No. 5. debts, sums of money, &c. due and addebted to him at the time of his death, he adds, " with the whole rights, title deeds, and *securities of said heritable* and " moveable subjects." An heritable security is a mere accessory of the debt secured, as much as an adjudication is of the debt on which it is led; 28th Feb. 1751, Wilson against Burrel, No. 18. p. 40. therefore the term *debts*, includes the sums in question, although lent on heritable bonds; and a general disposition is as effectual as the most particular and explicit can be; 26th Jan. 1770, Brown against Bower, No. 13. p. 5440.

Answered: The words used in the conveyance of heritable subjects, must be directly applicable to the subjects meant to be conveyed; and no other words, however clear the intention of the testator may be, can have the effect. A deed executed in a foreign country, according to the forms of that country, will not convey heritage in Scotland; 10th June 1795, Henderson against Selkrig, No. 44. p. 4489. Even moveables, in the construction of a settlement, have been distinguished from debts; 9th July 1776, Fraser against Smith, No. 2. *supra*; 14th May 1795, Earl of Fife against Mackenzie, No. 61. p. 2325. The word *debts*, can carry nothing but what is personal, and cannot possibly convey right secured by infeftment; 2d March 1770, Ross against Ross, No. 15. p. 5019; 13th February 1789, Waddel against Colt, No. 16. p. 5022; 12th January 1802, Galloway, Petitioner, No. 30. p. 15950.

The Court (8th February 1805) sustained the defences; and upon advising a reclaiming petition, with answers, " adhered."

Lord Ordinary, *Craig.* Act. *G. J. Bell.* Agent, *Thomas Darling.*
Alt. *Cathcart.* Agent, *W. Wallace Brown.* Clerk, *Pringle.*

F. *Fac. Coll. No. 225. p. 512.*

1807. *January* 28. WALLACE *against* WALLACES.

No. 6. Form of words necessary to vest succession in legatees, so as to transmit to their representatives.

ALEXANDER HOUSTON, banker in Edinburgh, executed a trust-disposition and settlement of his whole fortune, heritable and moveable, in favour of certain trustees, which bore, that " after payment of such debts as I may be ' owing, and after the decease of the longest liver of me and my said spouse, I ' hereby appoint my said trustees *to content and pay, or assign and make over to* ' *the persons after named*, the respective sums of money after specified, viz. To ' *Alexander Wallace, banker in Edinburgh, my nephew, the sum of* £1000. *Sterling*, ' and to Houston Wallace, son of the said Alexander Wallace, as my nameson, ' the like sum of £1000 Sterling, over and above his share of my effects as after ' mentioned; and after the payment of these and of any other legacies I may ' hereafter happen to bequeath to any person or persons, by a writing under ' my hand; and also after payment of all expenses that may be incurred in the ' execution of the trust, *I appoint the residue of my means and effects, heritable and*

'moveable, hereby disponed in trust, to be paid over or conveyed to the children, No. 6.
'whether male or female, of the said Alexander Wallace, including the said Houston
'Wallace, that may be in life at the decease of the longest liver of me and my said
'spouse, and that equally amongst them, share and share alike; which sum here-
'by bequeathed to the said Alexander Wallace, my nephew, shall be paid to
'him at the first term of Whitsunday or Martinmas that shall happen after the
'decease of the longest liver of me and my said spouse, with interest thereafter
'till payment; and which sums hereby bequeathed and made payable to the
'children of the said Alexander Wallace, shall be payable to them at their res-
'pectively attaining the age of majority, or being married, whichever of these
'events first happen after the decease of the longest liver of me and my said
'spouse.' &c.

By an after clause, it is provided, 'And further, in the event of the decease
'of any of the said Alexander Wallace's children before their share of the sums
'hereby bequeathed to them becomes payable, the share of the child or children
'so deceasing, or the balance thereof remaining unpaid, *shall fall equally among*
'the survivors of the said children, share and share alike.'

Mr. Houston predeceased his wife and his nephew Mr. Wallace, who at this time had several children. Mrs. Houston survived her husband a good many years, during which she enjoyed the liferent of the whole property. She also survived Mr. Wallace, her husband's nephew, and Major Robert Wallace, his eldest son, who had married, and left an infant child. At Mrs. Houston's death, when the succession came to be divisible, there were surviving three children of Mr. Wallace, and one grandchild, Robert Alexander, by his eldest son. Two questions occurred, 1*st*, Whether, by the terms of the settlement, the share of the succession belonging to Major Wallace, as a child of Mr. Wallace, transmitted to his child Robert Alexander, or whether, by his predeceasing the widow, it divided among his surviving brothers and sisters? 2*dly*, Whether the legacy of £1000 left to Mr. Wallace, vested in him and transmitted to his representative, Robert Alexander, Major Wallace's son, or, by his predeceasing the widow, lapsed and returned *in bona defuncti*.

