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.

No. 3. By Colonel Henry Hope's settlement, which was executed in America in 1779, in the English form, he disposed of his effects in the following manner: "That is to say, all and singular such pay, ready money, securities for money, "goods, chattels, and personal estate whatsoever, that I now am, or at the time "of my decease, I shall or may be possessed of, or in any manner entitled un- "to; and also all and singular such messuages, lands, tenements, hereditaments "and real estate whatsoever, and wheresoever, that I now am, or at the time "of my decease, I shall or may be seised or possessed of, or in any manner en- "titled unto, either in possession, reversion, remainder or expectancy, or "otherwise howsoever, I give, devise and bequeath the same, and every part "and parcel thereof, unto my dear wife Sarah, her heirs, executors, ad- "ministrators and assigns, to and for her and their own proper use and bene- "fit for ever, in case she shall be living at my decease; but in case my "said dear wife shall happen to depart this life before, then I give, "devise and bequeath the same, and every part and parcel thereof, "unto such child or children as may hereafter be born unto me of her "body, (if any such shall be born unto me), as shall be living at my "decease, and his, her, or their heirs, executors, administrators and assigns, "for ever, and to and for his, her, or their own proper use and benefit, and "to be equally shared and divided between them, if more than one, share "and share alike; and if but one, then to such one child only, and his or her "heirs, executors, administrators and assigns for ever; and in case no child shall "be born unto me, and shall happen to die before my said wife, so that no child "shall be living at my decease, then I give, devise, and bequeath all and singu- "lar my real and personal estate, aforesaid, and every part and parcel thereof, "unto my dear brother Charles Hope, Esq. a Captain in his Majesty's Royal "Navy, his heirs, executors, administrators and assigns, for ever."

Henry Hope predeceased his father, who, however, made no alteration in his settlement after his son's death; and Mrs. Sarah Jones having proved the will, intromitted with the whole of her deceased husband's effects. She was succeeded by her sister Mrs. Field, as her executrix, who received from Mr. Hope Weir's trustees a separate legacy of £500, which had been left to Henry Hope, his heirs and assignees. After her death, she was succeeded by her daughter, the wife of the Reverend James Graham, of the county of Tyrone.

After the death of the Marquis of Annandale, William Hope Weir, the eldest son and representative of the Honourable Charles Hope Weir, brought a process of multiplepoinding, to have it ascertained who was the heir or assignee of his brother Henry Hope, and cited Mrs. Graham and Charles Hope, the General's brother, as defenders.

The case was reported by the Lord Ordinary; and the Court (28th June 1805) pronounced the following interlocutor: "Find, that the provision in "question did not lapse by the predecease of the late General Henry Hope to "his father the testator: Find, that Mrs. Sarah Jones, the widow of the late Ge-

"neral Henry Hope, had right to that sum, in virtue of her husband's settlement "in her favour; therefore, prefers Mrs. Ann Graham, as his representative, "thereto; and decern in the preference, and against the raiser of the multi- "plepoinding accordingly." No. 3.

The residuary legatees of the Honourable Charles Hope acquiesced in this interlocutor; but a petition against it having been presented by Charles Hope, the Lords, upon advising it, with answers, (6th March 1806) "alter the in- "terlocutor reclaimed against, and find, That the legacy in question was not "carried by the will of the late General Henry Hope; therefore prefer the "petitioner thereto, and decern in the preference, and against the raiser of the "multiplepoinding accordingly."

Against this judgment Mrs. Graham presented a petition, and

Pleaded: A legacy taken to heirs and executors, does not lapse by the death of the legatee before the testator; Ersk. B. 3. Tit. 9. § 9. The testamentary deed of Charles Hope Weir, conveyed this legacy to his son Henry, "his "heirs and assignees," and thereby destined this sum to whatever person or persons his son should name as his heir and executor in any settlement executed by him. It is only on the failure of heirs nominate, that heirs-at-law are admitted to succession; and therefore, as Colonel Hope appointed his widow to be his executor, she or those coming in her right, must be entitled to this legacy, more especially as Mr. Hope Weir survived his son for a considerable time, and though he was acquainted with the nature of his settlements, executed no revocation of the legacy.

Answered: This legacy never belonged to Henry Hope, consequently it could never be assigned by him either to his wife or to any other person he might name his executor. The expression, heirs and assignees, does not alter the case, so as to put it in the power of the original legatee to assign during the life of the testator, and thereby to establish a right to the legacy, though he should die before the testator. To give the legatee the power of disposal, it is necessary that he should have succeeded to the subject; Ersk. B. 3. Tit 9. § 9. Had the original legatee survived the testator, the person named by him as executor would certainly have been preferred to the heir-at-law; but as he had nothing more than a *spes legati*, neither his creditors could attach it for his debts, nor could he convey it by his will; Patison against Patison, June 4, 1741. No. 24. p. 8070; Inglis against Miller, July 16, 1760, No. 33. p. 8084; Boston against Horsburgh, February 13, 1781, No. 41. p. 8099; Earl of Moray against Stuart, December 15, 1782, No. 43. p. 8103; Duncan against Campbell, November 8, 1791 (not reported.)

The Court was a good deal divided in opinion, but adhered to the last interlocutor.

Observed on the Bench: The term assignees, could only mean, that the legatee might assign the legacy when it became vested in his person; it could not give him the power of assigning, while the right was not vested in himself.

No. 3. This legacy, therefore, must either be considered as lapsed altogether, or it must devolve on the heirs-at-law of the original legatee. No principle is more clearly established, than that a will can only convey property which is vested in the testator at the time of his death.

Lord Ordinary, *Cullen.* Act, *Lord Advocate Erskine, Monypenny, Tytler.* Agents, *Hotchkis and Tytler*, W. S. Alt. *Connell, Campbell.* Agent, *D. Wemyss*, W. S. Clerk, *Pringle.*

J. *Fac. Coll. No. 270. p. 607.*