APPENDIX.

PART I.

LEGACY.

1777. *February* 27. JANET POLLOCK *against* JAMES GILMORE.

No. 1.
Proof allowed to explain a legacy above 100*l.* Scots.

See. No. 39. p. 8098.

THE late Arthur Gilmore of Malletsheugh, having no children of his own, communicated his intention of making a settlement to Robert Barclay, formerly a writer in Glasgow, and desired his assistance in framing the proper deeds. Mr. Barclay accordingly, at Gilmore's desire, made out a memorandum of his proposed settlements, which having been afterward sent to James Graham, writer in Glasgow, he in consequence thereof made out the following deeds, all afterward executed by the defunct; 1*st*, A conveyance of his lands and personal estate in favour of James Gilmore, his immediate elder brother, under the burden of his debts, and the annuities therein expressed; 2*dly*, A conveyance of a small heritable debt affecting a tenement in Glasgow, in favour of James Foules; and, 3*dly*, A conveyance of an heritable bond for 5000 merks, to Janet Pollock his widow, "*but with and under* "*the special burden, that the said Janet Pollock and her foresaids, by their accepta-* "*tion hereof, are and shall be burdened with the payment of the sum of* 2,000 "*merks Scots, at and upon the first term of Whitsunday or Martinmas, that shall* "*occur next after my death,*" &c.

The two first of these deeds were in every respect agreeable to the granter's intention, as contained in the memorandum made out at his desire by Mr. Barclay, and upon which authority alone, the deeds had been executed by the writer in Glasgow. But in the third conveyance of the heritable bond of 5000 merks to Janet Pollock his spouse, burdened with the payment of 2000 merks, the name of the person to whom that legacy is payable is by mistake omitted, although in the memorandum it is said, "James (the defunct's "brother) is to be burdened with the debts, and to receive from Janet (his

No. 1. " spouse) 2000 merks for that effect." And further—" the heritable bond " of 5000 merks to be conveyed to Janet, her heirs or assignees, *burdened with* " 2000 *merks to James;* payable at the first term after his death." In the scroll of that disposition likewise, these 2000 merks are expressly made payable, " to James Gilmour in Malletsheugh, my brother, and his heirs and " assignees." But these words were unintentionally omitted in the principal deed.

Janet the widow having refused to pay this sum of 2000 merks to James, an action was brought before Lord Covington, in which James Gilmore " craved a proof, for establishing that the memorandum was taken by Robert " Barclay at the desire of the defunct, in order to make out and extend the " foresaid deeds; and, *2dly*, To prove, that this memorandum was the only " rule which the writer had before him, to direct him in drawing and extend- " ing the said deeds."

The Lord Ordinary was pleased to allow the proof demanded before answer, and refused a representation against this interlocutor; nevertheless, Janet, in a reclaiming petition, contended, that this proof was perfectly incompetent, because by the law of Scotland no legacy for more than £100 Scots can be established by the testimony of witnesses, and that even in the case where parole evidence was competent, the deposition of a single witness cannot be regarded as proof. But even supposing that the memorandum, upon which the deeds were founded, had been holograph of the defunct, yet as it was dated nearly three months before the deeds themselves were executed, the will and intention of the testator might have altered within that period. *Voluntas hominum est ambulatoria usque ad mortem.* In this view, therefore, the intention of the testator could not be proved by the memorandum; much less so as it was not written by the defunct, but must rest solely upon the credibility and veracity of Mr. Barclay, who wrote that memorandum. It would not be competent to admit parole evidence in support of the defunct's intentions. But if Mr. Barclay were to be admitted as an evidence, a witness has no more to do, than to write down what it is wished he should say, and then swear to it, which would at once destroy the important distinction betwixt parole and written testimony. That it is not at all uncommon for persons in making settlements to reserve a power to burden to a certain extent, which if not used, the legatee succeeds to the subject, free from the burden which the testator had reserved the faculty of imposing; therefore, although the 5000 merks heritable bond was disponed to Janet under the burden of 2000, yet as the person to whom these 2000 were to be paid is never mentioned, that burden flies off altogether. Supposing a reserved faculty to burden with a certain sum, and that to prevent the necessity of executing another deed, a blank were to be left for the name of the person, to be afterward filled up, and that this deed were left by the testator in its original state blank in the name; if any person were to claim this sum, and offer to prove by witnesses, that the testator had declared

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-