Mr. Houston's trustees accordingly brought a process of multiplepoinding and exoneration, wherein the surviving children of Mr. Wallace and Robert Alexander Wallace appeared for their respective interests.

That Major Wallace's share of the general fund transmitted to his child, it was

Pleaded: That in the interpretation of settlements, the *presumed will* of the testator is the great rule of decision, wherever that can be either gathered from the terms of the deed, or supplied according to certain general and equitable principles recognised by law. One of the most important of those general rules of construing presumed will, is the doctrine which has been borrowed from the Roman law, commonly known by the name of the *Conditio si sine liberis decesserit*, which prescribes, that in all substitutions of descendants *inter se*, the

No. 6. substitution shall only take effect if the legatee deceasing leave no descendant of his body.

From various circumstances in the state of the family, as well as from natural presumption, there can be no doubt that Mr. Houston must have intended his succession, in case of the decease of one or more of Mr. Wallace's children before it opened to them, to go to any children they might leave, in preference to their surviving brothers and sisters. In the clause of substitution, therefore, of the children of Mr. Wallace *inter se*, the condition *si sine liberis decesserit* must be held as implied.

It is no doubt true, that by the form of words in this settlement, the funds are appointed to be distributed among the children of Mr. Wallace *that may be in life* at the decease of the testator and his spouse; and Major Wallace, the eldest, was not *in life* at that period.

But here the succession was vested in the trustees from the moment of Mr. Houston's death, as a fiduciary trust for the legatees; and its operation only suspended during his widow's liferent, which operated in favour of the legatees, in the same way as if the fee had been vested directly in themselves, under burden of the liferent. The fee being so vested, the *conditio si sine liberis* carries Major Wallace's share to his child.

Besides, the *conditio si sine liberis* being an equitable exception from the rules of strict construction, it is not essentially necessary that the fee should be vested in the parent deceasing, by words of strictly technical accuracy. It proceeds on this equitable principle, that no one who leaves his property among his descendants, can wish the families of such as predecease the term of payment, to be disappointed. It is not founded on the supposition of the right being vested in the parent, and from him transmitting to the child; but upon this, that by the condition or provision which the law implies or presumes, though not expressed, the child takes not *in right*, but *in place* of the predeceasing parent, as direct institute or legatee. In this case, there can be no doubt, that by the words used, the testator's intention was to convey his succession equally to all the children of Mr. Wallace. Such is the doctrine of the Roman law; *Lib.* 35. *T.* 1. *D. De Condit. et Demonstrat. L.* 102.; *Lib.* 6. *T.* 35. *C. De Instit. et Substit. L.* 6.; *Lib.* 6. *T.* 42. *C. De Fideicom. L.* 30. And of our own law, November 21st 1738, Magistrates of Montrose against Robertson, No. 50. p. 6398; March 1st 1781, Cuthbertson against Thomson and Young, No. 67. p. 4279; February 2d, 1781, Mackenzie against the Legatees of Holte, No. 15. p. 6602.

Answered: The fee of Mr. Houston's estate was truly vested in Mrs. Houston, his widow, not in the trustees, although she had not the power of disposal; and it did not vest in the trustees, nor in the children of Mr. Wallace, for whom they acted, till after Mrs. Houston's death, when the fund was divisible among such of those children only *as should be then alive*. Suppose the fund had been destined to A, B, C, D, *nominatim*, or to any public body,

as the Faculty of Advocates, or such of them as should be alive at a certain period, could it be held, that in such a case, the share of those who predeceased the term should go to their children? The case is the same here. No. 6.

But, supposing the bequest made in general to the children of Alexander Wallace, and to have vested in them as an *universitas*, it must have so vested only under a *condition* that they were alive at the specified term. Now, there is a settled distinction in cases of this kind, between conditions *precedent* and conditions *subsequent* to the grant or bequest. Where the right has first been directly vested in absolute terms, and a condition is annexed to it by a *subsequent* provision, there may be room for much liberality of construction in favour of the legatee; and, on this ground, conditions expressed in such a form have frequently been held to import only a suspension of the term of payment, without qualifying the constitution of the legacy itself. But, on the other hand, wherever the condition is *precedent*, that is, wherever it forms a constituent and radical part of the grant or bequest itself, it is clear, that if the condition does not take effect, no right is given. This distinction has been recognised in the case of an *uncertain day* attached to a legacy, which is equivalent to a *condition*; Voet. Lib. 36. Tit. 2. § 2.; December 9th, 1783, Burnets against Forbes, No. 44. p. 8105. Now, in the present case, it must be obvious that the *condition* is incorporated in the constitution of the legacy itself, and, on the failure of the condition, the legacy must be held to lapse *in bona defuncti*.

