rence of those words will be disregarded; Voet. lib. 39. tit. 6. § 17.; Russel *contra* Russel, No 36. p. 6372.; Scott *contra* Carfrae, No 37. p. 8090. No 41.

Answered by the defender; It is not to be disputed, that a legacy may fall, by the predecease of the legatee. But if, as in the present instance, the heirs of the legatee are called, not as substitutes, but as conditional institutes, the legacy cannot lapse; Ersk; B. 3. T. 9. § 9.; Inglis *contra* Millar, *sup. cit.*; Denham *contra* Denham, No 16. p. 6346. The objection, as to no mention of heirs having been made in the subsequent part of the deed, is groundless. Being mentioned in the dispositive clause, it is of no consequence that they are not again expressly referred to in that containing the nomination of executor; because, without this part altogether, the disposition would have been valid and effectual. The authorities quoted on the other side are therefore not applicable. And, with respect to what is said of assignees, it is well understood that the power of assigning can only have effect after the succession hath devolved.

THE LORD ORDINARY had found, that the deed, being of a testamentary nature, or a *donatio mortis causa*, had become void by John Horseburgh's predecease. But

THE COURT 'altered this judgment, and found the disposition effectual to the 'heir of John.'

Lord Ordinary, *Kennet.* Act. *Rae et Elphinston.* Alt. *Ilay Campbell.* Clerk, *Orme.*

S. *Fol. Dic. v. 3. p. 376. Fac. Col. No 22. p. 56.*

1782. *January* 15. ROSE *against* ROSES.

No 42.
A legacy was granted, to be *equally* divided between two legatees. Found, that the *jus accrescendi* had no place in such a case

ALEXANDER ROSE, by his testament, provided, 'That the sum of 6000 merks, 'due to him by Forbes of Ballogie, should be *equally* divided between his two 'brothers John and James.'

John predeceased the testator; and the question occurred, whether his share lapsed, thereby making room for the testator's next of kin; or whether it accresed to James as *conjunctus verbis*.

Pleaded for the pursuer's next of kin; Where a person legates his estate to A., and, in the same testament, legates that estate to B., it appears that the whole estate was meant for each; and it is only from the impossibility of giving one subject *in solidum* to two persons, that a division must necessarily follow. Hence, when, by any circumstance, the legacy does not take place as to one, the right of the other, meeting with no obstruction, acts with full effect. In like manner, where one bequeaths an estate to A. and B., he legates that estate to each; and any of them upon the failure of the other, is entitled to the whole. But the case is very different where the testator bequeaths an estate to A. and B. by *equal* parts, or *equally*. There the bequests to each are totally separate; and

No 42. as without any expression of that kind, the shares of the persons favoured would have been equal, this addition, which must not be deemed superfluous when any meaning can be affixed to it, must be held to signify, that each legatee is to have no more than a half. This is the opinion of Voet, and most of the Commentators on the civil law; of Stair, b. 3. tit. 8. § 27.; and of Bankton, b. 3. tit. 8. § 52.; and it is confirmed by a decision, Paterson *contra* Patersons, No 24. p. 8070

Answered for the legatee; Had the expression *equally* been omitted, there could have been no doubt of James being entitled, upon failure of his brother, to the whole legacy. Neither can it be supposed, that the testator, by this expletive, meant to limit to half the right of the persons favoured. This matter is well explained by Vinnius, in his Commentary on the Institutes, lib. 2. tit. 20. § 16. 'Qui sic legat: Titio et Seio fundum Tusculanum do, lego, *ex æquis partibus*, is utique conjungit utrumque in eandem rem, dum simul et semel eundem fundum ambobus legat. Nec mutat hanc conjunctionem *partium æqualium* expressio; nam etsi hæ partes non exprimantur, tacite tamen significanter enumeratione personarum. Quæ autem non expresse intelliguntur, tamen si exprimantur, pro supervacuis habentur.' Upon these principles, he lays it down, 'Si unus deficiat etiam in *verbali conjunctione*, sic mentem testatoris acceptam quasi in hunc casum alterum solidum habere voluerit, nec ob aliam causam ad eandem rem utrumque vocaverit, quam quod eam rem vel ulterum eorum *magis habere voluit quam heredem suum*.'

But, 2*dly*, Without entering into the nice disquisitions of the Roman lawyers, and attending to what was really meant by the testator, the decision of this case must be favourable to the legatee. It is evident that the testator meant to bestow 3000 merks on each of his brothers. By his own contractions, the debt due by Forbes of Ballogie is reduced to that sum; which therefore ought to be adjudged to the surviving legatee.

Replied for the testators next of kin, on the second point: The legacy bequeathed to each legatee, is the half of the debt due by Ballogie; and its decrease cannot, in sound construction, have any influence upon the right meant to be conferred on the legatee.

The Lords were of opinion, That, in legacies conceived in this form, the *jus accrescendi* did not take place; and, therefore, 'they preferred the next of kin.

Reporter, *Lord Kennet*. For the Testator's next of kin, *Ilay Campbell, Hay, Honyman*. For the Legatees, *Raz, Abercromby*. Clerk, *Home*.

C. *Fol. Dic. v.* 3. *p* 375. *Fac. Col. No* 13. p. 36.