No 29.

Which being complained of by bill of advocation, the LORDS found, 'That there was no occasion for confirming the special legacy, and that the legataries were entitled to retain their possession upon caution to answer for the values to all persons having interest, the same being ascertained by appretiation made by persons of skill.'

THE LORDS considered, that were the subjects confirmed, the legataries might pursue the executors to give them up upon caution; and if so, why not detain them upon caution, as no lapse of time can hurt the creditors in their preference to the legacy.

Fol. Dic. v. 3. p. 379. Kilkerran, (LEGACY.) No 5. p. 330.

1749. *November* 17. SMITHS *against* TAYLOR.

No 30.

A PERSON on his death-bed acquainted his nephew, that he intended, that he, along with two others who were his half-neices, should equally share his effects. After the death of the uncle, the neices pursued the nephew, on his implied consent, to make good his uncle's destination. It being found, That the nuncupative testament could not be sustained on the nephew's implied consent, but that the provision in their favour resolved into verbal legacies, a question arose, whether the destination should be sustained only to the extent of L. 100 Scots, to be divided equally among the three, or whether each of them had a claim to the extent of L. 100 separately. THE LORDS found, That the share of each of the legatees should be sustained to that extent.

Fol. Dic. v. 3. p. 379. D. Falconer. Kilkerran.

*** This case is No 9. p. 6594. *voce* IMPLIED WILL.

1756. *February* 13.
ARCHIBALD ARBUTHHNOT, ROBERT GORDON, and MARGARET GORDON, *against* ELISABETH ARBUTHNOT.

No 31.
A legacy was left, after others, in these words, 'And the remaining L. 600, residue of the said L. 1600, I bequeath to A. B.' A

IN July 1750, Robert Arbuthnot, in his marriage contract with Mary Arbuthnot, became bound to secure L. 900 Sterling of his own, and L. 700 of his wife's, with half of the conquest to the wife in liferent, and to the children of the marriage in fee, declaring, That whatever he should be worth at the dissolution of the marriage over L. 1600 should be esteemed conquest; in case one daughter only should exist of the marriage, the fee of the L. 1600 was declared restricted to L. 800.

Of this marriage there was one daughter, Elizabeth.

deficiency having happened of the total fund, this was found a special legacy, and the legatee entitled to draw proportionally with the others.

In February 1752, the father then residing in England, executed a will, in which he 'ratified his contract of marriage, and bequeathed to his wife L. 200 'over her provisions by that contract, and bequeathed all the residue of his 'estate to his daughter Elizabeth, subject nevertheless to his contract of marriage.

'In case his daughter Elizabeth should die in the lifetime of her mother before majority or marriage, then he bequeathed to his wife all his plate and furniture, and also bequeathed to her the residue of his estate; subject nevertheless, after her decease, to the payment out of the said sum of L. 1600 of several legacies in favour of Robert Arbuthnot, Robert and Margaret Gordon, amounting to L. 1000, and the remaining L. 600, residue of the said sum of L. 1600, he gave and bequeathed to such person as his wife should appoint; and failing such appointment, to her nearest in kin.' The wife and other friends he named executors.

At the time of making this will, 10,000 merks of the L. 1600 was heritably secured in Scotland; and therefore could not be conveyed by testament.

Soon after the testator died, and the wife, as executrix named, intromitted with all his effects, both in Scotland and England, except the heritable bond.

Elizabeth the daughter died in July 1753; and Mary the wife having returned to Scotland, also died in March 1754, having made a settlement in favour of Elizabeth Arbuthnot her sister.

An action was brought by the legatees against Elizabeth, who produced an account; by which it appeared, that the total fund, exclusive of the heritable bond, amounted to L. 1052 Sterling.

Pleaded for Elizabeth; That she was entitled, in right of her sister, *first*, To retain L. 200 as a *præcipuum*, to which Mary the wife became entitled immediately upon the death of the testator, leaving a daughter; and as this L. 200 was given to the wife, in preference to the daughter of the marriage, much more was it meant to be given to her in preference to the legatees. *Secondly*, That she ought to be ranked on the balance for L. 600 equally with the other legatees.

Answered for the legatees; The defunct's last will contains two separate settlements of his whole estate in two several events. If his daughter Elizabeth should survive her mother, or should live till majority or marriage, he then gave to his wife L. 200, and all the rest to his daughter: But if his daughter should predecease his wife before majority or marriage, he then settled his whole fortune in a different manner; he gave L. 1000 of legacies to the pursuers; and the residue, which he believed would amount to L. 600, he gave to his wife.

In the event, therefore, of the daughter's dying under age, it was not intended that Mary should have L. 200 as well as L. 600, since the testator's effects, at the time of making the will, amounted only to L. 1600, and were not sufficient to pay L. 800 to her and L. 1000 to the other legatees.

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, 1mo*, 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 *Johstone*. 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