was clear evidence from that memorandum, that this legacy of 2000 merks was meant to be paid to James Gilmour, the testator's brother, who on the widow's refusing to pay this legacy, sued her in an action for that end, and craved a proof for establishing that the memorandum of the settlements was taken by Barclay from the testator's mouth, and was the only rule for drawing them up. The defender *urged* the incompetency of proving by parole evidence any legacy above L. 100 Scots. THE LORDS allowed the proof. *See* APPENDIX. No 39.

Fol. Dic. v. 3. *p.* 379.

1778. *July* 28 TURNBULL *against* TURNBULL &c.

TURNBULL, in his testament, burdened his Executor with a provision of 2000 merks to a niece, in liferent, and to her children in fee. The niece had several children, who all outlived the testator, but predeceased their mother. After the mother's death, it was *urged* for the heir, That the legacy had fallen. THE LORDS found the legacy had not fallen, as the persons in whose favour it was conceived, had all outlived the testator, and that it now belonged to the nearest of kin to the children of the niece. No 40.

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

*** This case is No 41. p. 4248. *vocc* FIAR.

1781. *February* 13.

THOMAS BOSTON and Others, Children of ELIZABETH HORSEBURGH *against* ALEXANDER HORSEBURGH.

No 41.
A disposition *mortis causa* effectual to the heir of the disponee, though he himself predeceased the disponer, the disponee's heirs having been mentioned in the dispositive clause only, while the rest of the deed seemed to relate solely to the disponee himself.

IN 1736, Dr David Horseburgh executed a deed, by which, 'for the love 'and favour he bore to John Horseburgh of Horseburgh, his brother, he assigned and disponed to him, his heirs, executors, or assignees, the whole effects 'and debts that should happen to belong, or be due to him at the time of his 'death, with full power to the said John, whom he thereby nominated his sole 'executor, (but of whose heirs, it is to be remarked, no farther mention is 'made) to possess and dispose of the premises.' Then follows a reservation of a power to revoke, 'without consent of his brother above named;' and, after this, an obligation 'upon the said John to pay the Doctor's debts.' And the disposition concludes with a clause dispensing with delivery. But, throughout the whole deed, the mention of heirs is never repeated.

John Horseburgh, who afterwards was married, died several years before the Doctor, leaving a son, the above named Alexander; who, at the Doctor's death, in 1779, obtained himself confirmed executor-dative *qua* disponee or cre-

No 41. ditor to him, under the aforesaid settlement, which, it appeared, had been retained in the custody of John.

Soon after, Thomas Boston, and the other children of a sister of the Doctor and of John, raised an action against Alexander, concluding, 'That, as the 'deed in question was a testament, or *donatio mortis causa*, which, by the sur-'vivance of the granter, had fallen and become void, so they, being equally 'with Alexander his next of kin, were entitled to a proportional share of his 'moveable effects.' In support of this action,

The pursuers *pleaded*; The disposition of moveables above mentioned, as is evident from its terms, importing only a *donatio mortis causa*, could not, during the life of the disponer, vest the disponee in any right whatever. The general rule, then, relative to this subject is, *tempus mortis inspiciendum*; and, accordingly, if the circumstances occurring at the testator's death, be inconsistent with the destination of such a deed, it must for ever continue ineffectual, as it can receive no new force by any artificial interpretation, accommodated to those circumstances. From this principle, and from the presumption of particular favour, in the case of such donations or legacies, it would most undubitably follow, that the settlement in question has become void; were it not on account of the words, 'heirs, executors, or assignees,' which once occur in that deed.

But these words seem to have been admitted *per incuriam*. The deed is in the Doctor's own hand-writing, who, being no lawyer, must have copied it after some other conveyance, and probably one of heritable subjects, from which he inadvertently may have allowed the above clause once to creep into it; a supposition that is fully justified by a proper construction of the deed. Thus, from particular favour to John, it transfers those effects which should belong to the Doctor at the time of his death; the survivorship of the former being evidently supposed; who alone, personally, and not his heirs also, is nominated executor. John too, solely, is empowered to possess himself of the premises; and it is he only who is understood as accepting the disposition; for, upon him, and no other, the burden of the debts is laid. And, in reserving the faculty of revocation, the Doctor provides only that John's own consent should not be requisite, without making any reference to his heirs; thus plainly intimating, that they were not at all in his contemplation. Besides, if a literal interpretation of the words were to be adopted, John's assignees must thence have had an equal title with his heirs; which surely cannot be maintained.

It, therefore, was not the intention of this testator, that the heirs of John should succeed to him; and, according to the purpose of a testator, all testamentary deeds are to be interpreted. A legacy bequeathed to a person, and to his heirs or executors, will, indeed, devolve to the latter, notwithstanding that the testator has survived the former; but then, as in the case of Inglis *contra* Miller, 16th July 1760, No 33. p. 8084., the testator's meaning must be clear to that effect. If it can be shewn that he had no such intention, the mere occur-

rence of those words will be disregarded; Voet. lib. 39. tit. 6. § 17.; Russel *contra* Russel, No 36. p. 6372.; Scott *contra* Carfrae, No 37. p. 8090. No 41.

Answered by the defender; It is not to be disputed, that a legacy may fall, by the predecease of the legatee. But if, as in the present instance, the heirs of the legatee are called, not as substitutes, but as conditional institutes, the legacy cannot lapse; Ersk; B. 3. T. 9. § 9.; Inglis *contra* Millar, *sup. cit.*; Denham *contra* Denham, No 16. p. 6346. The objection, as to no mention of heirs having been made in the subsequent part of the deed, is groundless. Being mentioned in the dispositive clause, it is of no consequence that they are not again expressly referred to in that containing the nomination of executor; because, without this part altogether, the disposition would have been valid and effectual. The authorities quoted on the other side are therefore not applicable. And, with respect to what is said of assignees, it is well understood that the power of assigning can only have effect after the succession hath devolved.

THE LORD ORDINARY had found, that the deed, being of a testamentary nature, or a *donatio mortis causa*, had become void by John Horseburgh's predecease. But

THE COURT 'altered this judgment, and found the disposition effectual to the 'heir of John.'

Lord Ordinary, *Kennet.* Act. *Rae et Elphinston.* Alt. *Ilay Campbell.* Clerk, *Orme.*

S. *Fol. Dic. v. 3. p. 376. Fac. Col. No 22. p. 56.*

1782. *January* 15. ROSE *against* ROSES.

No 42.
A legacy was granted, to be *equally* divided between two legatees. Found, that the *jus accrescendi* had no place in such a case

ALEXANDER ROSE, by his testament, provided, 'That the sum of 6000 merks, 'due to him by Forbes of Ballogie, should be *equally* divided between his two 'brothers John and James.'

John predeceased the testator; and the question occurred, whether his share lapsed, thereby making room for the testator's next of kin; or whether it accresed to James as *conjunctus verbis*.

Pleaded for the pursuer's next of kin; Where a person legates his estate to A., and, in the same testament, legates that estate to B., it appears that the whole estate was meant for each; and it is only from the impossibility of giving one subject *in solidum* to two persons, that a division must necessarily follow. Hence, when, by any circumstance, the legacy does not take place as to one, the right of the other, meeting with no obstruction, acts with full effect. In like manner, where one bequeaths an estate to A. and B., he legates that estate to each; and any of them upon the failure of the other, is entitled to the whole. But the case is very different where the testator bequeaths an estate to A. and B. by *equal* parts, or *equally*. There the bequests to each are totally separate; and