1782. *December* 15.

FRANCIS, EARL of MORAY, and Others, *against* JAMES STUART, and Others.

No 43.
A special legacy bequeathed to a person, likewise nominated residuary legatee, with destination ' to ' heirs and ' assignees,' accrues, by the predecease of the legatee, to these heirs, as part of the residuary estate.

A legacy to a wife, ' exclusive of ' the *jus mariti*, and to ' be held by ' her, her ' heirs and ' assignees,' devolves to the heirs, notwithstanding her predeceasing the testator.

LADY EMILIA HALKET executed a trust-disposition ' of the whole estate, personal and real, which should belong to her at the time of her death.' The object of this trust was to bestow those effects on certain persons, to whom, by another deed, she was afterwards to appoint her trustee to convey them.

In that subsequent deed, which was holograph of herself, among a number of bequests of money, household furniture, and other moveables, were the following: ' To my niece Mrs Stuart, for her own proper use, exclusive of her ' husband's *jus mariti*, all the rest of my household furniture, clothes, &c. ' And also I hereby appoint, that *the whole residue* of my estate and effects, ' heritable and moveable, or proceeds thereof, remaining after answering and ' satisfying the special appointments and provisions made by me as above, shall ' be paid and delivered, or secured by my trustee, to and for the use and behoof of the said Mrs Stuart, and shall be held and enjoyed by her, and her ' heirs and assignees, as her own property, *without being subject* to the *jus mariti* of her husband, which is hereby excluded.' These residuary funds were burdened with an annuity to the sister of the testarix.

Lady Emilia survived Mrs Stuart, her residuary legatee, several years; but upon her death the above settlement, unrevoked, was found in her repositories.

Opposite claims to these legacies having been made by the heirs of Mrs Stuart, and by the Earl of Moray, and other heirs at law of Lady Emilia, the trustee convened all these parties in a process of multiplepoinding, in which it was

*Pleaded* for Lady Emilia Halket's Heirs at law; By the predecease of Mrs Anne Stuart, both the special and residuary legacy conceived in her favour have lapsed and the claim of her heirs is precluded. The first mentioned bequest unquestionably fell by the death of the legatee, to whom personally, not to whose heirs, it was divised. Nor could it accrue to the residuary succession, which was confined to the effects that should remain after those destined by special appointment had been separated and withdrawn. Even supposing the heirs of Mrs Stuart then to be entitled in her right to the residuary funds, her special legacy would not devolve to them, but would descend, in the same manner as if no such settlement had existed, to the heir at law of the testatrix. Unless this difference between the two legacies had been meant, for what end were they so separated and contra-distinguished from each other?

But, in regard to the residuary bequest itself, the heirs at law have also a valid claim. They are aware of the terms in which it is conceived, ' to and for ' the use and behoof of the said Mrs Stuart, and to be held and enjoyed *by her*, ' *and her heirs and assignees, as her own property*, without being *subject* to the

No 43. ‘ *jus mariti* of her husband.’ There is not, however, any distinction thus made this from the preceding legacy, which was indisputably personal to Mrs Stuart, and, from her predecease, not transmissible to her heirs. For though ‘ heirs and assignees’ are here mentioned, yet this legacy is not devised to her and to her heirs, but to herself alone; and therefore, it was not until she had been first vested in the right of it, or the effects destined for her had actually become ‘ her own property,’ that those words were to bear any application to her. Then, no doubt, the *jus mariti* being excluded, she might have assigned to whom she pleased subjects which she enjoyed independent on her husband; or, if not so disposed of, they would have devolved to her own heirs. Nor, indeed, can any other interpretation than this be reasonably admitted. Heirs and assignees, standing here in the same predicament, if it be supposed that the heirs of Mrs Stuart were thus favoured, it must follow that her assignees were equally so; that is, that the testatrix meant to put it, during her own life, in Mrs Stuart's power, to sell or gift the legacy to any stranger whatever, in such a manner that this assignment should be equally effectual, whether the legacy was ever to devolve to Mrs Stuart or not. That construction, however, would in any case seem very extraordinary, and in the present involves this peculiar absurdity, that it supposes Lady Emilia to will to confer a power in favour of Mrs Stuart, of which the latter, except she had been in the knowledge of the bequest, a thing that is not pretended, could not possibly avail herself. The import therefore, of the above mentioned phrase appearing from the manner in which it is introduced, sufficiently distinguishes this cause from that of Inglis *contra* Miller, 16th July 1760, No 33. p. 8084.; or of Boston *contra* Horseburgh, 13th February 1781, No 41. p. 8099.

