No 32. the mere act of delivery imports no transmission, without legal evidence of the will or intention of the testator; and that cannot be legally expressed or proved but by writing. Supposing, therefore, the fact were true, that the defunct gave his father such an order, to deliver the money to his sisters; yet that destination being only appointed to take effect after his death, was truly a legacy, to the constitution of which, of whatever kind, beyond the value of L. 100 Scots, writing is required, not only as the mean of proof, but as an essential solemnity, equally as in the nomination of an executor, the appointment of tutors and curators, or the conveyance of heritage; Schaw *contra* Lewis, No 47. p. 4494; Bankton, B. 3. T. 8. Par. 6.

*Replied*, There can be no danger in admitting such a quality as an intrinsic part of the oath, when the debt can only be constituted against the party by his oath. If the party has no regard to an oath, he might as easily swear away the debt altogether, and of which there would be a much greater risk, than of his swearing falsely in favour of a third party.

*Observed* on the Bench, 1*mo*, This is not a legacy, but a gift or donation *mortis causa*, which differs from a legacy, in so far as it is done *de præsenti*, though the effect of it is suspended till the donor's death. Upon this distinction, it is now understood, (though it was not so anciently), that a man may effectually convey his heritage in his testament, reserving his liferent, and a power to alter, providing he uses the *verba de præsenti*, such as "give, grant, or dispose," and not "legate or bequeath." The rule as to writ being essential to legacies, therefore, does not apply to this case, in respect of the delivery of the money, which was the same as if it had been made to the sisters themselves, and was a deed *inter vivos*, though only *mortis causa*. 2*do*, The quality of the oath is intrinsic. It is laid in the libel, that a certain sum belonged to the defunct at his death, and was put in the defender's possession; the mean of proof is the defender's oath, and his oath does not prove, that the money belonged to the defunct at the time of his death.

"THE LORDS sustained the reasons of suspension, and suspended the letters *simpliciter*."

Act. *Miller*. Alt. *Macqueen*. Reporter, *Strichen*. Clerk, *Gibson*.

*Fol. Dic. v.* 3. *p.* 378. *Fac. Col. No* 200. *p.* 357.

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No 33. Tho' a legacy falls by the predecease of the legatee, yet, if heirs are named, the heir takes it upon his survivance;

1760. *July* 16. JANET INGLIS *against* DAVID MILLER.

JOHN CHALMERS of Corsehill disponed his estate to John Chalmers writer in Edinburgh, with the burden of a legacy of L. 100 Scots to Isobel Inglis, her heirs, executors, or assignees. Isobel died before the testator; but left a son, Richard Miller, who survived the testator, but died without making up any titles to the legacy.

No 33.
and though he die afterwards without making up titles, the legacy will fall to his nearest in kin, and not to those of the firft legatee.

After his death, David Miller, his father, confirmed himself executor to Richard, and gave up this legacy in the inventory. Janet Inglis, sister to Isobel, having confirmed herself executrix to her *qua* nearest of kin, brought a process against John Chalmers for payment of this legacy; and Chalmers raised a multiple-poinding.

*Pleaded* for Janet Inglis, As Richard Miller died without making up any titles, the legacy was never so vested in him as that it could transmit to his executor. David Miller's confirmation, therefore, as nearest of kin to his son, cannot convey to him what did not belong to his son; but the legacy must go to Isobel Inglis's executors, by confirmation or otherwise. Had this legacy been left to Isobel Inglis, and failing of her, to her son Richard *nominatim;* upon Richard's surviving his mother, the legacy would have gone to his nearest of kin, confirming executor to him. But the legacy is left to Isobel Inglis, her heirs, executors, and assignees; and therefore a title must be made up to it by confirmation, in order to vest the right in the executor confirming, so as to transmit the right to his executors; and if the nearest of kin die without making up his titles by confirmation, he can transmit no right to his nearest of kin, but that debt must be taken up, as is done in this case, by the nearest of kin who shall confirm executor to Isobel Inglis. Her son, Richard, never was her executor; but Janet Inglis is confirmed in that office, and therefore must be entitled to the legacy in question.

