No 31.

Neither could she claim to be ranked equally with the other legatees for L. 600; because that sum was not left to her as a special legacy, but was conceived in terms of a residuary legacy; and although the testator had expressed what he imagined would be the amount of the residuary legacy, yet, as the form of words in which the legacy was conceived would certainly have entitled Mary to any surplus, if the funds had exceeded L. 1600, the same form of words must also be held to import a residuary legacy, so as to burden her with the loss arising from the deficiency of the funds. In support of this *L.* 75. § 2. *D. De legatis*, 1*mo*, was quoted.

Replied, The testator evidently intended by the will to favour his wife more that the other legatees. He bequeathed to her indeed L. 600 after the other legacies, and in form of a residuary legacy, not with any intention to subject her alone to the burden of any deficiency, but because he believed no deficiency would happen; and thought it therefore immaterial in what form the legacy was conceived. The words annexed to her legacy of L. 600 ought in this case to be considered in the same light as a *falsa demonstratio* in the civil law, and not as a *falsa causa*.

'THE LORDS found, That in the event which had happened, the wife had no right to the sum of L. 200 as a *præcipuum*; but that she had right to the sum of L. 600 as a special legacy equal with the other legatees.'

Act *Johnstone*. Alt. *D. Dalrymple, Lockhart*. Clerk, *Justice*.

J. D. *Fol. Dic. v.* 3. *p.* 377. *Fac. Col. No* 188. *p.* 279.

1759. *November* 21.

JANET MITCHELL, Relict of James Kay of Edinbelly, *against* THOMAS WRIGHT of Easter Glen.

No 32.
A donation *mortis causa*, of a sum of money exceeding L. 100 Scots, is effectual without writ, and may be proved by a quality of the party's oath.

JOHN WRIGHT, by a settlement made three years before his death, conveyed to Jean Kay, his spouse, all debts and effects that should belong to him at his decease.

Jean Kay survived her husband a short time; and by her testament appointed her mother Janet Mitchell her executor; who was afterwards confirmed executrix dative *qua* creditor to the said John Wright, in implement of his general disposition to his wife.

Upon this title Janet Mitchell brought an action before the Sheriff of Stirling against John Wright, the father of the said deceased John Wright, for payment of 1000 merks, said to have been put into his hands by young John a few days before his death.

The libel being referred to the defender's oath, he deponed, "That four or five days prior to the death of John Wright, the deponent's second son, the said defunct being then on his deathbed, gave to the deponent 1000 merks

Scots, to be delivered to Margaret and Mary Wrights, the deponent's daughters, equally betwixt them, by way of gift; and which the deponent accordingly delivered to them about six months after the defunct's death; and which sum was delivered to the defunct by Jean Kay, then the defunct's spouse; that if the defunct had lived any considerable time after, he would have returned the money to him, as the defunct desired the deponent not to deliver it till after his death." No 32.

Upon advising this oath, the Sheriff " found, That the defender's son, by his nuncupative testament, could only, by law, leave L. 100 Scots, to each of his sisters, and restricted the sum left to them accordingly; and found the defender liable for the balance."

John Wright obtained a suspension; and afterwards dying, the process was carried on by Janet Mitchell against his son and representative Thomas Wright.

Pleaded for the charger, That it appears from John Wright's oath, he was desired by his son not to deliver the money to his sisters till after his death; and that if his son had lived any considerable time after, he would have returned it to him; which proves that the property of the money was not transferred during the lifetime of John Wright the son: That therefore it can be considered in no other light than that of a legacy, or donation *mortis causa*; and as writing, by the law of Scotland, is essential to the constitution of a legacy of a greater extent than L. 100 Scots, this verbal legacy to each of the sisters cannot be sustained beyond that sum.

Pleaded for the suspender, 1*mo*, This was not properly a legacy, but rather a gift or donation *inter vivos*, as the money was given away by the donor in his own lifetime, and the father or sisters were under no legal obligation to return it. 2*do*, Supposing it to have been a legacy, yet it must subsist without writ, though beyond L. 100; for although a nuncupative legacy of a sum beyond that amount cannot be sustained, *propter lubricam fidem testium*; yet it is thought, a legacy of a specific debt or subject to a greater extent may be constituted and proved otherwise than by writ, Dirleton and Stewart, *voce* LEGACIES. And further, in this case, the proof does not rest upon the bare emission of words, but is established and made effectual by delivery of the money. 3*tio*, The quality of John Wright's oath, that the money was given him to be delivered to his daughters, is intrinsic. The only mean of proof for establishing the charger's claim, was his oath for instructing that the money was put into his hands; so it cannot be divided, but must also prove the ends and purposes for which the money was deposited.

Answered for the charger, The quality of the oath can have no greater effect, than if the father had been *ab ante* custodier of the money, or debtor to his son for any other cause; and it would be dangerous, if every custodier or debtor had it in his power to give away the defunct's effects to a third party, to the greatest extent, by swearing to a verbal order or legacy. Again,

No 32. the mere act of delivery imports no transmission, without legal evidence of the will or intention of the testator; and that cannot be legally expressed or proved but by writing. Supposing, therefore, the fact were true, that the defunct gave his father such an order, to deliver the money to his sisters; yet that destination being only appointed to take effect after his death, was truly a legacy, to the constitution of which, of whatever kind, beyond the value of L. 100 Scots, writing is required, not only as the mean of proof, but as an essential solemnity, equally as in the nomination of an executor, the appointment of tutors and curators, or the conveyance of heritage; Schaw *contra* Lewis, No 47. p. 4494; Bankton, B. 3. T. 8. Par. 6.

Replied, There can be no danger in admitting such a quality as an intrinsic part of the oath, when the debt can only be constituted against the party by his oath. If the party has no regard to an oath, he might as easily swear away the debt altogether, and of which there would be a much greater risk, than of his swearing falsely in favour of a third party.

Observed on the Bench, 1*mo*, This is not a legacy, but a gift or donation *mortis causa*, which differs from a legacy, in so far as it is done *de præsenti*, though the effect of it is suspended till the donor's death. Upon this distinction, it is now understood, (though it was not so anciently), that a man may effectually convey his heritage in his testament, reserving his liferent, and a power to alter, providing he uses the *verba de præsenti*, such as "give, grant, or dispose," and not "legate or bequeath." The rule as to writ being essential to legacies, therefore, does not apply to this case, in respect of the delivery of the money, which was the same as if it had been made to the sisters themselves, and was a deed *inter vivos*, though only *mortis causa*. 2*do*, The quality of the oath is intrinsic. It is laid in the libel, that a certain sum belonged to the defunct at his death, and was put in the defender's possession; the mean of proof is the defender's oath, and his oath does not prove, that the money belonged to the defunct at the time of his death.

"THE LORDS sustained the reasons of suspension, and suspended the letters *simpliciter*."

Act. *Miller*. Alt. *Macqueen*. Reporter, *Strichen*. Clerk, *Gibson*.

Fol. Dic. v. 3. *p.* 378. *Fac. Col. No* 200. *p.* 357.

No 33. Tho' a legacy falls by the predecease of the legatee, yet, if heirs are named, the heir takes it upon his survivance;

1760. *July* 16. JANET INGLIS *against* DAVID MILLER.

JOHN CHALMERS of Corsehill disponed his estate to John Chalmers writer in Edinburgh, with the burden of a legacy of L. 100 Scots to Isobel Inglis, her heirs, executors, or assignees. Isobel died before the testator; but left a son, Richard Miller, who survived the testator, but died without making up any titles to the legacy.