*Answered*, It is admitted that the special legacy, not having been divised to Mrs Stuart's heirs, became lapsed. The effect, however, was the same as it would have been, had any other of the various legacies of Lady Emilia fallen by predecease, or been repudiated, an increase of that residue which was bequeathed to Mrs Stuart, ‘ after answering and satisfying the special appointments and provisions.’ But it does not follow thence, that this legacy was nugatory; for after the death of the testatrix, it was to give immediate access to the whole subject of it; whereas, from the residuary part, another person was to enjoy an annuity.

With respect to the residuary legacy, it is now an established point, whatever subtilty may have heretofore prevailed to the contrary, that when a testator calls to his succession a legatee and his heirs, these heirs, in the event of the predecease, as well as of the survivorship of the legatee, are entitled to the bequest, Denham *contra* Denham, No 16. p. 6346.; Inglis *contra* Miller, No 33. p. 8084.; Boston *contra* Horseburgh, *sup. cit. Voluntas testatoris est suprema lex*; and in order to its having full effect, nothing more is necessary than that it should be clearly understood. Now, that Lady Emilia meant to exclude her heirs at law

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is apparent. The declared purpose of her trust-deed was to empower the trustee to convey her effects, not to her heirs at law, but to those person whom, by the deed in question, she has nominated. But whilst it was in favour of them only that he was bound to denude himself, it is equally unquestionable, that he was in no event to become, in his own person, entitled to any part of that succession; and therefore the testatrix must necessarily have proposed to call the heirs of the residuary legatee to succeed in her right, there being no one else to whom the residuary portion could possibly accrue. In so clear a case, the above criticisms on the words 'heirs and assignees,' ought not to occasion any doubt; especially when it is remembered, that the deed was written by the Lady herself. Nay the opposite gloss giving to that expression, as if it had been put in contrast merely to the *jus mariti*, would render it nugatory or absurd; because that once excluded, it was quit needless to subjoin, that the wife was to enjoy a free disposal of the legacy. Whereas taking it as importing a devise to the heirs of the legatee, is not only to ascribe to it a rational effect, but is the sole means of preventing the settlement from becoming so far caduciary; a good ground for adopting the latter interpretation, were it really a doubtful one; for it is a rule in law, that 'Legatum in dubio sic accipi debet, ne reddatur caducum;' Peregrin, de fidei commiss. p. 431.

THE LORD ORDINARY pronounced this interlocutor: Finds the legacy first above mentioned was specially provided to Mrs Stuart herself, without mentioning to whom it should go at her death; and as she died before Lady Emilia Halkett, finds, That the said special legacy is lapsed and void; but finds, That the same falls under and increases the residuary funds provided to Mrs Stuart and her heirs and assignees; and, lastly, prefers the heirs and children of Mrs Stuart to the whole residuary estate of the said Lady Emilia Halket, heritable and moveable, conveyed by the trust-right granted to the raiser of the multiplepoinding, that shall remain after payment of all the said Lady Emilia Halket's debts and funeral charges, and answering and satisfying the special appointments and provisions, made by her, and expences attending the trust.'

Lord Ordinary, *Braxfield*, Alt. *M'Laurin*. For the Heirs at law of the Testator, *Ilay Campbell*, Clerk, *Orme*.

*S.* *Fol. Dic. v.* 1. *p.* 529. *Fac. Col. No* 77. *p.* 118.

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1783. *December* 9.

HELEN and ELISABETH BURNETS, *against* SIR WILLIAM FORBES, Baronet.

No 44.
A legacy was left to a person, 'to be' 'paid when

A LEGACY granted by the father of Sir William Forbes, was conceived in the following terms: To Arthur Burnet, son to Lord Monboddo, I leave L. 500 'Sterling, *to be paid* when he is sixteen years of age.'