with child, and the same shall happen to be female, in that case, I leave 5,000 merks to Alexander Wedderburn of Kilgenny." He pursuing for payment of his legacy, it is *alleged*, The legacy is not pure but conditional, if the defunct's wife was with child, and that the said child were a female, and the pursuer cannot subsume that the conditions did exist; whereunto it was *replied*, That the allegiance ought to be repelled, because the defunct having left

No 1. a legacy in case his wife was with child of a daughter, he could never be presumed but to have left the legacy in case there was no child; and the will and intention of the testator is chiefly to be looked to in all testaments. THE LORDS sustained the legacy, and found, that, albeit it was conditionally conceived, yet it resolved in *legatum purum ab præsumptam defuncti voluntatem, qua omnes regantur conditiones in ultimis voluntatibus.*

Newbyth, MS. p. 78.

No 2. 1678. June 18. COMMISSIONERS of the Shire of Berwick *against* CRAW.

A TESTATOR leaving 4,000 merks in legacy to build a bridge, which cost but 1,000 merks, it was found, that the executor had not fulfilled the defunct's will, and that the surplus ought to be employed to other pious uses.

Fol. Dic. v. i. p. 441. Stair.

* * * See this case, No 10. p. 1350.

1724. January 31.

HELEN HAMILTON and her Husband *against* JOHN GORDON Factor to the Earl of Hopeton.

No 3.

A woman disposed her whole effects to a friend, upon the narrative of her confidence in his honesty to make the payments mentioned in the disposition; and she enumerated several legacies to be paid to her relations, and a certain sum as a legacy to the donee. Found, that the donee had right to all that remained after paying these legacies, tho' it was argued,

MARGARET HAMILTON, relict of Patrick Erskine, disposed to the said John Gordon her whole means and estate, (except part of her moveables, which she disposed to her friends) upon this narrative: 'For the entire trust and confidence I have in John Gordon. and because of his integrity and honesty for making the payments underwritten, therefore I dispo,' &c. And she burdened him with several considerable legacies, particularly the liferent of 2,000 merks to Helen Hamilton and her Husband, and 500 merks of the fee of it; and she left 1,000 merks to the said John Gordon; and there was a provision, that in case the fund should fall short, the whole legatars should suffer a proportional abatement. And the legacies were made payable at the sight of Robert Inglis and William Broadfoot writer of the deed.

It happened that there was a surplus of Margaret's effects, after payment of all her legacies; and the said Helen her sister being executrix decerned *qua* nearest of kin, pursued Gordon for that surplus, upon this head, that by the narrative of the deed it appeared he was only a trustee for the payment of the legacies; and he had accordingly a sum allowed to himself as a legatar, which was inconsistent with his having the whole subjects after payment of the other legacies.