*Pleaded* for Miller, As Isobel Inglis died before the testator, the legacy never belonged to her, and therefore cannot be taken up by confirmation, as *in bonis* of her. It is left to her, and to her heirs and executors; failing of her, therefore, they come in as legatees or conditional institutes, and must take in their own right, and not through her by confirmation. Agreeable to this doctrine, Voet gives his opinion, in the *tit. De mortis causa donationibus*, § 7., where he expressly considers the heirs of the first legatee as being themselves also legatees. A confirmation to Isobel, therefore, would be entirely inept, and could be of no other use, but to demonstrate, that Richard was nearest of kin and executor to his mother. But neither a service as heir, nor confirmation as executor, are required in the law of Scotland, *ad factum demonstrandum*, where no subject is to be carried by them. Thus it was expressly decided, Houston of Johnston against Nicolson of Carnoch, 28th January 1756, No 18. p. 5249.

As therefore this legacy never belonged to Isobel Inglis, because she did not survive the testator, no confirmation to her was necessary. Richard Miller had right to this legacy as legatee; and there is no doubt, that where a legacy is due, it transmits, though the legatee die before confirmation, in the same manner as an executor who is appointed universal legatee, though dying before confirmation, transmits his right to his executors.

"The Lords found, That the legacy in question having been left to Isobel Inglis, her heirs, executors, or assignees, did not become caduciary by her

No 33. predeceasing the testator; but found, That the same did fall and belong to Richard Miller, her son, as conditional institute; and found, That the legacy is now effectually carried by the confirmation of David Miller, as executor to the said Richard his son; and therefore preferred the said David Miller, and decerned; and found him entitled to the expenses of the extract."

Act. *Arch. Murray.* Alt. *Wa. Stuart.* Clerk, *Justice.*
*P. M.* *Fol. Dic. v.* 3. *p.* 375. *Fac. Col. No* 234. *p.* 428.

*** Lord Kames reports this case:

JOHN CHALMERS disponed his estate to his nephew, with the burden of certain legacies, one in particular of 150 merks to Isobel Inglis, wife of David Miller, her heirs, executors, or assignees, payable year and day after his death, with interest after the term of payment. Isobel died before the testator, leaving a son Richard Miller, who survived the testator, but died without making up any title to the legacy. His father David Miller, having confirmed himself executor to his son, and having inserted the said legacy in the inventory, brought a process for payment of the said legacy. The nephew of John Chalmers, who, as said above, was burdened with the legacy, *objected*, That, as Isobel predeceased the testator, the legacy was never due. It was found, 'That the legacy having been made to Isobel, her heirs, executors, or assignees, did not fall by her predeceasing the testator, but became due to Richard Miller her son as a conditional institute, and consequently to David Miller, confirmed executor to his son.'

*Sel. Dec No* 166. *p.* 227.

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No 34. 1760. *July* 16. WHARRIE *against* Relations of WHARRIE.

A PERSON, after bequeathing by testament, certain legacies to several of his relations by name, appointed the residue of his fortune to be divided 'equally 'among the relations not herein named.' The nearest relation not named in the testament, though a large legacy had been left to his children, claimed the whole residue, *pleading*, That it could never be the testator's intention to divide the surplus among the whole of his relations, to the remotest degree, who were not named; and that he, being confessedly the nearest who was not named, was justly entitled to that remainder. *Answered*, The pursuer, though no legatee himself, was expressly named in the testament; and his children having got a very large legacy, it could never be supposed to have been the testator's intention, that he and his children should have almost the whole succession.—THE LORDS repelled the pursuer's claim.

*Fol. Dic. v.* 3. *p.* 378. *Fac. Col.*

*** This case is No 12. p. 6599. *voce* IMPLIED WILL.