No 43.

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.

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.'

No 44.
'he is six-
'teen years
'of age.'
The legatee survived the testator, but died when only sleven years of age. Found that the legacy vested in the legatee *a morte testatoris*, and was due to his nearest of kin.

Mr Burnet the legatee survived the testator, but died when only eleven years old. The question therefore occurred, whether the legacy was due to his sisters, as his nearest of kin, though not exigible by them till the period at which he would have attained his sixteenth year; or whether, as altogether conditional, it had become ineffectual by his predecease? In an action at their instance, they

Pleaded, A referrence to a certain period in the age of a legatee has been deemed equivalent to a condition, where it is annexed to the *constitution* of the legacy. Thus, in the event which has happened, the bequest would have become void, if it had been devised in this manner: 'To Arthur Burnet, when 'he attains the age of sixteen, I leave L. 500 Sterling.' But a different rule prevails, where the legacy itself is expressed in words absolute and unconditional, and the reference to the age of the legatee adjected to the term of payment only; as in the case of a testator, who bequeaths a sum *payable* or *to be paid*, when the legatee attains a certain age. In such instances it has been held, that the legacy vests *a morte testatoris*, though the term of payment, for some reason known to the testator himself, is postponed to a more remote period.

This distinction, which has been received into the English law from that of the Romans, and is likewise acknowledged by some of the writers on the law of Scotland, arises from the different modes of expression adopted by testators, *l.* 5. *C. Quando dies leg. l.* 26. § 1. *D. ad eund. tit.; Voet, l.* 36. *tit.* 2. *p.* 2. *et seqq.; Mantica, De conject. ultim, volunt. l.* 11. *tit.* 23. *p.* 27. *et seqq.*; Blackstone, b. 2. c. 32. tit. 6.; Borough's Reports, v. 1. p. 226.; Bankton, b. 3, tit. 8. par. 42. p. 418. A legacy may with reason be thought conditional, where, as in the instance first given, its very existence is interwoven with a circumstance uncertain and contigent in its nature. But the same circumstance occurring only with regard to the term of payment, cannot detract from the validity of a legacy already completely established. In legacies of this last sort, therefore, upon the decease of the legatee, his representatives may insist for payment in like manner as he himself could have done. Hence the decision of this case must be the same, as if, in place of a reference to the legatee's attaining a certain age, the testator had appointed the payment to be made on the 20th April 1779, being the day on which the young gentleman, if alive, would have reached his sixteenth year. Nor is it of importance, that, in bonds of provision, a different interpretation has been given to clauses of this nature, because in such deeds, after the death of the child to whom they were granted, the inductive cause of the obligation is entirely removed.

Answered for the defender; It is an established rule with respect to legacies That *dies incertus an extiturus sit necne, pro conditione habetur*. Nor is it productive of any real difference, whether such an uncertain day be annexed to the *constitution* or to the term of *payment* of a legacy. A bequest to a person when he arrives at a certain age, cannot be due when he has not attained, and never can

attain that age; and a bequest which is not payable till that event has taken place, must be in the same situation. No 44.

For the purpose, indeed, of reconciling some apparently opposite decisions, of the Roman lawyers, preserved in the Pandects, and which are merely exceptions, on account of particular circumstances, from the general rule, the commentators on the civil law have determined, that where the legacy itself, and the term of payment, are specified in different members of the same sentence, a reference to the age of the legatee annexed to the latter, may be considered as not suspensive of the right, but merely of the term of payment. This distinction however, having no foundation but in a grammatical subtilty, has been rejected by repeated decisions of this Court, with regard to bonds of provision, in which the child's right, arising from the natural obligations of parents, ought to be deemed stronger than that of a legatee, whose claim flows from the bounty alone of the testator; Edgar against Edgar, No 1. p. 6325.; Belshes against Belshes, No 2. p. 6327.: Elliot against ———, No 10. p. 6342.; Executors of Bell *contra* Mason, No 6. p. 6332. Nor even in the law of England is the distinction adopted, except by the ecclesiastical courts, the adherence of which to the doctrines of civilians is peculiarly strict; Blackstone *loc. sup. cit.*

The Lords, moved chiefly by the authority of the Roman law, in which the distinction urged by the pursuers seemed clearly established, found, That the legacy in question having vested in Mr Burnet *a morte testatoris*, was due on his decease to the pursuers as his nearest in kin.

Lord Ordinary, *Swinton.* Act. *Maclaurin, Blair.* Alt. *Ilay Campbell, C. Hay.* Clerk, *Menzies.*

C. *Fol Dic. v.* 3. *p.* 376. *Fac. Col. No* 135. *p.* 212.

1786. *February* 2. Andrew Dowie *against* Alexander Millie.

No 45.
Found in conformity with Wright against Wright, No 36. p. 8088.

The father of Alexander Millie accepted a bill of exchange drawn by Andrew Dowie, his son-in-law; who, in an action for payment, judicially acknowledged, that the purpose of the deceased in this transaction was to create a testamentary bequest in favour of his daughter.

The question being, Whether a deed of that nature could be so executed? it was *contended* in behalf of the pursuer, That since the statute of 1772, shortening the endurance of these documents, there was not such danger to be apprehended from extending their use as in former times; 2d December 1782, Adam *contra* Johnstone, No 18. p. 1416. *voce* Bill of Exchange.

The Lords, however, found, 'That the bill in question was a *donatio mortis causa*, and that a donation constituted in the form of a bill is not a valid deed by the law of Scotland.'

Lord Ordinary, *Hailes.* Act. *Durham.* Alt. *Nairn.* Clerk, *Colquhoun.*

C. *Fol. Dic. v.* 3. *p.* 375. *Fac. Col. No* 254 *p.* 309.