Other Judges thought that this was stretching the maxim, *dies incertus, &c.* beyond its proper limits. There was here no condition annexed, and therefore *quod sine die debetur presenti die debetur.* The legacy vested *a morte testatoris*, but the executors might withhold payment till the majority or marriage of the legatee; that the testator meant to leave it to his executors to determine, whether the legacy should vest or not, or, in other words, to transfer to them his power of making a will, was surely not to be presumed. No 47.

The COURT 'assoilzied the defender.'

A reclaiming petition was followed, with answers; but the LORDS 'adhered.'*

Lord Reporter, *Monboddo.* Act. *Dean of Faculty, John Burnet.* Alt. *Wight.*
Clerk, *Home.*

D. D. *Fol. Dic. v. 3. p. 377. Fac. Col. No 2. p. 5.*

1798. *June 6.* DAVID FLEMING *against* CHRISTIAN MARTIN.

No 48.
A woman having executed a testament, with dispositive words, by which she conveyed the whole effects which should belong to her at her death to a sister, without mentioning her heirs, altho' she had children at the time; and their mother having died before the testatrix, a surviving sister was found entitled to exclude them from the succession.

MARGARET MARTIN executed 'a latter will and testament,' by which she 'gives and dispones, leaves and bequeaths,' the 'whole goods and gear,' &c. which should belong to her at her death, to her sister Helen, without mentioning her heirs, though she was a widow, with children grown up at the time. Helen, by the deed, was nominated executrix, and burdened with payment of Margaret's debts, and an annuity to Christian, an unmarried sister. It also contained a power of revocation.

Helen died a few days before Margaret, who left no heritable property.

Christian was confirmed executrix to Margaret; upon which David Fleming, one of two children left by Helen, founding on the will, brought an action against Christian, for half of his aunt's succession; and

Pleaded; As the deed contained dispositive words, which would have been sufficient to convey heritage; 17th June 1785, Robertson against Robertson, *voce* TESTAMENT.; 21st November 1759, Mitchell against Wright, No 32. p. 8082.; the right under it was transmissible to heirs.

And although the deed were considered to be strictly testamentary, as it must have been Margaret's intention that Helen's children should succeed to her, the omission of the term 'heirs,' must be held as a mere inaccuracy, and the claim supported on the same principle, that children dying before their father, transmit the provision made by him on them to their children, although heirs be not mentioned; 26th June 1789, Wood against Aitchison, *voce* PROVISION to HEIRS and CHILDREN; 21st January 1767, Binning against Binning, IBIDEM.; and even where the grandfather has substituted others to his immediate descendants; Home, 21st November 1738, Magistrates of Montrose against Robert-

* The second judgment of the Court upon this last point was pronounced on the 29th January 1793; it is stated here for the sake of connection.

No 50. son, No 50. p. 6398.; 19th November 1788, Omey against Maclarty, No 91. p. 6340.

Answered; The deed is purely testamentary. The terms 'give and dispone,' are used by the writer as synonimous with 'leave and bequeath.' As, therefore, Helen's heirs are not mentioned, and as an aunt is not under that natural obligation to provide for a nephew, which a parent is to provide for his grandchildren, Margaret must be presumed to have meant, that the ordinary rule, *quod morte legatarii perit legatum*, should take place. Even where heirs are mentioned, it is a question of intention, whether a legacy does not fall by the death of the legatee before the testator; 22d November 1752, Belsches against Murray, *voce* PRESUMPTION; 10th March 1769, Russel against Russel, No 36. p. 6372.; 13th December 1769, Scots against Carfrae, No 37. p. 8090.

The LORD ORDINARY reported the cause on informations.

One Judge was for the pursuer, from the dispositive words employed in the deed; and a doubt was expressed as to the intention of the testatrix. But the Court, in general, were against the claim, on the grounds stated for the defender.

THE LORDS sustained the defence; and afterwards, (22d June 1798,) refused a reclaiming petition for Fleming.

Lord Ordinary, *Cullen.* Act. *Hutchison.* Alt. *Montgomery.* Clerk, *Menzies.*
D. D. *Fac. Col. No* 80. *p.* 186.

See APPENDIX.