No 9. rather a testament, as being a total settlement of his effects among the defender and the two pursuers, and as such fell under the general rule, That a testament without writ is void: But the Court found as above; they considered it as a direction by the defunct to the defender, his nearest of kin, to give equal shares with himself to the pursuers. See LEGACY. TESTAMENT.

Kilkerran, (TESTAMENT.) *No* 4. *p.* 571.

1756. *March* 2. FARQUHARSONS *against* FARQUHARSON.

No 10.

A PERSON having no children, executed a deed, disponing in favour of his brother's heirs and assignees whatsoever, all his lands, &c. that should belong to him at his death. The brother had two sons and two daughters. The sons died before the uncle, who thereupon came to succeed to their estate; and he dying soon after, a brother consanguinean took up the succession to their lands, which by the investiture, went to heirs male. The two nieces insisted in an action, declaratory of the estate devolving and belonging to them, in virtue of their uncle's disposition of all lands belonging to him at his death to the heirs whatsoever of his father. *Objected* for the brother consanguinean, That the event of the disponer's succeeding to that estate could not possibly be in his view; for it would be absurd to suppose that he intended to dispone to the sons, who were the heirs of his brother, an estate which was their own.——THE LORDS found no action competent to the nieces upon the deed in question.—Affirmed upon appeal.

Fol. Dic. v. 3. *p.* 309.

*** This case is No 43. p. 2290.

*** Lord Kames also reports the same case:

1756. *February* 10. PATRICK FARQUHARSON succeeded to the estate of Inverey, which by the investitures was settled upon heirs-male, and had been so for a long time. His brother Charles was bred a writer in Edinburgh, and in the year 1721, having contracted a lingering disease, which made him apprehend death, he thought it necessary to settle his affairs. He executed a deed 26th October 1721, in which he assigns and dispones 'to and in favours of Patrick Farquharson of Inverey, his heirs and assignees whatsoever, all lands, heritages, tenements, annualrents, debts, sums of money, heritable and moveable, horses and goods and gear whatsoever, of whatever kind and denomination the same be of, that shall happen to pertain and belong to him the time of his decease.'

Charles recovered his health, and the deed was forgot as no longer necessary. Patrick Farquharson dying after, was succeeded by his two sons Joseph and

Benjamin in order, both of whom died without issue. Charles having survived all of them, succeeded to the estate of Inverey as heir-male, and made up titles accordingly. Having afterwards purchased the estate of Auchlossen, he took the title-deeds to himself and the heirs-male of his body; whom failing, to his other heirs-male, with a view probably that the two estates should be conjoined in the same heirs. Charles having, *anno* 1778, died without issue, the succession to both estates opened to James Farquharson, the next heir-male in order. Against him a process was brought by the daughters of Patrick Farquharson, founded upon the deed 1721, above narrated; subsuming, That the estate of Inverey belonged to Charles Farquharson at the time of his death; that by the said deed 1721, executed by Charles Farquharson, the said estate was settled upon Patrick Farquharson, his heirs and assignees; that they, the pursuers, were heirs of Patrick Farquharson, and from these premises concluding, that the defender, heir of the investitures, should be decerned to denude in their favours. No 10.

This case appeared not a little intricate. The words of the deed favoured the pursuers, and yet, in all appearance, Charles Farquharson had no such intention as to alter the investitures of the estate of Inverey, so as to make it descend to the heir of line, when he had settled his proper estate of Auchlossen upon heirs-male. The case was thought worthy of a hearing in presence, in which, as usual, every sort of argument was urged that seemed to have any influence. My intention is to select those arguments upon which the judgment was founded.

It appeared clear, in the *first* place, that Charles, in executing this deed, had no intention to make a settlement of the estate of Inverey, far less to exclude the heirs of the investiture. His sole purpose was to raise the family, by adding to the family estate his own acquisitions. In this view, he settled his real and personal estate upon Patrick, his heirs and assignees, plainly intending to leave all at his disposal. *2do*, The event that fell out was plainly a *casus incogitatus*. Nothing was farther from Charles's view or intention in making this deed, than to comprehend the estate of Inverey under it, to which at that period he had not the most distant prospect of succeeding. Therefore, if it be a rule that no deed can be effectual beyond the intention of the granter, this deed cannot be laid hold of by the pursuers. Though the estate of Inverey, *ex figura verborum*, may be comprehended under it, the maker's intention was very different. The action, therefore, cannot be sustained; for words without intention can give no right either in law or equity. *3tio*, This process is not only unsupported by the intention of the maker, but is in reality contradictory to his intention. His intention obviously was to join his own estate to that of the family. Now, the purpose of the present action is to disjoin the two estates. Charles's proper estate of Auchlossen is settled upon the heir-male; and the pursuers claim the family estate of Inverey, as provided to the heirs of line.

No 10.

'THE LORDS found, That the pursuers are not the heirs intended by the 'deed 1721; and, therefore, that there is no action upon that deed to oblige 'the defender to denude of the estate of Inverey in their favours.'

Sel. Dec. No 102. *p.* 142.

1757. *December* 13.

ALEXANDER ABERDEIN *against* ROBERT ABERDEIN.

No 11.
A disposition of an estate was written by the disponee's agent, and transmitted by the disponee to the disponer for his signature. Before it was returned, the disponee died. Although the disponee had thus never completed the disposition by acceptance, it was found sufficient to exclude the heir at law.

PROVOST ABERDEIN inclining to have a country seat near the town of Aberdeen, and finding that Farquharson of Invercauld was willing to sell the lands of Crabston, within three miles of that town, the parties exchanged missive letters, agreeing that the lands should be disponed to the Provost in liferent, and to any of his children he should please in fee, and that the price should be L. 3900 Sterling. In prosecution of this agreement, the writings of the estate were delivered to a writer, who, by the Provost's order, made out a scroll of the disposition to be granted by Invercauld to the Provost in liferent, and to Alexander, the only son of his second marriage in fee; and the scroll being revised by the Provost, was upon the 12th June 1756, extended and dispatched to Invercauld at his country-seat, inclosed in the following letter, subscribed by the Provost: 'This will come along with the amended disposition, and upon 'its being delivered to me duly signed, I am to put the bond for the price in 'the hand of your doer.' Invercauld not being at home, the packet was delivered to his Lady. As soon as he returned home, which was on the 21st of the said month of June, he subscribed the disposition, and sent it with a trusty hand to Aberdeen, to be delivered to the Provost. But the Provost being taken suddenly ill, died on the 25th June, a few hours before the express arrived at Aberdeen; by which means it came that the disposition was not delivered to him, nor the bond for the price granted by him.

This unforeseen accident gave rise to a question betwixt Robert, the Provost's eldest son and heir, and the said Alexander, son of the second marriage. For Robert, it was pleaded, that to complete the said disposition and to make it an effectual settlement of the land of Crabston, the Provost's acceptance was requisite; that this act not having been interposed, the disposition remained an undelivered evident, no less ineffectual than if it had wanted the subscription of the granter; and that laying aside this incompleted deed, the Provost's claim to the lands of Crabston, resting upon the mutual missives, must descend to his heir at law, seeing none of his children is named in these missives.

It was admitted for Alexander, the son of the second marriage, that the foregoing conclusion was indeed founded on the strict principles of the common law. But it was contended that the common law, in bestowing the estate of Crabston contrary to the express will of the purchaser, is so far unjust; and therefore, that it is the duty of the Court of Session, as a court of equity, to