No 23.

N. B. After this it would seem there was an act pronounced before answer, and a great deal of further litigation; but the Collector has not the papers.

C. Home, No 151. *p.* 257.

1741. *June* 4. BESSIE PATERSON *against* PATERSON of Drygrange, &c.

No 24.
Legacies fall by the legatee's pre-deceasing the testator, even though there be annexed a general clause, 'and 'to their heirs 'and executors.'

The *jus accrescendi* does not take place among those to whom any thing is left equally and proportionally.

THE deceased Alexander Paterson, cordiner in Potterrow, made a testamentary deed, in which he assigned and disponed to Robert Paterson of Drygrange, and James Shiels, brewer in Portsburgh, all his money and moveable goods, &c. and that as trustees for the uses and persons therein designed, containing a clause that they might apply the remainder, after paying his debts and legacies, for their own proper use and behoof. Amongst the legacies, he left 1000 merks to Charles Paterson, his brother-german; 'and likewise, he left to the said 'Charles and Bessie Paterson, equally and proportionally betwixt them, his 'whole household plenishing and made work that should be in his house and 'belong to him the time of his decease.' Charles predeceased Alexander, and, upon Alexander's death, Bessie confirmed herself executrix *qua* nearest of kin to Charles, and brought a process against the trustees for payment of the 1000 merks, and for delivering of the household plenishing, &c. that had been bequeathed to her and Charles equally and proportionally betwixt them.

As to the legacy for the 1000 merks, it was *objected* for the trustees, That Charles having predeceased the testator, the legacy died with him. Neither can it weaken the objection, that the legacies are left to the several persons therein named, and their heirs, executors, or assignees; because this legacy is not given to Charles Paterson, and his heirs and assignees, as if he were distinguished from other legatars, to whom a legacy had been left to them singly without such adjection; but there is one general clause prefixed to all the legacies, that the executors shall pay to the several persons therein named, and their heirs or assignees, the respective sums, and others therein mentioned, legated and bequeathed to them. 2*dly*, In several of the special legacies, there is an express mutual substitution, where it was intended that the same should not fall by the death of some of the legatars. 3*dly*, Supposing this adjection had been made to the legacy of Charles singly, it would not have altered the case, as is determined by many lawyers, particularly *Voet. Tit. Quando dies legat. ced.* § 1. who gives this reason for his opinion, That the mention of the heirs of the legatar is understood only to declare expressly what would have been true without such adjection, to wit, that the legacy being once due, or taken by the legatar, should be his in perpetual property, and descend to his heirs, without returning after his death to the heirs of the testator, and that such adjection is altogether superfluous.

No 24.

Answered for the pursuer, That although the objection is true in general, yet, in this particular case, the words of the settlement show, that the testator had been led, *ex dilectu personarum*, to make a more extensive nomination, by calling his brother, and his brother's heirs and executors, who were properly his own heirs and executors, as substitutes to the legacy; and as long as any person remains to whom such description would answer, the right to the legacy behoved to vest in him; that it was quite immaterial whether the legatee's heirs or executors are called in the beginning of the deed, or if such addition be made immediately after the nomination of the legatee; if they are at all called within the four corners of the settlement, there is a right vested in them, which must subsist, were they in a question with the heirs, much less the trustees of the disponers. Nay, it would have occasioned a very unnecessary repetition of stile to have called the heirs of the several legatees after any other manner; and whatever was the doctrine of the civil law upon this point, it is certain that, by our law, 'heirs and executors' are technical words of a legal and known signification, and that must give a right to whoever are included under that description.

In the *next* place, it was objected for the trustees, That, as to the legacy of the household-plenishing and made work to Charles and Bessie Patersons equally and proportionally betwixt them; that if Charles's interest be fallen by his death, the pursuer's claim for the whole depends upon the question, Whether the *jus accrescendi* takes place among legatars that are *conjuncti verbis tantum?* And that it does not, is laid down by Voet. Tit. *De legatis*, No 61.

Answered, That the common opinion is for the pursuer, namely, that, where a particular subject is left in different proportions, there the right of accretion ought to take place; because, *concursium tantum partes facient*. 2*dly*, That even with respect to the furniture, the pursuer is called to a succession, by a general substitution of them as heirs and executors to Charles, the institute in the legacy.

THE LORDS found, That Charles Paterson the legatee, having predeceased Alexander the testator, the legacy left to the said Charles did thereby fall; and that the pursuer, Bessie Paterson, as executrix, *qua* nearest of kin, decerned to the said Charles, had no title to the legacy of 1000 merks; nor to the half of the defunct's household-plenishing and made work, legated to the said Charles; and further found, That the said half of the household-plenishing legated to the said Charles did not, through his decease, accresce to the said Bessie Paterson.

Fol. Dic. v. 3. *p.* 375. *C. Home, No* 166. *p.* 279.