that it was meant for him, there can be no doubt, that the Court would find no difficulty in rejecting such a proof. No. 1.

It was answered on the part of James Gilmore, that the clause founded on does not contain a reserved faculty, but *de præsenti* actually imposes a burden, though the name of the person in whose favour it was imposed is omitted. The legacy then is in fact constituted, though, from the mistake of the writer, the name of the person for whom it was intended has been omitted. It is not therefore to constitute a legacy that the proof is required, but only to supply the apparent defect of one already constituted. Notwithstanding then that when the law requires writing as essential to the constitution of a right, no other proof can be admitted where that has not been adhibited; nevertheless where a writing used for that purpose has been destroyed in whole or in part, or where it is apparently defective, it has always been found competent to supply the deficiency by parole evidence. This is supported by two decisions, Wilson against Purdie, 23d November, 1744, No. 118. p. 12339. and Norvel against Ramsay, 22d June 1763, No. 46. p. 12290. With regard to the supposed alteration of the defunct's will, as the omission which gave rise to the dispute was perfectly unintentional, and merely arose from the mistake of the writer of the deed, it is clear that the defunct's intention remained the same at the time of executing these settlements, as at the time when the memorandum upon which alone they were founded was drawn out.

The Court, upon advising the petition with answers, adhered to the Lord Ordinary's interlocutor.

Lord Ordinary, *Covington*. For the petitioner, *Ad. Rolland*. Alt. *B. W. M'Leod*.

D. C.

1806. *December* 16. NICOLSON *against* RAMSAY and Another.

No. 2.
Legacy left by two persons in a joint settlement does not lapse by the death of the legatee before that of the last surviving of the granters.

HELEN and Elizabeth Mill, two sisters, executed a joint settlement of their affairs in 1797, by which they disponed their whole property, heritable and moveable, to Alexander Burnet Ramsay, Esq. and Captain Hercules Mill, under the obligation of paying their debts, and also certain legacies, particularly a legacy of £500 to George Mill Nicolson, payable with interest from the death of the longest liver.

It was provided, that the "discharge of the father, as administrator-in-law, "or tutors or curators of such of the legatees before named, or those succeeding to them, having right to the said legacies, as shall be minors at the time "of payment thereof, shall be a sufficient exoneration and acquittance to our "said disponees."

The disposition likewise contained "a reservation of our own liferent, and the "liferent of the longest liver of us, of the whole premises, and also full pow-

No. 2. "er and liberty to us, during our joint lives, to alter, innovate, and revoke "this present deed, in whole or in part; and also to us, and the longest liver "of us, to burden and affect the said subject with such other legacies, dona-"tions, and provisions, as we shall think proper."*

Helen Mill died in March 1800; and after her death, her sister Elizabeth made several additional bequests in two codicils to the settlement. She died in December 1802.

George Mill Nicolson, the legatee under the settlement, survived Helen, but died before Elizabeth Mill; and his executrix Helen Nicolson having claimed the legacy upon the death of Elizabeth Mill, was refused payment, on the ground, that the legacy had lapsed by the death of the legatee before the term of payment. Upon this she raised an action against the two disponees for payment of this legacy, and the Lord Ordinary appointed informations to the Court, who (7th March 1806) found the defenders liable in payment of the legacy. The executors presented a reclaiming petition, and

Pleaded: Legacies which are not left to heirs and executors, are altogether personal, and therefore lapse by the death of the legatee before the decease of the testator; Ersk. B. 5. Tit. 9. § 9. Upon the same principle, joint legacies to two or more persons, fall by the predecease of one legatee whose share does not transmit to the others; Paterson against Paterson, June 4, 1741, No. 24. p. 8070. The same rule must hold with regard to the death of joint testators. The legacy in question has lapsed in conformity to the general rule, *Dies incertus pro conditione habetur; Hien. ad Inst. de Legat.* § 633. *Vinnius ad Inst.* p. 340. Stair, B. 3. Tit. 8. § 22. for the condition upon which the legacy was granted never took place.

In all questions concerning legacies, *inspiciendum est tempus mortis testatoris;* Mackenzie against Legatees of Holte, No. 15. p. 6602. But from the mode in which this settlement was conceived, the death of the last survivor must be the rule in the same way as the death of the testator is in ordinary cases; for, by making a joint settlement with regard to their common property, they are to be viewed in the light of a single testator, and the legacies are accordingly not made payable until both sisters were dead. It was evidently the intention of these ladies to make the legacies personal to the legatees, and accordingly the surviving sister executed codicils, in which she granted new legacies.

Answered: By the death of one of these ladies, the legacy became irrevocable; so that from that period the legatees stood in a different situation from the ordinary case of legatees before the death of the testator, who are totally dependent on his will, which he may alter when he thinks proper. The settlement partook of the nature of an onerous contract between the two sisters. The survivor was to have the liferent of the whole effects, burdened with the payment of the debts of the deceased sister, and of the legacies they had mutually agreed upon. It would be quite unreasonable to hold that the survivor was to

No. 2

have the whole liferent, while at the same time the distribution of the subjects themselves was to be regulated by her alone. In the present case, therefore, while the parties made a mutual contract for themselves, the rights of legatees cannot be affected by those maxims of the civil law which have been introduced for the decision of ordinary cases, and which yield in every case to evidence of the will of the testator; Voet, Lib. 36. Tit. 2. § 4. Fowlie against Duncan, March 1, 1770, No. 28. p. 8092; Sempills against Lord Sempill, November 16, 1792, No. 47. p. 8103. And, that it was in the contemplation of the testators, that the legacies were to descend to the representatives of the legatees, is evident from the provision which is made, that the discharge of the curators of the legatees, "or those succeeding to them, having right to such legacies," shall be a sufficient exoneration and acquittance to the disponees.

The Court, by a small majority, adhered.

The case was viewed by the Court as attended with much difficulty, and it was observed, that though the very peculiar nature of the settlement did not make it likely that such a question would ever occur again, so as to make it of much consequence in point of precedent, it nevertheless was scarcely possible to decide the case one way or other, without deviating in some degree from established principles; for so far as regarded one of the sisters, the legacy was lapsed, but so far as regarded the other, it was vested in the person of the legatee. This suggested an idea which was adopted by several of their Lordships, that the pursuers should be found entitled to one half of the legacy. But the majority of the Court were of opinion, that a legacy could not be partly vested, and partly lapsed. And while it was admitted on all hands, that there was great difficulty in the case, the prevailing opinion on the whole was in favour of the pursuer's claim.

Lord Ordinary, *Glenlee.* Act. *Douglas.* Agent, *Jo. Wauchope*, W. S.
Alt. *Colquhoun.* Agent, *Geo. Watson.* Clerk, *M'Kenzie.*

J. *Fac. Coll. No. 264. p. 588.*

1807. *February* 17. GRAHAM *against* HOPE.

No. 3.
Provision or legacy to a person, his heirs and assignees, must vest in the legatee before it can be transmitted by his will.

THE Honourable Charles Hope Weir of Craigiehall, in 1785, executed a settlement, in which he bequeathed "to Colonel Henry Hope, my third son, "and Mrs. Sarah Jones, his spouse, in joint fee and liferent, but for the liferent "use only of the said Mrs. Sarah Jones, in case she shall survive her husband, "and to the said Colonel Henry Hope, his heirs and assignees, in fee, the sum of "£2000 Sterling." The purpose of this settlement was, to distribute among his children that share of the executry of the Marquis of Annandale, to which he and his sisters were to succeed on the death of the Marquis, who was a lunatic, and far advanced in years.