As to the plea founded on the *conditio si sine liberis decesserit* of the Roman law, even admitting that the rule was applicable to any *children* but those of the testator himself, and was so adopted from the Roman into our law, it appears that the rule only took place among direct descendants, where the testator was properly *loco parentis*, which is not the case here; Ersk. B. 3. Tit. 8. § 46.; Voet, *Lib.* 36. T. 1. § 17.—19. Farther, the rule of the Roman law seems to have been confined to the case of universal succession under a fiduciary testament, but not to the case of a particular legacy, as in the present question; Cod. *Lib.* 6. T. 25. L. 6. *De Impub. &c.* December 20, 1753, Yule against Yule, No. 51. p. 6400.

As to the *presumed will* of the testator, which has been conjectured from the general circumstances of the testator and legatees, &c. it is a very unsafe and fallacious mode of construction. The will of the testator must be discovered only from the terms he has used in his settlement.

None of the cases cited by the other party exactly apply, as in these the vesting words were stronger. There is a later case, which supports the principle maintained by the children of Alexander Wallace, June 6, 1798, Fleming against Martine, No. 48. p. 8111.

II. Whether the legacy of £1000, left to Alexander Wallace, lapsed by his predeceasing Mrs. Houston, and returned *in bona defuncti*. Robert Alexander Wallace

Pleaded; The very same principle which regulates the decision of the former branch of the cause, applies here. The expression in regard to the bequest to

No. 6. Alexander Wallace, is, "I hereby appoint my said trustees to content and pay, "or assign and make over to the persons after named, the respective sums of "money after specified, viz. to Alexander Wallace, banker in Edinburgh, my "nephew, the sum of £1000. Sterling." And, a little afterwards, "Which "sum *hereby bequeathed* to the said Alexander Wallace, my nephew, *shall be paid* "to him at the first term of Whitsunday or Martinmas that shall next happen "after the decease of the longest liver of me and my said spouse, with interest "thereafter till payment." The above terms imply the same principle of succession as in the former case, with regard to the general distribution among the children of Alexander Wallace, namely, that the fee was actually vested, at the testator's death, in the trustees, for behoof of the persons interested, and only the term of payment postponed during the burden of a liferent on the funds. The condition *si sine liberis* applies therefore here exactly as before, only in regard to a prior generation in the family, and is still more clear, as there is here no doubt of the bequest being conveyed *personally*, to Alexander Wallace, Mr. Houston's nephew. This is not a legacy suspended on a condition granted to a party unconnected with the testator, but a fee presently vested in a nephew, with the *implied condition* of going among his children, if he should have any, but the term of payment only postponed till the expiry of a liferent.

Answered: The above mentioned legacy of £1000. was granted merely on a future condition, viz. the legatee surviving Mrs. Houston the liferentrix, and on the failure of that condition, it lapsed, and entered into the general funds of the deceased; Voet, *Lib.* 36. T. 2.; December 9, 1783, Burnets against Forbes, No. 44. p. 8105.; November 19, 1788, Omey against Macclarty, No. 9. p. 6340; November 15, 1792, Sempels against Lord Sempel, No. 45. p. 8108.

The Court unanimously found, "That the legacy of £1000. Sterling left "to Mr. Alexander Wallace, vested in him at the decease of the testator "Alexander Houston, and now belongs to the representatives of the said "Alexander Wallace: That the memorialist Robert Alexander Wallace, in "place of his deceased father Major Robert Wallace, who was the eldest son "of Alexander Wallace deceased, is entitled to one equal fourth share of the "residue of the whole estate, means and effects, of the deceased Alexander "Houstoun, which shall remain, after deduction of debts, special legacies, and "expenses; and that the other memorialists, the then surviving children of the "deceased Alexander Wallace, are entitled equally to the other three-fourths "of the said residue; and remit to the Lord Ordinary," &c.

To which interlocutor the Court (24th February 1807) adhered, by refusing a reclaiming petition without answers.

Counsel for Robert Alexander Wallace, *Dean of Faculty Blair, M. Ross, A. Bell.* Agent, *V. Hathorn*, W. S. Counsel for the Children of Alexander Wallace, *Solicitor-General Clerk, Thomson, Moncrieff.* Agent, *H. J. Rollo*, W. S. Clerk. *Buchanan.*

F. *Fac. Coll. No.* 267. *p.* 596.